

GAHC010215522011



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

**Case No. : WP(C)/177/2011**

NEPUR DAS  
S/O BHLARAM DAS, R/O VILL. NORTH GUWAHATI MADHYAM KHANDA,  
GUWAHATI, DIST. KAMRUP, ASSAM.

VERSUS

THE STATE OF ASSAM AND ORS  
REP. BY THE PRINCIPAL SECY, HOME DEPTT, GUWAHATI-6, ASSAM.

2:THE DIRECTOR GENERAL OF CIVIL DEFENCE and COMMANDANT  
GENERAL OF HOME GUARDS

ASSAM  
BELTOLA  
GUWAHATI-28

3:BASANTA DUTTA

WORKING AS PBX OPERATOR  
CIVIL DEFENCE OFFICE  
JORHA

**For the Petitioner : Mr. M. P. Sharma, Adv.**

For the Respondents: Mr. C.K.S. Baruah, GA, Assam.

**BEFORE**  
**THE HON'BLE MR. JUSTICE SUMAN SHYAM**

Date of hearing : 21/11/2023.

Date of judgement : 21/11/2023

**JUDGEMENT AND ORDER (ORAL)**

1. Heard Mr. M.P. Sharma, learned counsel appearing for the writ petitioner. Also heard Mr. C.K.S. Baruah, learned Government Advocate, Assam, appearing for the respondent nos. 1 & 2. None has appeared for the respondent no. 3.

2. By filing this writ petition, the speaking order dated 09/09/2010 passed by the Director General of Civil Defence and Commandant General of Home Guard i.e. the respondent no.2 has been put under challenge *inter alia* contending that the impugned order has been issued without proper authority and jurisdiction and the same is also in clear contravention of the relevant Service Rules. By the impugned order, the respondent no. 3 has been absorbed in the cadre and has also been given consequential seniority over the petitioner.

3. The facts of the case, in a nutshell, as appearing from the materials on record are as follows :-

- (i) The writ petitioner was appointed as Civil Defence Wireless Operator under the respondent no. 2 on 07/01/1995. On the other hand, the respondent no. 3 was appointed as PBX Operator on 01/11/1991 in the establishment of Director General, Civil Defence and Commandant General, Home Guards, i.e. the respondent no. 2 pursuant where to, he had joined on 03/11/1991. The pay scale of PBX Operator was marginally higher than the post of Civil Defence Wireless Operator and Demonstrator but the nature of duty of both the posts were more or less the same. The post of PBX Operator was not a cadre post under Rule 3 of the relevant service rules i.e. "**Assam Civil Defence (Non-Gazetted) Service Rules, 1991**" although the said post did find mention in the schedule of the Rules which mentioned all the posts which were part of the service. As such, although, the respondent no. 3 had joined way back on 03/11/1991 as a PBX Operator, yet, due to the aforesaid anomaly in the Rules, he was not given the benefit of seniority by treating his post as ex-cadre

whereas, persons appointed after him like the writ petitioner, who had joined as a Wireless Operator, were assigned seniority position in the Gradation List. Aggrieved thereby, the petitioner had approached the authorities ventilating his grievance in the matter.

- (ii) Taking note of the amended provisions of the Rules and the grievance expressed by the respondent no. 3, the respondent no. 2 had passed the impugned order not only treating his post of PBX Operator to be a part of the cadre service but also assigning seniority to him over the persons who were appointed after the respondent no. 3 including the writ petitioner. Immediately, thereafter, the Gradation List of Civil Defence Demonstrators and Wireless Operators etc. were published wherein, in view of his seniority position the name of the respondent no.3 figured at Sl. No. 1 whereas the petitioner's name appeared at Sl. No. 4. Aggrieved thereby, the instant writ petition has been filed.

4. Mr. Sharma, learned counsel for the writ petitioner has argued that since the respondent no. 3 was appointed against an ex-cadre post, he could not have been encadred by the impugned order, far less any seniority be given to him above the petitioner herein, who was all along holding a cadre post. According to Mr. Sharma, regardless of the date of appointment, seniority in this case ought to be governed by the fact that the persons holding cadre post must be recognized to be of higher seniority than those absorbed against ex-cadre post. Mr. Sharma has further argued that it is only the Governor of Assam who had the competence and jurisdiction to pass such an order absorbing the respondent no. 3 to the cadre service and not the respondent no.2. Therefore, viewed from any angle, submits Mr. Sharma, the impugned order is illegal and hence, is liable to be set aside.

5. It is also the submission of Mr. Sharma that as per the provisions of Rule 5(2) of the Rules, the deemed encadrement can only be applied with regard to posts of equivalent nature and, therefore, the impugned order is also bad on account of the fact that the post of PBX Operator was not equivalent to the post of Civil Defence Wireless Operator. The learned counsel for the petitioner has, however, clarified that the writ petitioner is not assailing the appointment of the respondent no. 3 in the post of PBX operator but only assailing his

seniority.

6. Mr. C.K. S. Baruah, learned Government Advocate, Assam, on the other hand, has invited the attention of this Court to the counter affidavit filed by the respondent no. 3 to submit that the writ petition is wholly misconceived. According to the learned Government Advocate, the impugned order dated 09/09/2010 has been issued merely to give effect to the provisions of the Rules and also to rectify a defect in the process of encadrement of the respondent no. 3. Contending that the writ petitioner is junior to the respondent no. 3 in service and, therefore, he cannot assail the seniority assigned to the respondent no.3, Mr. C.K.S. Baruah, learned Government Advocate, Assam has further contended that since the impugned order is in consonance with the service Rules and considering the fact that Rules are not under challenge, no relief can be granted to the petitioner in this case.

7. I have considered the submissions advanced at the Bar and have also gone through the materials available on record.

8. As has been noted herein above, the writ petitioner is not assailing the appointment of the respondent no. 3 in the post of PBX Operator nor is the order of his appointment a part of the record. Therefore, that aspect of the matter need not detain this Court.

9. It is noticed from the materials available on record that even under the Rules of 1991, the post of PBX Operator was included in the schedule at Sl. No. 10. Therefore, merely because "PBX Operator" did not find place in Rule 3 of the Rules, it may not be correct to say that the post of PBX Operator was not a post included in the service under the Rules of 1991.

10. Rule 5 of the Rules of 1991 lays down the method of recruitment in the cadre of Wireless Operator etc. which is reproduced herein below for ready reference :-

*"5. Method of recruitment :- Recruitment in the Service shall be made in the manner prescribed hereinafter :-*

*(1) (a) Recruitment to the cadre of Wireless Operators shall be made by direct recruitment;*

*(b) Recruitment to the cadre of Civil Defence Demonstrators shall be made*

*on the basis of 50% direct recruitment from the Civil Defence Volunteers and the balance 50% by promotion to the cadre of wireless operators;*

*(c) Recruitment to the cadre of Civil Defence Instructor Class-II shall be made on the basis of 50% direct recruitment and balance 50% by promotion from the cadre of Civil Defence Demonstrators.*

*(d) recruitment to the cadre of Civil Defence Instructor, Class-I shall be made by promotion only.*

*(2) Notwithstanding anything contained herein before under sub-rule (b) of this rule, persons appointed in equivalent posts in the Civil Defence Department before commencement of these rules shall be treated to have been encadred in Civil Defence Demonstrators."*

11. As has been noted above, Rule 3 of the Rules of 1991 lays down the class and cadre wherein, the posts of Civil Defence Demonstrators and Civil Defence Wireless Operators are mentioned. Subsequently by amending sub-rule (2) of the Rule 5 by the amended Rules of 1998, the following provision has been inserted :-

*"2. For sub-rule (2), the following shall be substituted, namely :-*

*(a) Notwithstanding anything contained herein before under sub-rule (b) persons appointed to equivalent posts in the Civil Defence Department before commencement of these rules shall be treated to have been encadred in Civil Defence Demonstrators and Civil Defence Wireless Operator."*

12. It is by following the aforesaid provision of the amended Rules that the impugned order dated 09/09/2010 has been passed by the respondent no. 2.

13. Mr. Sharma submits that since the post of PBX Operator was not included in the pre-amended Rule 3, hence, the amended Rules could not have been invoked by the respondent no. 2 to pass the impugned order. This Court is unable to agree with such submission of the

petitioner's counsel on account of the fact that as noted herein above, the post of PBX operator did find mention in the schedule of the Rules although it was not included in Rule 3. Moreover, PBX operator was discharging the duties which were more or less similar to that of Civil Defence Wireless Operator and Demonstrator, carrying more or less equal pay scale and, therefore, if the respondents have found that PBX operator post was equivalent to the post of Civil Defence Wireless Operator and Demonstrator, which post is included in Rule 3 of the Rules of 1991, it cannot be said that such a conclusion is erroneous. As such, this Court is of the view that the amended sub-rule (2) has been rightly invoked by the respondent no. 2 in this case. By the impugned order dated 09/09/2010, the respondent no. 2 has merely rectified a lacunae in the Rules, by clarifying that the respondent no. 3 was holding a post which was part of the cadre, thus, redressing the long standing grievance of the private respondent in a manner which is expected of a model employer.

14. It must be noted herein that the respondent no. 3, having been appointed way back in the year 1991 against a substantive post of PBX Operator, he could not have been denied seniority in the cadre or subsequent promotion based on his seniority position merely on the ground that Rule 3 of the pre-amended Rules did not include the post of PBX Operator. Therefore, this Court is of the opinion that the challenge made in this writ petition is completely misconceived and does not command for acceptance by this Court.

15. It is also to be noted herein that there are two other persons junior to the respondent no. 3 but senior to the writ petitioner in the Gradation list but they have not been made parties in the writ petition. It appears that those two persons are also not in anyway aggrieved by the seniority position of the respondent no. 3. Under the circumstances, the challenge made in this writ petition is found to be not maintainable on such count as well.

16. Finally, it may be noted herein that the impugned order was passed in the year 2010 and in the meantime, it appears that not only the respondent no. 3 but even the petitioner has also got promoted to higher posts. Therefore, unless there is very strong and compelling ground for this Court to interfere with the impugned order dated 09/09/2010, any order passed in this writ petition, may have the prospect of upsetting the settled seniority position of the departmental officials and also disturb the administrative set up of the department. This Court is reluctant to embark upon such an exercise at this point of time and

in the peculiar facts and circumstances of this case.

17. For the reasons stated herein above, this Court is of the opinion that there is no merit in the writ petition, the same is accordingly dismissed.

Parties to bear their own costs.

**JUDGE**

*Sukhamay*

**Comparing Assistant**