

GAHC010186992011



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

Case No. : WP(C)/2146/2011

ON THE DEATH OF PRADIP KR. GHOSH HIS LEGAL HEIR SMT. NANDITA
GHOSH REPRESENTING
U D ASTT, S/O LT. PRASANNA KR. GHOSH , R/O HENGRABARI, HEALTH
COMPLEX, P.O. HENGRABARI, GHY-36, DIST KAMRUP M, ASSAM

1.1: Nandita Ghosh
R/o H. NO. 47
Jyoti Path
Odalbakra
Guwahati -3

VERSUS

THE STATE OF ASSAM AND ORS
REP. BY THE COMMISSIONER AND SECY., GOVT. OF ASSAM, HEALTH AND
F.W. A DEPT, DISPUR, GHY-6

2:THE COMMISSIONER AND SECY.
GOVT. OF ASSAM
FINANCE DEPTT
DISPUR
GHY-6

3:THE DIRECTOR OF HEALTH SERVICES
ASSAM
HENGRABARI
GHY-3

Advocate for the Petitioner : MR.B CHETRI

Advocate for the Respondent : MR.D SAIKIA

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER(ORAL)

Date : 01-06-2023

Heard Mr. B. Chetri, the learned counsel for the petitioner. Mr. N. Bhuyan, the learned counsel appears on behalf of the Health Department.

2. The instant writ petition was filed in the year 2011 and as such the instant writ petition is taken up for final disposal taking into account that more than a decade have already passed. It is the further relevant to take note of that during the pendency of the instant writ petition, the petitioner expired and vide an order dated 3rd of January, 2018, his wife Smti Nandita Ghosh was substituted as the petitioner in IA (C) No. 3638/2017 in the instant proceedings. However, for the sake of convenience, the original petitioner is referred to as 'the Petitioner' and his wife as the 'substituted Petitioner'.

3. The case of the petitioner herein is that the petitioner was promoted and appointed temporarily as Typist in the Directorate of Health Service vide an order dated 8th of July, 1977. In the said order, it was mentioned that the petitioner was posted against the vacancy caused due the release of Shri S.N. Bora, Typist to the post of Lower Division Assistant (LDA) in the Office of the District Health Officer, Nagaon. Subsequent thereto, on 5/8/2003, the Director of Health Service, Assam taking into account that the petitioner was the senior most LDA promoted the petitioner to the post of the Upper Division Assistant (UDA) purely on temporary basis against the existing vacant post caused due to the retirement of Shri Sriman Kerky, UDA in the Office of the Director of Health Service(FW), Assam. It is relevant to mention that there is no mention in the

said order that the petitioner has to join before the Director of Health Service, Family Welfare, Assam and the promotion order was passed by the Director of Health Service, Assam.

4. Be that as it may, the petitioner on 5/8/2003 submitted his joining report to the Director of Health Service, Assam which was duly received under the seal of the Director of Health Service.

5. It further appears that the Director of Health Service, Assam had issued an order on 16/8/2003 thereby entrusting various officers and staffs of the said Directorate for Control Room Duty to gear up for the inevitable emergency situation being occurred due to Japanese encephalitis and epidemic for flood and post flood in the State. The petitioner's name was shown at Serial No. 3 as UDA. Subsequently thereto on 5/11/2003 the said Director of Health Service have issued another order whereby various officers and staffs were detailed out in the Control Room Duty to gear up for the inevitable emergency situation and the petitioner's name appears in the said order at Sl. No. 35 and shown as UDA. On 18/9/2006, the Director of Health Service again issued another order whereby various officers and staffs of the said Directorate including the Office of the Joint Director of Health (M)/ Joint Director of Health Service (L)/Joint Director of Health Service (TB)/ERO(Filaria) and Inspector of Drugs, Kamrup were detailed out in the Control Room Duty to gear up for the emergency situation that had occurred due to the disaster epidemic in the State. At Serial No. 34 of the said order, the petitioner's name can be seen and shown as UDA. This Court finds it relevant to note that the said Order did not mention about officials from the Directorate of Health (FW) though had mentioned about the various other offices including the Directorate of Health Service.

6. It is the case of the petitioner that in spite of the petitioner being

promoted to the higher post of UDA but the respondent authorities continued to pay the petitioner the salary as payable to the LDA. Under such circumstances, the petitioner had from time to time submitted various representations.

7. At this stage, it may be relevant to mention that one Tapan Kumar Das had challenged the promotional order of the petitioner dated 5/8/2003 by way of a writ petition being W.P.(C) No. 7846/2003. This Court vide an order dated 23/9/2003 issued notice and in the interim stayed the order dated 5/8/2003. It was however mentioned that if the private Respondent therein i.e. the Petitioner herein has already taken over the charge, his promotion to the post of UDA shall be subject to the final outcome of the writ petition.

8. During the course of hearing, Mr. N. Bhuyan, the learned counsel for the Health & Family Department submitted that the said writ petition was however withdrawn on 16/9/2011 pursuant to the filing of the instant writ petition. It further reveals from the records that on 1/9/2009, the Director of Health Service issued another order whereby the petitioner was shown as LDA Accounts Branch of the said Directorate and was entrusted to look after the table of the Cashier, Accounts Branch in addition to his own duties without any financial benefits until further order. This order also makes it clear that the administrative control over the service of the Petitioner was retained and exercised by the Director of Health Service and not the Director of Health Service (FW).

9. It further appears that the petitioner thereupon retired on 30/4/2010. Being aggrieved by the fact that the petitioner was not given the salary as well as other benefits including the retirement benefits on the basis of his salary to the promotional post of UDA, the instant writ petition was filed seeking a direction upon the respondent authorities for fixation of the petitioner's pay scale as UDA w.e.f 5/8/2003 and to release all service benefits i.e. the arrear

salary and other retirement benefits due to the petitioner as well as for appropriate directions in that regard. It reveals from the records that pursuant to the filling of the instant writ petition on 20/4/2011, this Court admitted the writ petition.

10. Pursuant thereto, the respondent No. 3 i.e. the Director of Health Service filed an affidavit-in-opposition on 11/8/2011. In the said affidavit-in-opposition at paragraph No. 6, it has been mentioned that there were three Directors in the Health Department. They are :- (i) The Director of Health Service, (ii) The Director of Health Service (FW) and (iii) Director of Medical Education. The common cadre of the three Directors have been maintained by the Director of Health Service but the pay fixation, administrative control or other service conditions of the employees of each Directorate are maintained by the respective Directorate as each of the Directorate is separate and has independent entity. It was further mentioned that the pay fixation of an employee of the Director of Health Service (FW) cannot be done by the Director of Health Service. In that context, it was mentioned that though the petitioner was promoted to the post of UDA vide an order dated 5/8/2003 against the existing vacant post caused due to the retirement of Sriman Kerky, UDA in the Office of the Director of Health Service (FW), Assam, the petitioner never joined in the Office of the Director of Health Service (FW), Assam and he never worked as a UDA till the date of his retirement. It was further mentioned that the petitioner did not join in his promotional post and as such he continued to draw the salaries of the LDA only and he never drawn the pay scale of UDA. It was further submitted that the petitioner had simply submitted his joining report before the Director of Health Service, who was not the competent authority to accept the joining report. It was mentioned that it was only the Director of

Health Service, Family Welfare, Assam, who was the competent authority before whom the petitioner should have submitted his joining report and the petitioner was promoted to the post of UDA by the order dated 5/8/2003 in a vacant post in the Office of the Director of Health Service (FW), Assam.

11. As regards the communication which has been enclosed as Annexure-D series, it was mentioned in the affidavit that in the said communication, it was inadvertently written as UDA inasmuch as the petitioner did not work as UDA in the Office of the Respondent No. 3 and he did not receive the pay scale of UDA.

12. To the said affidavit-in-opposition, an affidavit-in-reply was filed by the Petitioner on 16th of November, 2011 wherein the Petitioner stated that pursuant to his order of promotion dated 5/8/2003, the petitioner joined in the Office of the Director of Health Service, Hengrabari on 5/8/2003 as UDA by submitting his joining report. It was further mentioned that when the joining report was submitted by the petitioner on 5/8/2003, the Director of Health Service ought not to have accepted the joining report by endorsing his sign and seal and allowing him to continue in the same establishment to discharge his duty as UDA. It was further mentioned that promotional order dated 5/8/2003, the petitioner was never directed/asked to join in the Director of Health Service (FW) but he was promoted against the vacant post of Sriman Kerky, UDA in the Office of the Director of Health Service (FW).

13. I have heard the learned counsel appearing on behalf of the parties.

14. From a perusal of the affidavit filed by the respondent No. 3 as well as taking into account the order dated 5/8/2003, it is apparent that it is the Director of Health Service who had issued the promotional order to the petitioner on 5/8/2003. There is no denial to the fact that the petitioner

submitted the joining report to the Director of Health Service on 5/8/2003. Therefore, the order dated 23/9/2003 passed in W.P.(C) No. 7846/2003 would have no application inasmuch as the petitioner already joined his promotional post on 5/8/2003.

15. Now the question arises as to whether the petitioner should have joined before the Director of Health Service or the Director of Health Service, Family Welfare. The order dated 5/8/2003 is silent in that respect. However, in Annexure -C which is the joining report of the petitioner, the same was duly accepted by the Director of Health Service. The communications enclosed as Annexure-D series also shows the administrative control of the Director of Health Service upon the services of the petitioner inasmuch as the petitioner was deployed for the Control Room Duty wherein the petitioner's name was shown in the various communications enclosed as Annexure-D series as UDA. The explanation as regards the documents in Annexure-D series by the Respondent No. 3 in the affidavit do not inspire the confidence of this Court. It seems to be an after thought by blaming the subordinate staff without taking responsibility to the said documents.

16. It further reveals that the petitioner has submitted representations also but the respondent authorities at no stage clarified or even took action against the petitioner for not joining his place of promotional posting. Under such circumstances, this Court finds it difficult to accept the stand of the respondents to the effect that the petitioner ought not to have joined before the Director of Health Service but before the Director of Health Service (FW). Under such circumstances, this Court is of the opinion that the petitioner would be entitled to the salary as the UDA. Now that the petitioner have expired, this Court is further of the opinion that his wife who is the substituted petitioner would be

entitled to the arrears on account of the difference in the salary of UDA and LDA as well as re-computation of the pension and the other pensionary benefits on the basis of the petitioner's salary as UDA.

17. Accordingly, this Court therefore disposes off the instant writ petition with a direction to the respondent No. 3 to take appropriate steps for payment of arrears of the salary to the substituted petitioner which would be the difference between the salary of the UDA prevailing at that point of time with the salary which the petitioner actually received pursuant to his order of promotion and also further to re-compute the pension, family pension and other retirement benefits of the petitioner as well as the substituted petitioner on the basis of the salary as the UDA.

18. The said exercise be completed within a period of 4(four) month from the date a certified copy of the instant order is served upon the respondent No. 3.

JUDGE

Comparing Assistant