

GAHC010027762011



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

Case No. : WP(C)/491/2011

JIBAN CHANDRA SAIKIA
S/O LT.HOWANG CH. SAIKIA, R/O MANIKANCHAN PATH, BELTOLA,
P.S.BASISTHA, GHY-28, DIST KAMRUP METRO, ASSAM

VERSUS

THE STATE OF ASSAM AND ORS
REP. BY THE CHIEF SECY, TO THE GOVT. OF ASSAM, DISPUR, GHY-6

2:THE COMMISSIONER AND SECY. ATO THE GOVT. OF ASSAM

PERSONAL A DEPTT
DISPUR
GHY-6

3:THE COMMISSIONER AND SECY. TO THE GOVT OF ASSAM

FINANCE DEPTT
DISPUR
GHY-6

4:THE PRINCIPAL SECY. TO THE GOVT. OF ASSAM

RAJ BHAWAN
GHY-1

5:THE COMMISSIONER AND SECY. TO THE GOVT. OF ASSAM

SECRETARIAT ADMINISTRATIVE DEPTT
DISPUR
GHY-

Advocate for the Petitioner : Mr. U. K. Nair, Senior Advocate
Mr. S. J. Saikia, Advocate

Advocate for the Respondents : Mr. R. Borpujari, SC, Finance.

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 20.07.2023

Date of Judgment : 20.07.2023

JUDGMENT AND ORDER (ORAL)

Heard Mr. U. K. Nair, the learned senior counsel assisted by Mr. S. J. Saikia, the learned counsel for the petitioner and Mr. R. Borpujari, the learned counsel appearing on behalf of the Finance Department, Government of Assam.

2. The petitioner herein is aggrieved by the inaction on the part of the Finance Department of the Government of Assam in not granting the concurrence for creation of a post of Additional Secretary in the Governor's Secretariat thereby depriving the petitioner of his promotion to the post of Additional Secretary in the Governor's Secretariat, and as such, has sought for a mandamus directing the respondents to grant the benefit of an Ex-Cadre promotion to the post of Additional Secretary in the Governor's Secretariat retrospectively, with financial benefits, with effect from 15.09.2009 and also to release the arrear salary in the pay scale of the Additional Secretary from 15.09.2009 to 13.06.2010 and also to compute the pensionary benefits on the basis of the said pay scale.

3. The facts involved in the instant case is that the petitioner joined the Governors' Secretariat, in the month of September, 1976 and was promoted to

the post of Under Secretary in the year 1991. In the year 1997, the petitioner was promoted to the post of the Deputy Secretary and in the year 2003, the petitioner was again promoted to the post of the Joint Secretary. During this period, the petitioner was also allowed to officiate in the post of the Secretary for several times since 1997 to 2006 on the orders of the Governor of Assam.

4. The relevant fact for the purpose of the instant dispute is that a proposal for creation of the post of Additional Secretary in the Governor's Secretariat was mooted which was approved by the Hon'ble Governor. The said proposal was submitted on 17.02.2009 to the Commissioner and Secretary, Personnel (A) Department for concurrence regarding creation of the post of Additional Secretary. The Personnel (A) Department vide the endorsement dated 15.09.2009 gave its no objection to the creation of one Ex-Cadre post of Additional Secretary for giving promotion to the petitioner subject to the condition that the post shall stand abolished as and when the petitioner quits or superannuates subject to the concurrence of Finance Department. The endorsement so made by the Personnel (A) Department makes it clear that the proposal which was mooted from the Governor's Secretariat for creation of a post of the Additional Secretary for the grounds and reasons stated in the endorsement dated 17.02.2009 was accepted only for creation of a supernumerary post for the purpose of facilitating the petitioner to be promoted to the post of the Additional Secretary and the existence of such post was made co-terminous with the services of the Petitioner.

5. The Finance Department of the Government of Assam, who received the said proposal on 18.09.2009 returned the same with the advice to re-examine it in the light of the new ROP Rules which was yet to be issued. Thereupon, the Governor's Secretariat resubmitted the proposal vide endorsement dated

09.02.2010 which was again returned to them by the Finance Department vide endorsement dated 14.05.2010 with the request to obtain fresh view of the Personnel (A) Department on the proposal with reference to the recommendation No.3 of the General Recommendation in Chapter-10 of the report of Assam Pay Commission, 2008.

6. At this stage, this Court finds it relevant to take note of the proposal so submitted on 26.05.2010 by the Commissioner and Secretary to the Governor of Assam, a copy of which was submitted during the course of hearing. A perusal of the said proposal shows that the Commissioner and Secretary to the Governor of Assam had made an endorsement that the recommendation No.3 of the Pay Commission in Chapter-10 accepted by the Government suggested that new post without any functional utilities should not be created only to facilitate promotion. In that view of the matter, the said endorsement mentioned the functional utility of the post of the Additional Secretary in the Governor's Secretariat. The Personnel (A) Department thereupon again reiterated its earlier view stating their no objection for creation of one Ex-Cadre post of Additional Secretary for granting promotion to the petitioner but observed that the said endorsement shall be subject to the concurrence of the Finance Department of the Government of Assam. It further reveals that in the meantime, while the proposal dated 26.05.2010 of the Commissioner and Secretary to the Governor of Assam was pending concurrence before the Finance Department, the petitioner retired on 30.06.2010 and thereupon on 31.07.2010, the said proposal was returned to the Governor's Secretariat stating that as the petitioner had already superannuated on 30.06.2010, the Governor's Secretariat may reconsider the proposal. The petitioner, therefore, being aggrieved by the inaction on the part of the Finance Department of the Government of Assam in

granting the concurrence for which he could not be promoted to the post of the Additional Secretary and thereby being deprived of the pay scale and the consequential benefits had approached this Court by filing the instant writ petition on 18.01.2011.

7. It reveals from the record that this Court vide the order dated 21.02.2011 had issued notice. The record further reveals that the Personnel (A) Department of the Government of Assam, i.e. the respondent No.2; the Finance Department, Government of Assam, i.e. the respondent No.3 and the Principal Secretary to the Government of Assam, i.e. the respondent No.4 have filed their affidavits.

8. In the affidavit filed by the respondent No.3, it is the categorical stand of the Finance Department that no post can be created to benefit any particular Government employee and this principle has been duly accepted by the Government with the approval of the Cabinet as per the recommendation of the Assam Pay Commission, 2008. It was mentioned that though the Personnel (A) Department had granted the approval for creation of the post of Additional Secretary in the Governor's Secretariat for allowing promotional benefit to the petitioner even after the recommendation of the Assam Pay Commission, 2008, the Finance Department was not in total agreement with the Personnel (A) Department and was contemplating to inform the Governor's Secretariat accordingly with reference to their endorsement dated 09.06.2010. However, before the Finance Department could take the decision, the petitioner had already retired on 30.06.2010 and accordingly, relevant file of the Governor's Secretariat was returned to the Governor's Secretariat for reconsideration.

9. The Personnel (A) Department in its affidavit filed on 29.03.2012 has stated that the Personnel (A) Department had no objection for creation of one

Ex-Cadre post of an Additional Secretary for granting promotion to the petitioner which accordingly was intimated to the Governor's Secretariat but the same was made subject to the concurrence of the Finance Department of the Government of Assam.

10. The respondent No.4, i.e. the Principal Secretary to the Governor of Assam in his affidavit-in-opposition through the Under Secretary to the Government of Assam at paragraph No.6 stated that the Finance Department of the Government of Assam was requested to expedite the matter at the earliest by the then Commissioner & Secretary to the Governor vide communication dated 06.05.2010 due to delay in process since the proposal was sent on 10.02.2010 with the approval of the Personnel (A) Department. It was mentioned that the Finance Department again sent back the file seeking the fresh view of Personnel (A) Department in the light of new ROP 2008 vide the endorsement 14.05.2010. Thereupon the file was again moved to the Personnel (A) Department and they made an endorsement on 01.06.2010 whereby it gave no objection to the creation of one Ex-Cadre post of Additional Secretary as conveyed by them earlier also. It was mentioned that the file was endorsed to the Finance Department on 09.06.2010 for necessary concurrence on the proposal as a special case since the petitioner was due for superannuation on 30.06.2010. However, the Finance Department returned the file with observation that the petitioner for whom the Ex-Cadre post of Additional Secretary was proposed to be created has already attained the age of superannuation on 30.06.2010 and for which the proposal may be re-considered by Governor's Secretariat vide their endorsement dated 31.07.2010.

11. It further reveals from the record that the petitioner had filed a reply to the affidavit filed by the respondent No.2 wherein it was mentioned that as the

Governor of Assam is the highest Constitutional Body of the State and there was a recommendation being made by the three consecutive Governors, thus the Finance Department should not have kept the file pending till the date of retirement dated 30.06.2010, as the file was placed before them well advance in time. It was further mentioned that the Chief Secretary to the Government of Assam had also approved the same on 15.09.2009 and the file thereafter placed before the Finance Department for its concurrence and the Finance Department kept the file pending and on retirement after 55 days, returned back with the comment that the concerned officer has already superannuated.

12. It is also relevant to take note of that an affidavit-in-reply was also filed by the petitioner to the affidavit-in-opposition filed by the respondent No.3. In the said affidavit-in-reply, the proposal so submitted to the Governor of Assam dated 26.05.2010 as well as the endorsement of the Finance Department dated 31.07.2010 was enclosed.

13. I have heard the learned counsels for the parties and perused the materials on record. The issue involved in the instant writ petition simply stated is that the petitioner is aggrieved by the inaction on the part of the Finance Department in not granting the concurrence for creation of an Ex-Cadre post of the Additional Secretary for which the petitioner could not be promoted while he was in service. It, however, appears that the Finance Department taking into account the initial proposal so submitted on 17.02.2009 and the endorsement so made on 15.09.2009, returned the proposal with an advice to the Governor's Secretariat to re-examine in the light of the new ROP Rules which were to be issued. It further appears that the Governor's Secretariat thereupon on 09.02.2010 again submitted the proposal directly to the Finance Department wherein the Finance Department again returned the proposal with an

endorsement dated 14.05.2010 with a request to obtain fresh views of the Personnel (A) Department on the proposal with reference to recommendation No.3 of the General Recommendation in Chapter-10 of the Assam Pay Commission, 2008. It is under such circumstances the third proposal was again submitted on 26.05.2010 wherein in order to overcome the recommendation No.3 of Chapter-10 of the Assam Pay Commission, 2008 have mentioned the functional utility of the post of Additional Secretary in the Governor's Secretariat. This proposal when submitted to the Personnel (A) Department, the said Department reiterated its stand similar to its endorsement dated 18.09.2009 thereby stating that the Personnel (A) Department had no objection for creation of an Ex-Cadre post of Additional Secretary for granting promotion to the petitioner and making the said post coterminous with the services of the petitioner subject to concurrence of the Finance Department. The said endorsement so made by the Personnel (A) Department, was however, contrary to the recommendation No.3 of Chapter-10 of the Assam Pay Commission, 2008 in as much as it was the mandate which was duly accepted on the basis of a Cabinet decision that there can be no creation of a post for the purpose of facilitating a promotion to an Officer.

14. Under such circumstances, this Court is of the opinion that as the basic intention for creation of a post of Additional Secretary in the Governor's Secretariat was only for the purpose of facilitating the promotion of the petitioner to the post of Additional Secretary while he was in service and as the same was contrary to the recommendation No.3 of Chapter-10 of the Assam Pay Commission Recommendations, there was no illegality on the part of the Finance Department of the Government of Assam in not granting the concurrence for the creation of the post of Additional Secretary during the

period the petitioner was in service, i.e. upto 30.06.2010.

15. The relief which has been sought for is in effect a direction for creation of a supernumerary post of Additional Secretary in the Governor's Secretariat for the purpose of granting the petitioner retrospective promotion to such post which is yet to be created. It is the opinion of this Court that such a relief cannot be granted by this Court as the same would run counter to the recommendation No.3 of Chapter-10 of the Assam Pay Commission, 2008.

16. Under such circumstances, this Court does not find any merit in the instant writ petition for which the petition stands dismissed.

JUDGE

Comparing Assistant