

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM : NAGALAND : MIZORAM AND ARUNACHAL PRADESH)
ITANANGAR PERMANENT BENCH

WA 05 (AP) 2014

1. Rockpo Dabu Lewi,
S/o Torak Dabu,
Deputy Director, Urban Development,
Govt. of Arunachal Pradesh, Lohit District,
Tezu.

..... Writ petitioner/Appellant.

– Versus –

1. The State of Arunachal Pradesh represented by the Secretary to the Government of Arunachal Pradesh, Department of Urban Development and Housing, Itanagar.
2. The Director of Housing Development and Housing, Govt. of Arunachal Pradesh, Itanagar.
3. Himmar Ete, Deputy Director, Urban Development and Housing Department, Basar, West Siang District, Arunachal Pradesh.

..... Respondents.

Advocate for the writ petitioner/appellant : Mr. D. Panging.
Advocate for the State Respondent : **Ms. G. Deka, learned Sr. Govt. Adv. For State respondent Nos. 1 & 2,**
Mr. N. Ratan, learned counsel, for respondent No. 3.

B E F O R E

**THE HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HON'BLE MR JUSTICE SUMAN SHYAM**

Date of hearing : 19.01.2016.
Date of Judgment & Order : 28.01.2016

JUDGMENT & ORDER (CAV)

(M. ZOTHANKHUMA, J)

Heard Mr. D. Panging, learned counsel for the petitioner. Also heard Ms. G. Deka, learned Sr. Govt. Advocate appearing on behalf of the

State respondents and Mr. N. Ratan, learned counsel appearing for the respondent No. 3.

2] By way of this writ appeal, the appellant/writ petitioner No. 2 has challenged the Judgment and Order dated 04.11.2003 passed in WP © 272 (AP) 2008 dismissing the writ petition.

3]. The entire controversy relates to whether the appellant is senior to respondent No. 3 in the grade of Urban Programme Officer (UPO, in short) in the Department of Urban Development and Housing, Govt. of Arunachal Pradesh.

4]. The case in brief is that the appellant was initially appointed as Junior Engineer in PWD on 12.01.1993 while the respondent No. 3 joined the PWD as Junior Engineer in 1994. The appellant, thereafter, was appointed as Urban Programme Officer on deputation basis on 12.04.2001. It may be stated here that the post of Urban Programme Officer is one grade higher than the post of Junior Engineer. The appellant was thereafter absorbed in the Department of Urban Development and Housing as Urban Programme Officer w.e.f. the date of joining in the said Department vide order dated 23.08.2004. The order dated 23.08.2004 is reproduced below:-

**GOVERNMENT OF ARUNACHAL PRADESH
DEPARTMENT OF URBAN DEVELOPMENT & HOUSING
A.P. CIVIL SECRETARIAT::ITANAGAR**

NO. DOH/Estt-003/99-2000 (PT) Dated Itanagar the 23rd August, 2004.

ORDER

Consequent upon the acceptance of option exercised by the following JE's (Civil) for absorption in the Department of Urban Development and on the basis of NOC obtained from SE/Addl. CE (Coordination) APPWD, Itanagar, the Governor of Arunachal Pradesh is pleased to **absorb permanently** the following JE's (Civil) of PWD in the Department of Urban Development as Urban Programme Officer (UPO) in the interest of public service at the existing Scale of Pay Rs.6500-200-10,500/- **with effect from their joining in the Department as per details shown below:-**

| Sl. No. | Name of Officers | Date of birth | Educational Qualification | Date of Joining on deputation as UPO | Date of absorption | Place of posting |
|---------|------------------|---------------|---------------------------|--------------------------------------|--------------------|------------------|
| 1. | Er. R. D. Lewi | 02.11.1968 | B. Tech(Civil) | 12.4.2001 | 20.8.2004 | Daporijo |
| 2. | Er. Hali Welly | 01.01.1972 | DCE (Civil) | 19.7.2002 | 20.8.2004 | Ziro |
| 3. | Er. T. Tachang | 02.09.1967 | DCE (Civil) | 17.4.2001 | 20.8.2004 | Tezu |
| 4. | Er.K. Indu | 01.02.1965 | DCE (Civil) | 29.03.2001 | 20.8.2004 | Khonsa |

| | | | | | |
|-------|--|--|--|--|--|
| Singh | | | | | |
|-------|--|--|--|--|--|

1. The inter-se-seniority of the officers shall be decided after conducting DPC by a Board based on performance cum merit of the above officers.
2. The pensionary benefit for the period of their services till the date of their absorption in the Urban Department, Arunachal Pradesh shall be governed by the CCS Pensions Rules, 1972 as amended up to date.
3. The other terms and conditions of service which are not specified herein shall be governed by the relevant rules and regulation of the Government of Arunachal Pradesh amended and circulated from time to time.

Sd/-
(M. Pertin) IAS
Secretary, (UD & Housing)
Govt. of Arunachal Pradesh,
Itanagar.

5]. The respondent No. 3 who had joined the PWD as Junior Engineer in 1994 joined the Department of Urban Development and Housing, Govt. of Arunachal Pradesh on deputation basis on 29.12.1997 as Assistant Urban Programme Officer (AUPO, in short). The post of Assistant Urban Programme Officer (AUPO, in short) is equivalent to the post of Junior Engineer. The respondent No. 3 was subsequently absorbed in the Department of Urban Development and Housing as Assistant Urban Programme Officer (AUPO, in short) vide order dated 05.02.2001 w.e.f. 29.12.1997.

6]. The respondent No. 3 was thereafter allowed to function as Urban Programme Officer (UPO, in short) without any extra financial benefits vide order dated 22.10.2011.. Thereafter, vide order dated 24.02.2005, the respondent No. 3 was promoted to the post of Urban Programme Officer w.e.f. 22.10.2001, i.e. from the date of assuming post of Urban Programme Officer on functional basis. The order dated 24.02.2005 is reproduced below:-

**GOVERNMENT OF ARUNACHAL PRADESH
DIRECTORATE OF URBAN DEVELOPMENT & HOUSING
ITANAGAR**

NO. DOH/Estt-125/99-2001-02

Dated Itanagar the 24th February, 2005.

ORDER

The Governor of Arunachal Pradesh, as per the recommendation of the DPC board held on 7/2/05, is pleased to promote Shri H. Ete, Assistant Urban Programme Officer, Along to the post of Urban Programme Officer in the scale of Pay of Rs.6,500-200-10,500/- Per month plus other allowances as admissible from time to time with effect from 22nd Oct'2001 i.e. from the date of assuming as Urban Programme Officer on functional basis and hereby posted at Along, West Siang District, Arunachal Pradesh.

The other terms and conditions not specified herein shall be governed by the rules and regulations of Govt. from time to time.

This issues with the approval of competent authority.

(M. Riba)

7]. The State respondents thereafter published the provisional seniority list of UPO in which the appellant/writ petitioner was placed at Serial No. 7 and the respondent No. 3 was placed at Serial No. 18. Subsequently, another provisional seniority list dated 21.01.2007 was published, wherein, the appellant/writ petitioner was placed at Serial No. 8 and the respondent No. 3 was placed at Serial No. 6. Despite objections made by the appellant/writ petitioner No.2 to the provisional seniority list dated 21.01.2007, the State respondents published the final seniority list dated 16.07.2008, in which the appellant/writ petitioner No. 2 was placed at Serial No. 7 and the respondent No. 3 was placed at Serial No. 6.

Prior to the publication of the final seniority list dated 16.07.2008, a Committee had been constituted for finalization of the final seniority of UPO in the Department of Urban Development and Housing. The case of the appellant R. D. Lewi and the respondent No. 3 Himmar Ete were also considered. The Committee which sat on 11.07.2008 determined that the respondent No. 3 was to be treated as senior to the appellant. The reason given by the committee for coming to the said decision is reproduced below:-

"In view of the position highlighted above, the Committee is of the opinion that there should be certain criteria for determining the inter-seniority of the above officers like date of joining, existing rules and procedure for determination of seniority etc.

As per the general principles of seniority and other relevant guidelines issued by the Government of India as well as State Government of Arunachal Pradesh, in case of the counting of service of deputationist absorbed later on in the Department,

"the guiding principle is that the absorbed person is treated on par with direct recruitment and his seniority is always counted from the date of absorption. And in case of persons who were absorbed on same date, the determining factor for counting seniority shall be the date of joining to the new post. Accordingly, the Committee had decided to reckon the date of joining as determining factor for the officers who were absorbed in the Department on same date for fixing seniority

In case of promotion, the general principle is that the promote shall always come first over the absorbee in a recruitment year like PI, DI, P2, D2, P3, D3 so on".

8]. Being aggrieved in being placed junior to the respondent No. 3 in the final seniority list dated 16.07.2008, the appellant/writ petitioner No.2 challenged the same on the ground that the appellant/writ petitioner's absorption into the Department as Urban Programme Officer being effective from the date of joining i.e. 12.04.2001 vis-à-vis, the respondent's promotion to the post of Urban Programme Officer w.e.f. 22.10.2001, the appellant/writ petitioner No. 2 had to be treated to be senior to the respondent No. 3 in the matter of seniority.

9]. The learned Single Judge by relying on the case of Director, CBI – vs- D.P. Singh reported in (2010) 1 SCC 647 dismissed the writ petition on the ground that the appellant/writ petitioner was absorbed in the borrowing Department not from the date of joining the Department on deputation but on and from 20.08.2004, while the respondent No. 3 was promoted as Urban Programme Officer w.e.f. 22.10.2001, i.e. the date on which the respondent No. 3 was given functional promotion to the post of Urban Programme Officer vide order dated 24.02.2005. The learned Single Judge also held that as the appellant/writ petitioner No.2 was holding a post lower than Urban Programme Officer in a substantive capacity prior to the appellant's absorption date on 20.08.2004, the period of deputation, i.e. 12.04.2001 to 19.08.2004,

of the appellant as UPO could not be counted for the purpose of seniority in UPO.

10]. As reflected in the order dated 23.08.2004, the appellant/writ petitioner No. 2 along with 3 others have been absorbed as Urban Programme Officer w.e.f. the date of joining. The appellant having joined in the Department on 12.04.2001, the appellant's absorption as Urban Programme Officer was w.e.f. 12.04.2001.

11]. This absorption of the appellant as UPO w.e.f. the date of joining in the Department, i.e. 12.04.2001 means that the appellant's substantive post as on 12.04.2001 was UPO. This is due to fact that the absorption date of 20.08.2004 relates back to the appellant's date of joining the department i.e. 12.04.2001.

12]. There is also no dispute at the bar that there is no other date on which the appellant had joined the Department of Urban Development and Housing except 12.04.2001.

13]. In the case of Commissioner of Police, Bombay-vs-Gordhandas Bhanji, reported in AIR (39) 1952 SC16 it has been held by the Supreme Court as follows:-

"We are clear that public orders, publically made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to effect the acting's and conduct of those to whom they are addressed and must be construed objectively with reference to language used in the order itself".

14]. Thus, the appellant's absorption order dated 23.08.2004 having clearly stated that the appellant was absorbed permanently as UPO w.e.f. joining in the Department, the appellant's date of absorption as UPO on a substantive capacity has to be date of his joining the Department, which is 12.04.2001

15]. In the case of *Director, Central Bureau of Investigation and Another (Supra)*, relied upon by the learned Single Judge, the facts are to the effect that the respondent, D. P. Singh "*who belonged to the U.P. Police Service came on deputation to Central Bureau of Investigation (CBI) as Inspector on 31.12.1970. He was promoted as DSP on ad-hoc basis vide order dated 24.11.1977. Subsequently in 1980, he exercised option for absorption in CBI. This option was accepted in 1983 but no formal order was issued. A formal order regarding the respondent's absorption in CBI was issued on 15.05.1995. He was appointed as DSP on transfer basis (permanent absorption basis) in the CBI retrospectively from 29.06.1987 on the recommendation of UPSC. Though the respondent was absorbed as DSP in CBI from 29.06.1987, he claimed seniority from 24.11.1977*".

16]. D. P. Singh, though not being given any retrospective absorption by the Govt. for his period of service prior to 29.06.1987, D. P. Singh claimed seniority as DSP from 24.11.1977. The Apex Court in the said case thereafter, took into account the office memorandum No.20020/7/80-Estt.(D) dated 29.05.1986 and came to a finding that the date of absorption, would be the date from which seniority in the grade was to be counted. D. P. Singh, having been absorbed w.e.f. 29.06.1987, D. P. Singh's service prior to 29.06.1987 could not be counted for the purpose of seniority in the grade of DSP. It has been held in Para-16 of the case, "Director CBI (Supra) as follows:-

"16 Insofar as the present case is concerned, admittedly, the respondent did not hold the rank of DSP or the equivalent post in his parent Department on the date of his

appointment as DSP on Ad-hoc basis in 1977 or at the time of his absorption in 1987 and, therefore, his seniority as DSP can only be counted from the date of his absorption i.e. 29-6-1987”.

Similarly, in the present case, though the appellant has been absorbed as UPO in the Department on 20.08.2004, the same been given retrospective effect w.e.f. 12.04.2001. Thus, the appellant has to be held to be holding the post of UPO on a substantive basis w.e.f. retrospective date of absorption, i.e. 12.04.2001, i.e. date of joining the Department as stated in the order dated 23.08.2004.

17]. The O.M. dated 29.05.1986, which has been discussed by the Apex Court in the case of ***Director, Central Bureau of Investigation and Another (Supra)*** is reproduced below:-

**"No.20020/7/80-Estt(D)
Government of India/Bharat Sarkar
Ministry of Personnel, Public Grievances & Pensions
Department of Personnel & Training
New Delhi, 29-5-1986**

OFFICE MEMORANDUM

Subject: Seniority of persons absorbed after being on deputation.

The undersigned is directed to day that the existing instructions on seniority of transferees in Para 7 of the annexure to this Department's OM No. 9/11/55-RPs dated 22.12.1959 (copy enclosed) mainly deal with cases where person are straightaway appointed on transfer. It is, however, observed that most of the cases of permanent absorption are those where the officers were taken on deputation initially under the method of transfer on deputation/transfer contained in the relevant recruitment rules. This OM is intended to fill this gap in the existing instructions.

2. Even in the type of cases mentioned above, that is, where an officer initially comes on deputation and is subsequently absorbed the normal principle that the seniority should be counted from the date of such absorption, should mainly apply. Where, however, the officer has

already been holding on the date of absorption in the or equivalent grade on regular basis in his parent Department, it would be equitable and appropriate that such regular service in the grade should also be taken into account in determining his seniority subject only to the condition that at the most it would be only from the date of deputation to the grade in which absorption is being made. It has also to be ensured that the fixation of seniority of a transferee in accordance with the above principle will not affect any regular promotions made prior to the date of absorption. Accordingly, it has been decided to add the following sub-Para (iv) to Para 7 of general principles communicated vide OM dated 22.12.1959:

"(iv) In the case of a person which is initially taken on deputation and absorbed later (i.e. where the relevant recruitment rules provide for transfer on deputation/transfer), his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, been holding already (On the date of absorption) the same or equivalent grade on regular basis in his present Department, such regular service in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from:

The date he has been holding the post on deputation,

Or

the date from which he has been appointed on a regular basis to the same or equivalent grade in his parent Department, whichever is later.

The fixation of seniority of a transferee in accordance with the above principle will not, however, affect any regular promotions to the next higher grade made prior to the date of such absorption. In other words, it will be operative only in filling up of vacancies in higher grade taking place after such absorption.

In cases in which transfers are not strictly in public interest, the transferred officers will be placed below all officers appointed regularly to the grade on the date of absorption.

3. All the Ministries/Departments are requested kindly to bring these instructions to the notice of all concerned in the Ministries/Departments and attached and subordinate officers under them for their guidance and to ensure their compliance.

4. These orders will not be applicable to transfers within the Indian Audit and Accounts Department which are governed by orders issued by the C & AG from time to time.

5. Hindi version is attached.

Sd/-
(K.S.R Krishna Rao)
Deputy Secretary to the
Government of India"

18]. The above O.M. states that "where an Officer comes on deputation and is subsequently absorbed, the normal principle that the seniority would be counted from the date of such absorption, should mainly apply. By reading the above O.M. and keeping in mind the facts of that case, the Supreme Court had held in the case of Director, CBI (Supra) that the seniority of D. P. Singh should be counted from the date of his absorption. In the present case, also, the State Govt. has absorbed the appellant permanently as UPO w.e.f. the date of joining in the Department which is 12.04.2011.

19]. Thus, the service of the appellant for the purpose of seniority in the grade of UPO has to be counted w.e.f. 12.04.2001. Another aspect of the matter is that the order dated 23.08.2004, which has been issued by the State respondents in its wisdom, by which the appellant has been given retrospective absorption in the post of UPO w.e.f. 12.04.2001 has not been put to challenge and neither have the State respondents cancelled or withdrawn the order dated 23.08.2004.

20]. Thus, the learned single Judge could not have held the appellant to be junior to the respondent No. 3, while applying the ratio of the case Director, CBI & Anr.,(Supra) to the facts of the present case. Though the order dated 23.08.2004 shows the date of absorption of the appellant as 20.08.2004, the date of permanent absorption of the appellant as UPO being w.e.f. joining the Department, which is 12.04.2001, the appellant's date of absorption as UPO has to be taken as 12.04.2001.

21]. The Committee which finalized the criteria to be followed in fixing the inter-seniority list of UPOs in its meeting dated 11.07.2008 had held that the guiding principle "***is that the absorbed person is treated on par with direct recruitment and his seniority is always counter from the date of absorption. And in case of persons who were absorbed on same date, the determining factor for counting seniority shall be the date of joining to the***

new post. Accordingly, the Committee had decided to reckon the date of joining as determining factor for the officers who were absorbed in the Department on same date for fixing seniority. In case of promotion, the general principle is that the promote shall always come first over the absorbee in a recruitment year like PI, DI, P2, D2, P3, D3 so on". Thus the decision of the committee in its meeting dated 11.07.2008 was to the effect that the promotee should come first, over an absorbee in a recruitment year. Thus, the respondent No. 3 who was promoted as UPO w.e.f. 22.10.2011 should be made senior to the appellant who was absorbed as UPO w.e.f. 12.04.2001. This principle enunciated by the committee in its meeting dated 11.07.2008 could not, in our view be made applicable to the present case due to the reason that the order dated 23.08.2004 absorbing the appellant as UPO w.e.f. 12.04.2001 had given certain rights to the appellant. The right of seniority that had accrued to the appellant vide order dated 23.08.2004 could not have been taken away by the committee meeting/minutes dated 11.07.2008. In the present case, no rules were shown to us which would govern seniority of the employees of the concerned Department. It is settled law that in the absence of rules governing seniority, length of service is to be counted for the purpose of seniority. In the present case, not only has the appellant been in service for a longer period as UPO than the respondent No. 3, but also the appellant's absorption as UPO has been made prior in time than the promotion of the respondent No. 3 as UPO in the said Department.

22]. Another aspect of the matter which has to be considered is with respect to Term No. 1 of the order dated 23.08.2004. Term No.1 is as follows:-"***The inter-se-seniority of the Officers shall be decided after conducting DPC by a board based on performance-cum-merit of the above Officers***". The insertion of this term No. 1 in the order dated 23.08.2004 creates an impression that the order dated 23.08.2004 has not fixed the seniority of the appellant as UPO w.e.f. the date of joining the Department i.e. 12.04.2001, but counts the seniority of the appellant as UPO from the date of absorption, i.e. 20.08.2004. This term No. 1 in our view cannot be read into the order dated 23.08.2004 and the same is inapplicable to the facts of the case. Firstly, as held in the earlier Paragraph's, the appellants date of absorption having been given retrospective effect from the date of joining i.e. 12.04.2001, the appellant's date of absorption as UPO on a permanent basis

has to be taken to be from 12.04.2001. Secondly, the criteria for counting seniority of Officers has to be from the date of joining or date of promotion, date of appointment or length of service etc. The Term No. 1, whereby the seniority of Officers was to be decided based upon performance-cum-merit after date of joining etc., is alien to service jurisprudence. There can be no nexus for determining seniority based on performance-cum-merit, unless a new appointment or promotion is to take place. In the present case, the appellant having already been absorbed as UPO permanently w.e.f. date of joining in the Department, the insertion of term No.1 is an exercise in futility and cannot be contemplated under service jurisprudence. Last but not the least, the Committee which decided the criteria to be followed in determining seniority in its meeting dated 11.07.2008 has also not followed term No. 1 of the order dated 23.08.2004.

23]. In view of the fact that the right that has accrued to the appellant to count his service in the grade of UPO w.e.f. 12.04.2001 has not been taken away, the appellant's seniority in the grade of UPO has to be counted w.e.f. 12.04.2001. The seniority of the respondent No. 3 as per the order dated 24.02.2005 being w.e.f. 22.10.2001, the respondent No. 3 has to be considered to be junior to the appellant in the grade of UPO.

24]. In view of the reasons, stated above, the Judgment and Order dated 04.11.2003 passed in WP (C) 272 (AP) 2008 is set aside. The impugned final seniority list of UPO dated 16.07.2008 is also set aside and quashed. The State respondents are directed to issue a fresh final seniority list of UPOs placing the appellant/writ petitioner No.2 above the respondent No. 3 in the new final seniority list to be prepared by the State respondents within a period of 2 months from the date of receipt of a copy of this Judgment and Order.

24]. The Writ Appeal is accordingly allowed. No costs.

JUDGE

JUDGE

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