

(2014) 10 GAU CK 0016
In the Gauhati High Court
Case No : Case No. WP(C) 189(K) of 2013

Asangla Imsong

APPELLANT

Vs

The State of Nagaland

RESPONDENT

Date of Decision : 16-10-2014

Acts Referred:

Constitution of India, 1950 — Article 162, 309

Citation : (2014) 10 GAU CK 0016

Hon'ble Judges : Nishitendu Chaudhury, J

Bench : Single Bench

Advocate : S.M. Ozukum, Advocate for the Appellant; I. Iralu, Sr. Advocate, Alemla, Advocate and N.M. Jamir, Govt. Advocate, Advocate for the Respondent

Judgement

Nishitendu Chaudhury, J.—Petitioners in this case were appointed initially as District Public Relations Officer on being selected by the Nagaland Public Service Commission and were put on probation. Subsequently, by notification dated 20.08.2008 their services were regularized w.e.f. the date of their entry into the service. Similarly, respondent No. 3 was appointed as Technical Executive under the same department by order dated 25.03.2002 on the basis of the recommendation of the Nagaland Public Service Commission. As on the date of appointment, the rules holding the field was the Nagaland Information and Publicity Service Rules, 1983 (hereinafter referred to as "the Rules"). The Rules were framed in the year 1983 in exercise of power under proviso to Article 309 of the Constitution of India. As on the date of framing of the Rules, there was no such post of Technical Executive but subsequently in the year 1986 the post of Technical Executive was created by the Government in exercise of power under Article 162 of the Constitution of India. Similarly, two more cadres of Joint Directors and Additional Directors were created in the year 1989 and 1990 respectively. However, there was no consequent and corresponding amendment in the Rules of the 1983. Be that as it may, the post being the sanctioned ones, they remained part and parcel of the Nagaland Information and Publicity Service. It is to be noted here that respondent No. 3 who was initially appointed as

technical executive on 25.03.2002 was subsequently regularized by order dated 12.05.2006 w.e.f. her initial date of entry. The post of Technical Executive was a Class-I at the beginning whereas the posts of District Public Relations Officer were initially part of Class-II Gazetted service. However, subsequently by an amalgamation order issued by the Government on 18.04.2013 the posts of D.P.R.O. were also upgraded and redesignated as Assistant Directors/Public Relations Officers (P.R.O.). The posts thus became Class-I on such upgradation and redesignation. By the same order the posts of Technical Executive were redesignated as Assistant Directors.

2. While the present petitioners were working as D.P.R.O. since 2002 and respondent No. 3 was working as Technical Executive since 25.03.2002, the Government by impugned order dated 30.09.2013 allowed respondent No. 3 to officiate to the provisional post of Deputy Director and granted her promotional pay scale. It is this order which has been brought under challenge by the present petitioners. According to the writ petitioners, there was a proposal for officiating promotion of the petitioners to the post of Deputy Director vide letter dated 28.09.2012 (Annexure-7) but the same was not considered and the respondent No. 3 was given officiating promotion overlooking the claim of the petitioners.

3. The respondent No. 3 has filed an affidavit-in-opposition to this writ petition annexing her order of initial appointment, the order of regularization and also the order of re-designation and upgradation issued on 18.04.2013. It is the case of the respondent No. 3 that while the writ petitioners were all along officers of Class-II Grade they only made their entry into Grade-I on the basis of re-designation and upgradation caused by notification dated 18.04.2013 but respondent No. 3 had all along been in Class-I Grade. The petitioners by filing an additional affidavit to this affidavit-in-opposition, however, has contested the claim of the respondent No. 3 saying that the post of Technical Executive was really an ex-cadre one and so the Class-I service of respondent No. 3 was of no consequence for the purpose of promotion to the post of Deputy Director arose.

4. The official respondents have filed an affidavit-in-opposition. It is mentioned in paragraph 5, 6 and 9 of this affidavit that respondent No. 3 was initially appointed as Inspector of Industries on contract basis under the Directorate of Industries of the Government. Her service was regularized by order dated 05.12.1999 and while serving as an Assistant Engineer (Electronics) on probation, the Government by order dated 20.12.2005 posted her as Technical Executive under the Directorate of Information and Public Relations w.e.f. 22.03.2002. This was done by notification dated 12.05.2006.

5. I have heard Mr. SM Ozukum, learned counsel for the petitioners, Mr. I Iralu, learned senior counsel assisted by Ms. Alemla for the respondent No. 3 and Mr. NM Jamir, learned Government Advocate on behalf of respondents No. 1 and 2.

6. Having considered Annexure-R/3 of affidavit-in-opposition of the respondent No. 3 which is an order dated 25.3.2002 and the Annexure-C of the affidavit-in-

opposition submitted by the respondent No. 1 and 2 which is notification dated 20.12.2005, it appears that respondent No. 3 was actually appointed as Technical Executive in the Directorate of Information and Public Relations by order dated 25.03.2002 consequent to recommendation by the Nagaland Public Service Commission. She was thereafter put on probation for 2(two) years under Rule 11 of the Nagaland Information and Public Relations Service Rules, 1983. By notification dated 20.12.2005, the Government must have regularized her service from the date of her initial appointment on 22.03.2002 but by second sub-para, she was asked to put on probation for a period of 2(two) years under Rule 11 of the 1983 Rules. The second sub-para appears to be in conflict with Annexure-R/3 of the affidavit-in-opposition submitted by the respondent No. 3. It is stated at the bar that respondent No. 3 was put on probation by order dated 25.03.2002 and not by order dated 20.12.2005. Having considered the documents affixed to the writ petition and the affidavit in opposition it appears that the orders issued by the Government of Nagaland in this case if read giving full meaning to the letters then there is probability of landing up in utter confusion. This is because while making appointment of the petitioners on 26.02.2002 by Annexure 1 and 3 of the writ petition it was mentioned that they were so appointed as D.P.R.O. (Class-II Gazetted) on the recommendation of the Nagaland Public Service Commission w.e.f. 03.12.2001. It is stated that these petitioners appeared before the Nagaland Public Service Commission in response to the advertisement issued for selection from open market and so they came under the service of the State only on the basis of the order dated 26.02.2002. But the orders dated 26.02.2002 available at Annexure 1 and 3 of the writ petition divulge that appointment orders were issued on 26.02.2002 "with retrospective effect from 03.12.2001". Mr. NM Jamir, learned Government Advocate appearing in this case submits that addition of the word "with retrospective effect from 03.12.2001" is a misnomer as there is no question of giving retrospective effect to the appointment of someone on selection from open market on the basis of recommendation by Public Service Commission. Similarly, once the respondent No. 3 was appointed on the basis of recommendation of the Nagaland Public Service Commission on 25.03.2002 there was no question of relating the order back to 22.03.2002 or any other date. Over and above, once she was appointed on regular basis on the recommendation of the Nagaland Public Service Commission and thereupon put on probation for 2(two) years in the year 2002 there was no necessity to put her again on probation by order dated 20.12.2005 more so, when she was not actually put on probation for the second time. The second paragraph in notification dated 20.12.2005, therefore, appears to be another misnomer as described by Mr. NM Jamir, learned Government Advocate while giving reply in respect of anomaly in regard to Annexure 1 and 3 to the writ petition. Under such circumstances, the second paragraph of notification dated 20.12.2005 does not appear to be of any consequence.

7. Be that as it may, the subject matter in the present writ petition is officiating

promotion of the respondent No. 3 to the post of Deputy Director in the Department of Information and Public Relations. Government in the mean time has come forward with a rule in exercise of power under proviso to Article 309 of the Constitution of India under the name and style of "the Nagaland Information and Public Relations Service Rules, 2013". These rules contain provisions for probation, seniority and promotion. Rule 13 of the Rules deals with procedure for departmental promotion. There is no dispute that next promotion from the cadre of Assistant Directors/D.P.R.O. is the post of Deputy Director and so such promotion on regular basis has to be made in accordance with the procedure prescribed under Rule 13 of the 2013 Rules.

8. Rule 13 of the Rules is quoted below:--

"13. Procedure for Departmental Promotion:

(a) Promotion to various posts in the service shall be considered by Departmental Promotion Committee consisting of the following:

1. Chairman, NPSC --Chairman
2. One member from NPSC to be nominated by Chairman, NPSC --Member
3. The Chief Secretary or his nominee --Member
4. Commissioner & Secy/Secretary (P&AR) --Member
5. Commissioner & Secy/Secretary of the Department --Member
6. Head of the Department --Member Secretary

Provided where promotion is to be made to the post of Head of Department or Additional Head of Department, Commissioner & Secretary/Secretary of the Administrative Department shall act as the Member Secretary and Head of Department shall not be included in the committee.

The proceedings of the committee shall be valid if attended by three or more members including one each among Sl. No. (1) & (2), Sl. No. (3) & (4) and Sl. No. (5) & (6).

As far as practicable, the proceedings of the committee shall be guided by the guidelines of the DPC as provided at Annexure "A".

(b) Wherever any vacancy/vacancies arise to be filled up by promotion under Rule 5(i)(b), the Head of the Department shall furnish the following particulars together with comments, if any, to the Government:

(i) Seniority list of the cadre from which promotion is to be given. The list should contain at least twice as many names as the number of existing vacancies available.

(ii) Dossiers of the officers concerned.

(iii) Annual Performance and Assessment Reports of five consecutive preceding years.

(iv) Recommendation of the Head of the Department including integrity certificate.

(v) Vigilance Clearance in respect of each eligible candidate.

(c) On receipt of the particulars under Sub-rule (b) above, Government shall furnish such particulars with comments, if any, indicating the number of vacancy/vacancies and other relevant matter as may be necessary to the Commission. The Committee, when called upon by the Commission, shall meet and prepare a list of officer(s) equal to the number of vacancy/vacancies in order of preference to be filled in by promotion. Whenever a junior officer is selected in preference to a senior one, the Committee shall record in written, the reasons of such supersession. The select list shall be valid for one year from the date of its approval by the Commission under Sub-rule (i) below of this Rules. All vacancies arising during the period intended to be filled by promotion shall be filled up from that list. The selection shall be based on the following aspect of the candidates:--

(i) Personality and character.

(ii) Tact, energy and general intelligence.

(iii) Integrity

(iv) Performance

(v) Minimum 5 years record of the previous services.

(d) On receipt of the above list, the Government shall forward the same to the Commission with the documents mentioned at Sub-rules above of this Rule.

(e) The Commission shall consider the list prepared by the Committee along with the other documents received from the Government or on receipt of other documents as may be called for by them and, unless it considers any change(s) necessary, approve the list.

(f) If the Commission considers it necessary to make any change(s) on the list received from the Government, the Commission shall inform the Government of the change(s) proposed and after taking into account the comments, if any, the Government may approve the list finally with such recommendation of the Commission for appointment/promotion.

(g) The select list drawn under Sub-rule (c) will be valid for one year from the date of its approval by the Commission under Sub-rule (e) above. All vacancies arising in the grade during that period and intended to be filled by promotion shall be filled up from that list.

(h) The Committee shall meet once a year to review the select list drawn under Sub-rule (c). In the event of any great lapse in conduct or performance of duties

on the part of any candidate in the select list the committee may remove any such candidate from the select list."

9. It would appear from perusal of Rule 13(c) that on receipt of particulars from the concerned authorities Government is required to intimate the Nagaland Public Service Commission as to probable vacancy/vacancies and thereupon the D.P.C. shall prepare list of officers in equal number of such vacancies in order of preference. Schedule II of the Rules indicate that promotion to the post of Deputy Director shall be made by selection from amongst the members of the Junior Grade. The only criterion is that a candidate must have served as Assistant Director/D.P.R.O/P.R.O. for a period of not less than 7 (seven) years. The post of Deputy Director, therefore, appears to be a selection post. The procedure for making selection has been indicated in Rule 13(c) of the 2013 Rules. It is, however, provided therein that whenever a Junior Officer is selected in preference to a senior one, the Committee is duty bound to record reasons for so doing. It is needless to say that reasons to be recorded must be valid reasons.

10. In the case in hand, impugned order relates only to officiating promotion. It is not a case of regular promotion and this is why the procedure prescribed under Rule 13(c) does not appear to have been complied with. The learned counsel for the respondents fairly submit that the impugned promotion is only an officiating promotion and regular promotion shall be made by the authority by holding D.P.C. in accordance with the procedure prescribed under Rule 13 of the 2013 Rules. Since the impugned order is not a substantive order of promotion there is no reason for the petitioners to be aggrieved at it and so this writ petition is disposed of with direction to the official respondents to hold D.P.C. within a period of 3 (three) months from the date of receipt of the certified copy of this order. The D.P.C. shall consider the case of all eligible candidates strictly complying with the provision of Rule 13 of the 2013 Rules. It is needless to say that till a decision is arrived at and a regular promotion is given by the official respondents by way of holding D.P.C., the respondent No. 3 shall continue to hold the Office of Deputy Director but her officiation as Deputy Director shall not be considered to be as an additional qualification while holding the D.P.C.

11. The writ petition is disposed of. No order as to costs.