

GAHC010006522012



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

Case No. : WP(C)/3179/2012

SMT. DEEPA BORKAKOTI
D/O- LT. RAMESH BORKAKOTI, R/O VILL.- CHATIAL GAON, P.O.- CHATIA,
DIST.- SONITPUR.

VERSUS

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

2:THE JOINT COMMISSIONER OF TAXES
KAR BHAWAN
DISPUR
GHY- 6.

3:THE DY. COMMISSIONER OF TAXES
TEZPUR ZONE
TEZPUR
DIST.- SONITPUR.

4:JAYANTA SARMAH
LOWER DIVISION ASSTT. LDA
O/O THE DY. COMMISSIONER OF TAXES
TEZPUR ZONE
TEZPUR

Advocate for the Petitioner : MR. N. C. Das, Senior Advocate

Advocate for the Respondent : Mr. B. Choudhury, SC
Mr. S. Sahu, R-4.

**BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR**

JUDGMENT & ORDER (ORAL)

Date : 23-01-2024

Heard Mr. N. C. Das, learned counsel for the petitioner. Also heard Mr. B. Choudhury, learned Standing Counsel for the Finance & Taxation Department and Mr. S. Sahu, learned counsel for the private respondent no. 4.

2. The petitioner, by way of instituting the present proceedings presented a challenge to an order, dated 16.07.2011, issued by the Joint Secretary in the Finance (Taxation) Department, by which, it was held that the petitioner would not be entitled to reckon the services rendered by her as Lower Division Assistant(LDA)-cum-Typist in the Office of the Superintendent of Taxes, Balipara Check Post, Balipara, on account of the fact that the said Check Post was abolished and the petitioner was redeployed in the same capacity in the Office of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur. The petitioner has also presented a challenge to an order dated 16.05.2012, promoting the respondent no. 4 to the cadre of Senior Assistant (earlier UDA) in the Office of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur.

3. The petitioner, in pursuance to a process of selection, was appointed as LDA-cum-Typist in the Office of the Superintendent of Taxes, Balipara Check Post, Balipara, vide an order dated 25.11.1994. The initial appointment of the petitioner was for a period of 3(three) months, however,

the said appointment was continued with. Thereafter, the respondent authorities vide the order dated 21.06.2004, proceeded to permanently retain the post of LDA as created in the Office of the Superintendent of Taxes, Balipara Check Post, Balipara, and accordingly, the services of the petitioners were also so accommodated on regular basis against the said posts. In the amalgamated gradation list of the Ministerial Staff of the Taxation Department as of 01.11.2007, published vide the communication dated 25.02.2008, the name of the petitioner figured at Serial No. 514 therein and her initial date of appointment was shown as 03.12.1994. In the said list, the name of the respondent no. 4 also figured at Serial No. 631 and his entry into the cadre of LDA (now Junior Assistant (JA)) is reflected as 02.09.2006.

4. The respondent authorities in the Finance (Taxation) Department on coming to a conclusion that the Batamari Check Post was rendered unviable from the point of view of evasion of Taxes, the said Check Post was decided to be abolished vide issuance of notification dated 14.07.2008. The said notification prescribed that consequent upon abolition of the said Check Post the official and staff working therein shall be relocated at places where there existed shortages. Accordingly, the petitioner was vide order dated 15.07.2008, posted as a Junior Assistant in the Office of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur.

5. The petitioner on 03.10.2008 required the Commissioner of Taxes, Assam to fix her inter-se seniority in the establishment of Deputy Commissioner of Taxes, Tezpur Zone, Tezpur by reckoning the services

rendered by her in the Office of the Superintendent of Taxes, Batamari (Balipara) Check Post w.e.f. 03.12.1994. In course of processing of the said representation, the Commissioner of Taxes vide his communication dated 07.08.2009, informed the authorities in the Finance (Taxation) Department, Govt. of Assam that the petitioner was transferred and posted to the Office of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur and accordingly, her inter-se seniority in the transferred office is to be fixed by reckoning her date of initial appointment in the erst-while Batamari Check-Post.

6. The representations as preferred by the petitioner and the recommendations made thereon by the Commissioner of Taxes, Assam was finally considered by the authorities in the Finance (Taxation) Department and on such consideration vide order dated 16.07.2011, the same came to be disposed of rejecting the prayer of the petitioner for fixation of her seniority in the Office of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur by reckoning the services rendered by her as an LDA-cum-Typist in the establishment of the Superintendent of Taxes, Batamari Check-Post. In the said order dated 16.07.2011, it was contended that the petitioner is in fact a retrenched employee on abolition of the said Check-Post, however, on humanitarian grounds her services were not retrenched but relocated and posted to different establishments under the Finance (Taxation) Department. A reference was made to the Office Memorandum bearing No. ABP.150/61/161 dated 05.05.1954 to contend that in such circumstances the previous services rendered by the employee in an abolished establishment cannot be considered for fixation of their seniority in the redeployed establishment. Thereafter, the seniority of the petitioner being fixed below

that of the respondent no. 4, the respondent no. 4 was vide order dated 16.05.2012, promoted to the post of Senior Assistant against the vacancies as arising in the establishment of Deputy Commissioner of Taxes, Tezpur Zone, Tezpur. It is in the said premises the petitioner had approached this Court by instituting the present proceedings.

7. Mr. N. C. Das, learned senior counsel has submitted that the order by which the Batamari Check Post was abolished and the services of the petitioner required to be relocated at other establishments, does not refer to the provisions of the said Office Memorandum dated 05.05.1954. It is the contention of the learned Senior Counsel for the petitioner, that the relocation of the petitioner in the Office of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur was in the form of a transfer and as such, the petitioner cannot be contended to be ineligible to reckon the services as rendered by her in the said Check Post prior to its abolition, for fixation of her seniority in the establishment to which she was so transferred. In support of the said contention, Mr. Das, learned senior counsel refers to the communication dated 07.08.2009, issued by the Commissioner of Taxes, Assam, wherein, it was clearly stipulated that the movement of the petitioner from the abolished Check Post to the Office of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur was by way of transfer and posting and accordingly, the services rendered by the petitioner in the erst-while Batamari Check Post was to be reckoned for fixation of her seniority in the establishment, to which, she was so transferred.

8. Mr. N. C. Das, learned senior counsel further submits that it was for

the first time that the reference to the said Office Memorandum dated 05.05.1954, was made in the impugned order dated 16.07.2011 and such reference was so made without there being any materials to demonstrate that the services of the petitioner was dealt with under the provisions of the said Office Memorandum while transferring and posting her to the establishment of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur. Mr. Das, learned senior counsel by referring to the seniority positions as assigned to the petitioner and the respondent no. 4 in the amalgamated gradation lists circulated vide the communication dated 25.02.2000, contends that the petitioner is senior to the respondent no. 4 and accordingly, the respondent no. 4 could not have been permitted to supersede the petitioner in the matter of promotion to the rank to Senior Assistant (earlier UDA).

9. In the above premises, Mr. Das, learned Senior Counsel for the petitioner submits that the petitioner's seniority has to be declared to be so fixed by also reckoning the services rendered by her in the abolished Check Post and the petitioner being senior to the respondent no. 4, she is to be so promoted with all consequential benefits to the cadre of Senior Assistant (earlier UDA) w.e.f. 16.05.2012, if so required by interfering with the promotion so effected in the case of the respondent no. 4.

10. Mr. B. Choudhury, learned standing counsel for the Finance (Taxation) Department, by drawing the attention of the Court to the affidavits filed on behalf of the authorities of Finance (Taxation) Department had contended that the petitioner was on abolition of the Batamari Check Post rendered a

retrenched employee and as such, the case of the petitioner shall be governed solely by the provisions of the said Office Memorandum dated 05.05.1954. By referring to the said Office Memorandum dated 05.05.1954, more particularly, to Clause-5 thereof, it is contended that persons who are treated as retrenched employees are not permitted to reckon the previous services rendered by them before such retrenchment for the purpose of fixation of their seniority in the new post, even if the break-in service between such retrenchment and fresh appointment is condoned. It is the contention of Mr. Choudhury, learned Standing Counsel that it was only on humanitarian grounds that the petitioner immediately on abolition of the said Check Post came to be posted in the establishment of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur and such benevolence shown by the authorities now cannot be taken advantage of by the petitioner to claim that there being no retrenchment in her case, the petitioner is entitled to count the services rendered by her in the Check Post for the purpose of fixation of seniority in the post of LDA in the establishment of Deputy Commissioner of Taxes, Tezpur Zone, Tezpur.

11. Mr. Choudhury, learned standing counsel in the above premises submits that the order dated 16.07.2011, having been so issued by taking into consideration all relevant aspects of the matter, the same does not call for any interference. Accordingly, the promotion as effected in the case of the respondent no. 4 vide the order dated 16.05.2012, also does not call for any interference.

12. Mr. S. Sahu, learned counsel for the respondent no. 4 submits that the

petitioner is not entitled to claim seniority over the respondent no. 4 inasmuch as she being an employee of an abolished establishment, the provisions of the Office Memorandum dated 05.05.1954, automatically, applies in her case. In support of his such contention, Mr. Sahu, learned counsel for the respondent no. 4 relies upon in the decision of the Apex Court in the case of *Joyachan M. Sebastian V. The Director General & Ors.* reported in *1996 (7) Supreme 45.*

13. I have heard the learned counsels for the parties and also perused the materials on record.

14. The petitioner was appointed in pursuance to a selection process as a LDA-cum-Typist in the establishment of Superintendent of Taxes, Batamari Check Post. Although the initial appointment of the petitioner was so granted for a period of 3(three) months, such appointment was continued with and the post in the said establishment being permanently retained by the Government of Assam, the services of the petitioner was also granted permanency.

15. The name of the petitioner also figures in the amalgamated gradation list of ministerial staff working in the Taxation Department as of 01.11.2007, circulated vide the communication dated 25.02.2008. After publication of the said amalgamated list on 25.02.2008, the respondent authorities in the Finance (Taxation) Department had arrived at a decision to abolish the Batamari Check Post on the ground that it had been rendered unviable over the period of time. Accordingly, the notification dated 14.07.2008, was issued

towards abolishing the said Check Post and at the same time relocating the services of the persons working therein like the petitioner. The exact nature of the posting as effected in the case of the petitioner to the establishment of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur can be understood from the communication dated 07.08.2009 issued by the Commissioner of Taxes, Assam, wherein it has been categorically stated that the petitioner was transferred and posted to the Office of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur on abolition of the Batamari Check Post. It is also to be noted that the notification dated 14.07.2008, while abolishing the said Check Post had only required the relocation of the staff working therein. No stipulation was incorporated in the said notification dated 14.07.2008 to the effect that the relocation of the staffs of the said Check Post on its abolition was in terms of the Office Memorandum dated 05.05.1954 and was being so done treating such staffs to be retrenched employees.

16. The petitioner was not informed that the joining by her in the establishment of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur was in the form of a fresh appointment which is the procedure prescribed under the said Office Memorandum dated 05.05.1954, rather the contention of the Commissioner of Taxes, Assam dated 07.08.2009, reflects that such joining by the petitioner was in pursuance to her transfer and posting to the establishment of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur and the same accordingly has to be understood to be in continuance of the services rendered by her in the now abolished Check Post. Accordingly, in view of the procedure as adopted in the case of the petitioner in pursuance

to the abolition of the said Check Post, it cannot be held that the petitioner was disentitled to have her seniority fixed in the cadre of JA (earlier LDA) in the establishment of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur by reckoning the services rendered by her w.e.f. 03.12.1994 in the said Check Post. This brings this Court to a consideration of the Office Memorandum dated 05.05.1954.

17. On a perusal of the Office Memorandum dated 05.05.1954, it is reflected that the same relates to concessions granted to Government servant who on retrenchment were reappointed in another State Government office. It is in respect of the Government servant, who has been retrenched and thereafter reappointed in another State Government office that the said Office Memorandum dated 05.05.1954, stipulates that they would not be entitled to reckon the services rendered by them prior to retrenchment in the new post, to which they are subsequently appointed by way of reappointment. For the application of the said Office Memorandum, there has to be a retrenchment followed by a reappointment of the Government servant concerned.

18. In the case on hand, it is clear that while abolishing the Batamari Check Post vide the notification dated 14.07.2008, the services of the petitioner was not retrenched and was rather required to be relocated. The petitioner was not offered a fresh appointment as a Junior Assistant (earlier LDA) in the Office of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur, rather, she was so posted there on transfer. Further, the amalgamated gradation list of the ministerial staff working in the Taxation Department having been so prepared and circulated by the authorities vide

the communication dated 25.02.2008, it reflects that at that relevant point of time, the various establishments working under the Commissioner of Taxes, Assam were treated to be a single amalgamated establishment. Accordingly, the movement of the petitioner from the Batamari Check Post to the establishment of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur has to be deemed to be a movement within the cadre. Consequently, in the absence of a fresh order of appointment issued to the petitioner, her posting as a LDA in the Office of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur has to be reckoned to be one made in the same cadre and accordingly, the same is to be treated to be in continuance to the services rendered by the petitioner in the Batamari Check Post.

19. Accordingly, it is to be held that the provisions of the said Office Memorandum dated 05.05.1954 were never applied in the case of the petitioner and therefore, the petitioner cannot be held to be covered by the provisions of the said Office Memorandum dated 05.05.1954.

20. The above conclusions with regard to the applicability of the provisions of the Office Memorandum dated 05.05.1954, on the services of the petitioner having been drawn, brings this Court to consider the impugned order dated 16.07.2011.

21. A perusal of the impugned order dated 16.07.2011, reflects that the same is solely based on the provisions of the said Office Memorandum dated 05.05.1954 and it has been held therein that the services of the petitioner is covered by it. This Court having already concluded that the provisions of the

said Office Memorandum dated 05.05.1954, has got no application insofar as it concerns the services of the petitioner and the services rendered by the petitioner as LDA in the establishment of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur having been held to be in continuance of such services rendered by her in the establishment of the Superintendent of Taxes, Batamari Check Post, the order dated 16.07.2011, being solely based on the Office Memorandum dated 05.05.1954, cannot be sustained and accordingly, requires to be interfered with.

22. At the stage, it is noted that in the case of *Md. Alimuddin Ahmed V. The State of Assam & 4 Ors.* in *WP(C)6149/2018*, decided by this Court vide the order dated 24.05.2019 also involved the issue of the petitioner therein on abolition of the Jalukbari Check Gate being relocated in the Office of the Deputy Commissioner of Taxes-Zone A, Kamrup Metro being denied the benefit of the services rendered by him in the Jalukbari Check Gate for the purpose of fixation of his seniority in the relocated office. This Court, upon consideration of issues arising and also the contentions raised by the respondents therein, proceeded to hold that the services rendered by the petitioner in the earlier establishment cannot be denied for the purpose of fixation of the seniority of the petitioner in the new establishment. The relevant paragraphs of the said decision having a bearing on the issues arising in the present proceeding is extracted herein below:-

"7. This Court is not satisfied with the above explanation as the transfer of the petitioners from the earlier establishment of check gate to the new establishment of unit-D, Assistant Commissioner of Taxes,

Guwahati is not on their own volition but on account of the closure of check gates by the authorities and as such they cannot be deprived of the service benefits including seniority which they had gained in the other establishments belonging to the same Department and they cannot be treated as new entrants in the same Department.

8. It have been submitted by the learned counsel for the State respondents that the decision has to be taken by the Government and accordingly the necessary direction may be issued to the State Government to take a decision in this regard.

9. This Court is of the view that if a person who have been appointed on regular basis in the same department is brought to another establishment without his fault, the seniority earned by him in earlier establishment under the same department by passing appropriate orders in this regard."

23. It is to be noted that the respondent authorities in terms of the said order dated 24.05.2019 by this Court in the case of *Md. Alimuddin Ahmed (supra)* had proceeded to fix the seniority of the said petitioner in the post currently held by him in terms of the directions passed by this Court, by reckoning the services rendered by him in the abolished Check Post.

24. Accordingly, the petitioner herein who is similarly situated like the petitioner in the case of *Md. Alimuddin Ahmed (supra)* is also entitled to the similar benefits.

25. The contention of Mr. S. Sahu, learned counsel for the respondent no.

4 is now to be considered. The contention of Mr. Sahu, learned counsel is that the Office Memorandum dated 05.05.1954 squarely applies to the petitioner, when viewed in the light of the amalgamated gradation list of ministerial staff working in the establishment of Finance (Taxation) Department as well as the communication dated 07.08.2009 of the Commissioner of Taxes, Assam reveals that in the case of the petitioner, it was not a fresh appointment rather it was a case of transfer and posting of the petitioner to the establishment of Deputy Commissioner of Taxes, Tezpur Zone, Tezpur. In view of the factual position arising in the present case, the decision as relied by the learned counsel for the respondent no. 4 in the case of *Joychand (supra)* will have no application to the issues arising in the present proceedings.

26. At this stage, Mr. N. C. Das, learned Senior Counsel on instructions received from the petitioner has submitted that the petitioner was promoted to the post of Senior Assistant (earlier UDA) vide an order dated 01.07.2020.

27. In view of the said discussions and conclusions reached by this Court hereinabove, the following directions are passed:-

(i) The impugned communication dated 16.07.2011, stands set aside and quashed.

(ii) It is declared that the petitioner's services as Junior Assistant (earlier LDA) in the establishment of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur is held to be in continuation of the services

in such capacity rendered by the petitioner in the Batamari Check Post before its abolition.

(iii) The petitioner's seniority as Junior Assistant (earlier LDA) in the establishment of the Deputy Commissioner of Taxes, Tezpur Zone, Tezpur is to be fixed by reckoning her services as an LDA (now Junior Assistant) w.e.f. 03.12.1994.

(iv) The petitioner is accordingly, declared to be senior to the respondent no. 4 in the cadre of LDA (now Junior Assistant).

(v) The petitioner is held to be entitled for promotion to the cadre of UDA (now Senior Assistant) w.e.f. 16.05.2012. Accordingly, the Commissioner of Taxes, Assam is required to issue appropriate orders promoting the petitioner as UDA (now SA) w.e.f. 16.05.2012, i.e., the date of promotion of the respondent no. 4 to the cadre of Senior Assistant.

(vi) The promotion as effected in the case of the petitioner to the rank of Senior Assistant w.e.f. 16.05.2012 would result in the petitioner being senior to the respondent no. 4 in the cadre of Senior Assistant also.

(vii) The petitioner having already been promoted as Senior Assistant

vide the order dated 01.07.2020, the respondent authorities in terms of the directions passed herein above shall give a retrospective effect to such promotion of the petitioner w.e.f. 16.05.2012.

(viii) The petitioner on being promoted w.e.f. 16.05.2012, will be entitled to have the pay and allowances fixed notionally w.e.f. 16.05.2012 till 01.07.2020. The pay and allowances of the petitioner w.e.f. 01.07.2020 be re-fixed basing on the notional fixation was so made in her case in the cadre of UDA (now Senior Assistant) w.e.f. 16.05.2012 and the arrears thereof shall be released to the petitioner forthwith.

(ix) The retrospective effect given to the promotion of the petitioner shall be so effected without disturbing the promotion granted to the respondent no. 4.

(x) The Commissioner and Secretary to the Government of Assam, Finance (Taxation) Department and the Commissioner of Taxes, Assam shall be required to implement the directions as passed by this Court herein above within a period of 90 days from the date of receipt of a certified copy of this order from the petitioner.

(xi) The petitioner is required to submit a certified copy of this order before the Commissioner of Taxes, Assam, along with a forwarding.

26. With the above observations and directions, the writ petition stands disposed of.

JUDGE

Comparing Assistant