

GAHC010184872014



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

Case No. : WP(C)/1854/2014

LENIN MOCHAHARI
S/O ASWINI KR. MOCHAHARI R/O COLLEGE ROAD, UDALGURI, WARD
NO. 6, P.S. UDALGURI, DIST. UDALGURI BTC, ASSAM.

VERSUS

THE STATE OF ASSAM AND 10 ORS
REP. BY THE COMMISSIONER, LOWER AND DIVISION, PANBAZAR,
GUWAHATI-1.

2:THE DEPUTY COMMISSIONER

UDALGURI
DIST. UDALGURI
BTC
ASSAM.

3:THE BODOLAND TERRITORIAL COUNCIL
REP. BY THE PRINCIPAL SECRETARY TO THE BODOLAND TERRITORIAL
COUNCIL
KOKRAJHAR.

4:THE JOINT SECRETARY

EXCISE DEPTT. BODOLAND TERRITORIAL COUNCIL
KOKRAJHAR.

5:THE SUPERINTENDING OF EXCISE

CUM CHD
EXCISE DEPTT. BODOLAND TERRITORIAL COUNCIL
KOKRAJHAR.

6:THE SUPERINTENDENT OF EXCISE

UDALGURI
DIST. UDALGURI BTC
ASSAM.

7:SRI HARESWAR BRAHMA

8:SRI GAGAN LAHKAR

9:SRI BOLORAM DEKA

10:SRI PHUKAN BARMAN

11:SRI NARENDRA BAISHYA
THE PRIVATE RESPONDENT NO. 7
8

9 10 AND 11 ARE UNDER THE CARE OF OFFICE OF THE DEPUTY
COMMISSIONER
UDALGURI
DIST. UDALGURI BTC
ASSAM
PIN- 784509

Advocate for the Petitioner : MR.M SARANIA

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 10.06.2024

Heard Mr. M. Sarania, learned counsel for the petitioner. Also heard Ms. A. Talukdar, learned Govt. Advocate appearing for respondent nos.1 and 2; and Ms. R.B. Borah, learned standing counsel for the BTC, respondent nos.3 to 6.

2. The case of the petitioner is that by order under Memo No.DPN-8/86/4635-39, dated 21.05.1986, the Deputy Commissioner, Darrang, Mangaldai had appointed the petitioner as an LDA-cum-Typist against Govt. Sanction No. GAG.300/83/49, dated 24.02.1980 in the scale of pay of Rs. 470-800 per month plus other allowances. The petitioner places reliance on the draft Gradation List of Grade-III employees of appointment made under the Deputy Commissioner, Darrang, Mangaldai to project that in the said draft gradation list dated 05.01.2024, the name of the petitioner appeared at Sl. No.81 and that the name of the respondent no.7 is at Sl. No.85.

3. By order bearing Memo No. UPE-2/2009/pt-1/20, dated 14.12.2009, the Deputy Commissioner, Udalguri had promoted the respondent no.7 as Senior Assistant (Grade-III) against unreserved category.

4. The petitioner, who was placed senior to the respondent no.7 in the draft gradation list referred above, had submitted a representation for considering his promotion to the next higher rank of Senior Assistant (UDA) from Junior Assistant, which was forwarded by the Superintendent of Excise, Udalguri to the Commissioner, Lower Assam Division (respondent no.1). Subsequent representations of the petitioner were also forwarded to the respondent no.1 for consideration.

5. The learned counsel for the petitioner has referred to the draft gradation list dated 31.08.2010, issued by the Deputy Commissioner, Udalguri to project that in the said draft gradation list, the name of the petitioner appears at Sl. No.19, whereas the name of the respondent no.7 appears at Sl. No. 20. Accordingly, it is projected that even when the draft gradation list dated 31.08.2010 was published, the respondent no.7 was junior to the petitioner.

6. Thereafter the petitioner was promoted by an order dated 08.07.2013 to the newly created post of UDA in the Excise Branch of Udalguri district and his salary was ordered to be drawn from the Head of Account 2039-State Excise. The learned counsel for the petitioner has submitted that the service of the petitioner was never formally placed under the Bodoland Territorial Council and therefore, it is only for the administrative convenience that while serving in the amalgamated establishment of the Deputy Commissioner, Udalguri, he was posted in the Excise Department, which is a transferred subject and such inter-departmental transfer in the office of the Deputy Commissioner is a regular feature. To support the said contention, the learned counsel for the petitioner has relied on the copy of letter bearing no. UPE-17/2005-06, dated 23.10.2013 issued by the Deputy Commissioner, Udalguri. Accordingly, it is submitted that the promotion of the petitioner should be made w.e.f. 14.12.2009, the date on which the respondent no.7, who was his junior, was promoted to the next higher post of Senior Assistant (Grade-III).

7. Opposing the prayer made in the writ petition, the learned Govt. Advocate as well as the learned standing counsel for the BTC have both submitted that the service of the petitioner was placed under the BTC as Excise Department is a transferred subject to BTC. Accordingly, it is submitted that the petitioner was drawing salary from the Head of Account 2039-State Excise, which is a transferred subject. It is also submitted that as per the draft gradation list of the employees under the administrative control of the BTC, the petitioner was promoted in his due turn by order dated 08.07.2013. Accordingly, it is submitted that the petitioner is not entitled to be considered for promotion from the anterior date of 14.12.2009, the date on which the respondent no.7 was promoted.

8. Considered the submissions made at the Bar and perused the materials available on record.

9. It is not in dispute that the petitioner was appointed by the Deputy Commissioner, Darrang, Mangaldai as it was then, by an order dated 21.05.1986. The fact that the petitioner was serving under the amalgamated establishment of the Deputy Commissioner is evident not only from the draft gradation list dated on 05.01.2004, but also from the other draft gradation list dated 31.08.2010. It is also not in dispute that in both the gradation lists, the petitioner was placed above the respondent no.7.

10. The respondent no.5 has filed an affidavit-in-opposition on 07.11.2023, wherein it has been stated that the petitioner was promoted to the post of UDA, being a candidate under the Excise Department of BTC. However, the respondent no.5 has not produced any common gradation list of the BTC employees to show that the petitioner was absorbed as a regular employee under the BTC. In the district of Udalguri, the areas of the said district is under the BTC, with several departments being placed under the administrative control of the BTC.

11. Accordingly, it appears that as the petitioner is serving in the Excise Branch of the establishment of the present District Commissioner, Udalguri and as his service is placed in the Excise Branch, his salary is paid through Head of Account 2039-Excise. There is no document on record as stated above that the service of the petitioner was absorbed under the BTC. The said view of the Court is also supported by the draft gradation list dated 05.01.2004, as well as the other draft gradation list dated 31.08.2010, because both the said draft gradation lists appears to be a common draft gradation list in the amalgamated establishment of the Deputy Commissioner, Udalguri (now District

Commissioner, Udalguri).

12. Had the petitioner been absorbed under the BTC, his name would not have appeared in the draft gradation list for the amalgamated establishment of the Deputy Commissioner, Udalguri.

13. It appears that as the petitioner continues to be an employee under the amalgamated establishment of the Deputy Commissioner, Udalguri, his appointment order was issued by the Deputy Commissioner, which is otherwise permissible under the Assam Ministerial District Establishment Service Rules, 1967.

14. Therefore, if from the said establishment, the petitioner was placed under the administrative control of the BTC by absorption as a BTC employee, there ought to have been an order for placing his services under the permanent control of the BTC. There is no such order of absorption of the service of the petitioner under the BTC. Therefore, the only presumption that can be drawn by this Court is that the petitioner continues to be an employee of the amalgamated establishment of the Deputy Commissioner, Udalguri, now District Commissioner, Udalguri, and as he was posted in the Excise Branch of the said establishment, which is under the administrative control of the BTC. Therefore, for administrative convenience, his salary was drawn under the Head of Account 2039-State Excise, which cannot be treated as if the service of the petitioner was absorbed under the BTC.

15. The projection by the learned Govt. Advocate as well as the learned standing counsel for the BTC that the petitioner is an employee of the Excise Department, which is a BTC transferred subject, is not sufficient for the Court to draw presumption that the petitioner was absorbed under the BTC for a simple

reason that if the petitioner was an employee of the BTC, then the Deputy Commissioner, Udalguri would have no authority to promote the petitioner by order dated 08.07.2013 to the post of UDA, which was newly created in the Excise Branch of Udalguri. The order of promotion by the Deputy Commissioner is indicative of the fact that the petitioner was an employee under the amalgamated establishment of the Deputy Commissioner, Udalguri. The BTC authority can only promote employees of BTC.

16. The learned counsel for the petitioner has submitted at the Bar that the notification of the creation of BTC was issued on 31.05.2003 and that the establishment under the transferred subjects started functioning from 30.10.2003.

17. The name of the petitioner and respondent no.7, both appear in the two common gradation lists dated 05.01.2004 and 31.08.2010. The petitioner was promoted by the Deputy Commissioner, Udalguri by order dated 14.12.2009. Therefore, there is no reason to exclude the petitioner from considering his promotion when his name was placed senior to that of the respondent no.7 as on 14.12.2009. As per the case projected by the petitioner, his position in the draft gradation list was at Sl. No.81 whereas the name of respondent no.7 was placed at Sl. No.85.

18. It may also be mentioned that in paragraph-15 of the writ petition, the petitioner has taken a specific stand to the effect that generally the employees of amalgamated establishment of Deputy Commissioner, Udalguri are transferred frequently from one Branch to another for the work under the said establishment, the employees get their salary under Head of Account 2029-LR when they work in the Administration, Election, Planning Branch etc. and when they are rendering service under the various revenue circles of the district, they

draw their salary from the Head of Account 2053. The said statement of the petitioner has been admitted in paragraph-8 of the affidavit-in-opposition filed by respondent no.2. However, the respondent no.5 in his affidavit has offered no comment as regards the statement made in paragraph-15 of the writ petition. Therefore, owing to non-specific denial of the statement made in paragraph-15 of the writ petition, by applying the *doctrine of non traverse*, the said statement is deemed to be admitted by the respondent no.5. Except for respondent nos.2 and 5, no other respondents have filed their affidavit-in-opposition. Therefore, the said stand of the petitioner is also deemed to be admitted by all the respondents on their failure to deny statements made in paragraph-15 of the writ petition.

19. In view of the finding of the Court that the petitioner was an employee of the amalgamated establishment of the Deputy Commissioner, Udalguri (now District Commissioner, Udalguri), the District Commissioner, Udalguri would be the appropriate authority to revisit and re-examine the entitlement of the petitioner for promotion on and from 14.12.2009, the date on which the respondent no.7 was promoted.

20. Accordingly, this writ petition deserves to be and is accordingly allowed.

21. The Court is inclined to hold that as the name of the petitioner is placed before the name of the respondent no.7 in the hereinbefore referred two draft gradation lists dated 05.01.2004 and 31.08.2010, the petitioner is held to be entitled to be considered for promotion on and from 14.12.2009, the date on which the respondent no.7 was promoted by order passed by the Deputy Commissioner, Udalguri.

22. As the petitioner has already superannuated on 30.10.2022, the

petitioner is entitled to notional financial benefits on and from 14.12.2009 to the extent that may have accrued upon such deem promotion on and from 14.12.2009.

23. The District Commissioner, Udalguri, the authority which was erstwhile designated as Deputy Commissioner, Udalguri, shall pass all such consequential orders that may be necessary for granting of notional and financial benefit to the petitioner as well as to pass consequential order to give effect to the promotion to the petitioner on and from 14.12.2009, the date on which the respondent no.7 was promoted. The said exercise shall all be done within an outer period of 4 (four) months from the date when a certified copy of this order is furnished to the District Commissioner, Udalguri.

24. The State respondents are granted liberty to apply before this Court for extension of time to extend the financial benefit to the petitioner.

JUDGE

Comparing Assistant