

(2020) 09 GAU CK 0024

In the Gauhati High Court

Case No : Case No. : WP(C) 698 Of 2020, I.A.(Civil) 1270, 1319 Of 2020

Asi (Steno) Hrishikesh Das

APPELLANT

Vs

State Of Assam And Ors

RESPONDENT

Date of Decision : 25-09-2020

Acts Referred:

Constitution Of India, 1950 — Article 13, 226

Citation : (2020) 09 GAU CK 0024

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : U Das, N Dutta

Final Decision : Allowed

Judgement

1. Heard Ms. U. Das, learned counsel for the writ petitioner. Also heard Shri N. Dutta, learned senior counsel for the newly impleaded respondent nos. 6 to 10. The State is represented by Shri D. Nath, learned Additional Senior Government Advocate, Assam.

2. Considering the subject matter in dispute and completion of exchange of pleadings and as agreed to by the parties, this matter was taken up for final disposal at the admission stage itself. Further, urgency was expressed by the parties.

3. The principal issue which has arisen for determination is promotion to the post of Sub-Inspector of Police under the Home Department, Assam vis-à-vis the Rules embodied in the Assam Police Manual. However, before going into the controversy at hand, it would be convenient to state the facts of the case in brief.

4. The writ petitioner Shri Hrishikesh Das is presently working as an Assistant Sub-Inspector of Police (Steno) [hereinafter referred to as ASI(Steno)]. He was initially appointed as AB Constable on 22.01.2006. Thereafter, pursuant to an exercise undertaken for promotion vide a letter of March, 2013, the petitioner was promoted to the present post of ASI(Steno) which he joined on 07.11.2013.

Vide the aforesaid letter of March, 2013, all Superintendent of Police/All Commandants of APBn/ APTF Bn/CDO Bn/Training Institution were requested to furnish service particulars in respect of AB Constables under them who have completed minimum length of five years of service as on 01.01.2013.

5. It is the case of the petitioner that the ADGP (T & AP) Assam had thereafter issued a letter dated 15.11.2019 requesting to furnish particulars of ASIs/HCs/ Halvs who have completed three years in the rank as on 30.11.2019. The said communication however made certain categories ineligible for such examination. The said communication was followed by a WT message dated 29.11.2019 reminding the authorities to submit the particulars of all eligible ASI/HC/ HV (Both AB & UB). Though, the petitioner claims that he fulfills all the criteria including completion of the required years of service as ASI(Steno) in the Armed Branch, he could come to know that his service particulars were not sent to the Office of the respondent No.3 - Additional Director General of Police (T&AP). Accordingly, the petitioner had submitted a representation dated 29.11.2019 which was also not paid any heed to forcing him to approach this Court by filing the present writ petition.

6. When the writ petition had come up for consideration on 07.02.2020, this Court after noticing that the examination for the post of SI was scheduled on 08.02.2020 directed that the petitioner be allowed to participate in the Departmental examination with a further direction that the result of the petitioner shall be kept in a sealed cover. Accordingly, the petitioner had participated in the said examination and his results are stated to be kept in a sealed cover.

7. At this stage, certain similarly situated candidates had filed an application for impleadment as their results were also kept in sealed cover. The said application which was registered as I.A. (Civil) No. 1318/2020 was allowed vide order dated 21.08.2020 and the applicants were arrayed as respondent nos. 6 to 10. The writ petitioner had also filed I.A.(Civil) 1270/2020 for declaration of results and a similar prayer was also made vide newly impleaded respondent nos. 6 to 10 by filing I.A.(Civil) No. 1319/2020. The aforesaid I.A.s have also been heard together along with the writ petition.

8. Ms. U. Das, learned counsel for the petitioner fairly submits that the position and situation of the newly impleaded respondent nos. 6 to 10 being at par and their cause of action being common, she would adopt the arguments of Shri N. Dutta, learned senior counsel who is appearing on behalf of the said respondents.

9. Shri Dutta, the learned senior counsel submits that the action of excluding the petitioner and his clients from the purview of consideration for promotion to the rank of Sub-Inspector is wholly unreasonable, arbitrary and in teeth of the Division Bench judgment dated 06.10.2015 passed in W.A. No. 6/2014 whereby the judgment dated 05.10.2012 of the learned Single Judge in WP(C) No.3070/2010 has been upheld. In fact, he submits that the issue is no longer

res integra in view of the categorical findings and ratio laid down by the Hon'ble Division Bench. Drawing the attention of this Court to the stand of the Department which finds in the affidavit-in-opposition filed on 20.08.2020, the senior counsel has submitted that the foundation of the defence of the Department is a communication dated 16.08.2003 which allegedly lays down the criteria for promotion to the post of Sub-Inspector. It is submitted that Rule 40 of Part-III of the Assam Police Manual being the only law holding the field of promotion to the rank of Sub-Inspector of Police, any executive instruction in the form of guidelines cannot override the statutory rules holding the field. As regards the Circular dated 13.12.2013 is concerned, the same, as the nomenclature suggests, is a transfer policy of the Armed Branch Personnel and therefore has no manner of application in the present case. Referring to the relevant annexure to the writ petition it is submitted that the communication dated 15.11.2019 which is on the subject of departmental examination of ASIs/HCs/HAVs for promotion to the rank of SI(UB), particulars of all such personnel who will complete three years of service as on 30.11.2019 were called for. The said communication also specifically mentioned certain personnel who were not eligible, who were of three categories:

"1. Hony. ASI / Hony. (HC / Hav)

2. Adhoc HCs (UB) of SB Assam who have not passed the Sr. NCOs Cadre course / Combined Course and not completed 03 (three) years of service in the rank after passing the Sr. NCOs Cadre Course.

3. PSO Hav of AB stream / UB stream, if not passed the Sr. NCOs Cadre Course / Combined course."

10. It is further submitted that the subsequent WT message dated 29.11.2019 had removed all ambiguity inasmuch as the same was reminder for submission of particulars of ASIs/HCs/HAVs both of Armed Branch (AB) and Unarmed Branch (UB).

11. Drawing the attention of this Court to Rule 40 of the Assam Police Manual Part-III which deals with promotion to the rank of Sub-Inspector of Unarmed Branch, it is submitted that the only objective eligibility for an Assistant Sub-Inspector is to have served with credit for full three years in the Department. For ready reference, the aforesaid Rule-40 is extracted hereinbelow-

"40. Promotion of Assistant Sub- Inspector to the rank of Sub-Inspector of the Unarmed Branch - Not more than 50 percent of the appointments of Sub-Inspectors in the Un-armed Branch may be filled by Promotion from the rank of Assistant Sub-Inspectors.

The officers selected for Promotion will ordinarily go through the prescribed course of training along with the cadets appointed direct. An Assistant Sub-Inspector who has completed his departmental examinations and has acted satisfactorily as Sub-Inspector may be exempted from under-going training, or

may be permitted to undergo, as hortened course in drill and discipline before appointment as Sub-Inspectors.

An Assistant Sub-Inspectors must ordinarily have served with credit for full 3 years in the department and he sufficiently well educated to make him eligible for promotion."

12. The learned Senior Counsel, accordingly, submits that the present is a fit case for interference by exercise of the extra ordinary powers under Article 226 of the Constitution of India and in continuation of the interim order passed by this Court by virtue of which the petitioner and the newly impleaded respondents were allowed to participate in the examination, a direction should be given to declare the results. The learned Senior Counsel has very fairly submitted that the present prayer is confined to only the declaration of results of the recruitment process in accordance with law.

13. Ms. U Das, learned counsel for the petitioner has adopted the arguments of the learned Senior Counsel, Shri N Dutta. The learned counsel, however, has supplemented the contention that an executive instruction cannot override the statutory Rules by citing the following decisions: -

- i) (2009) 14 SCC 619, Radha Mohan Malakar & Ors. Vs. Usha Ranjan Bhattacharjee & Ors.;
- ii) (2011) 14 SCC 620, V Gopal Vs. P Ganaselvaudayakumari & Ors.;
- iii)(2012) 3 SCC 400, Rameshbhai Dabhai Naika Vs. State of Gujarat & Ors.;
- iv) (2013) 3 SCC 55, State of Bihar & Anr. Vs. Sunny Prakash & Ors.;
- v) (2013) 12 SCC 210, State of Jharkhand & Ors. Vs. Jitendra Kumar Srivastava & Anr.

14. Though aforesaid proposition of law is a settled principle, it would be convenient to note in brief the ratio laid down in the aforesaid cases. In the case of Radha Mohan Malakar (supra), the Hon'ble Supreme Court held as follows:

"9. It is well settled that provisions of statutory rules cannot be overridden or violated by administrative instruction and that administrative instruction which is inconsistent with and violative of the Rules, is illegal and void."

In the case of V Gopal (supra), it has been laid down that administrative instructions cannot be equated with any Rule.

In the case of Rameshbhai Dabhai Naika (supra), the Hon'ble Supreme Court after taking into consideration the reported case of Dwarka Nath Tiwari Vs. State of Bihar (AIR 1959 SC 249) had reiterated that it is trite that a Circular letter being an administrative instruction is not a law within the meaning of Article 13 of the Constitution of India.

In the case of State of Bihar & Anr. (supra), the said principle has been laid down by following the case of Shri Dwarka Nath Tiwari.

In the case of State of Jharkhand & Ors. (supra), it has been laid down that rights vested upon a citizen by a law cannot be taken away without any statutory provision and any such attempt to do so under the umbrage of administrative instructions cannot be countenanced.

15. Opposing the writ petition as well as the prayer made by the newly impleaded respondent nos.6 to 10, Shri D Nath, learned Addl. Senior Government Advocate, Assam submits that the service of the petitioner is governed by the Circular dated 16.08.2003 and it is the said Circular which would hold the field of promotion to the next higher grade of SI (Steno). He submits that the said Circular specifically lays down that on promotion to the rank of ASI (Steno), the incumbent would be permanently absorbed in the ministerial stream and his further avenues for promotion etc. will be in the ministerial stream only and shall not be entitled to shift in GD of other line. By drawing the attention of this Court to the pleadings at paragraph 3 of the writ petition, it is submitted that the willingness of the petitioner was also taken into account before considering promotion to the said post of ASI (Steno). That being the position, the petitioner or any other similarly selected person would be estopped from making any claim thereafter other than in ministerial stream.

16. Reference is also made to a Circular dated 03.11.2013 issued by the DGP, Assam on the Transfer Policy of Armed Branch Personnel. In Sl. No. 17 of the said Circular, the aforesaid condition of the earlier Circular dated 16.08.2003 has been reiterated, namely, permanent absorption in the ministerial stream. It is further submitted that serving in the Battalion under the Commandant has got nothing to do with the general police.

17. As regards the decision of the Hon'ble Division Bench in WA No.6/2014 whereby the decision of the Single Bench has been upheld, the learned State Counsel submits that the facts are distinguishable and the post of ASI (Steno) was not the subject matter. To fortify the aforesaid submission, the learned State Counsel relies upon the following two decisions of the Hon'ble Supreme Court: -

- i) (1987) 1 SCC 213, Ambica Quarry Works etc. Vs. State of Gujarat & Ors.;
- ii) (2013) 15 SCC 414, Arasmeta Captive Power Company Pvt. Ltd. Vs. Lafarge India Pvt. Ltd.

In the case of Ambica Quarry Works etc. (supra), the Hon'ble Supreme Court has laid down that the ratio of a decision cannot be made universally applicable and would depend on the facts which have to be similar.

In the case of Arasmeta Captive Power Company Pvt. Ltd. (supra), after quoting with approval the earlier decision of Ambica Quarry Works etc., it has been laid down that the ratio decidendi of a judgment has to be found out by reading the entire judgment and which is set out in the judgment itself. It has to be

understood in the context of the facts of the case and not in isolation. It has been specifically laid down that -

"by reading a line here and there from the judgment, one cannot find out the entire ratio decidendi of the judgment".

18. The learned State Counsel summarises his arguments by contending that it was the Circular dated 16.08.2003 which was the basis of the promotion to the post of ASI (Steno) and having taken advantage of the said Circular at an earlier stage, the petitioner and similarly situated persons cannot be allowed to reprobate. Additionally, it is submitted that the validity of the Circulars are otherwise not the subject matter of challenge.

19. Rejoining the issue, Shri N Dutta, learned Senior Counsel submits that the communication dated 15.11.2019 in unequivocal terms lays down that for promotion to the post of SI (Unarmed Branch), all ASIs are eligible and there is no requirement of being an ASI (Steno). The WT Message dated 29.11.2019 issued subsequently makes it clear that all ASIs (both AB/UB) are eligible for consideration for such promotion.

At this stage, by taking leave of this Court, the learned Senior Counsel has also placed on record an affidavit dated 25.06.2020 filed by the Department in a connected writ petition, WP(C) No.2632/2020 in which the results of the present promotion was the subject matter of challenge. In paragraphs 15 and 17 of the said affidavit-in-opposition, it has been contended that the examination has been conducted as per the Rules of 1936 and the guidelines of this High Court. For ready reference, the said paragraphs are extracted hereinbelow: -

"15. That with regard to the statements made in paragraph 13 of the writ petition the deponent states that the examination has been conducted as per the Departmental Examination Rules, 1936 and subsequent guidelines of the Hon'ble Gauhati High Court conveyed by the Assam Police Headquarters to the ADGP (T&AP), Assam.

17. That with regards to the statements made in paragraph 15 of the writ petition the deponent states that the departmental examination has been conducted after a long gap of 7 years (the last departmental examination was held in 2013) by maintaining all the Rules and guidelines as mentioned in the Assam Police Manual Rule 40 and the Rules on Departmental Examination 1936 with total fairness and under strict supervision. The petitioners are trying to derail the process of promotion of the deserving candidates after not finding their names amongst the list of successful candidates."

The learned Senior Counsel accordingly submits that it would not lie on the face of the Department to contend that any Circular has been followed for the present promotion by overlooking the statutory Rules in force.

20. To bring home the contention that the Circular dated 16.08.2003 is otherwise redundant, the learned Senior Counsel has drawn the attention of this Court to

the requisition for the present promotion vide communication dated 15.11.2019. The said requisition places at par the post of ASIs and Havildars. On the other hand, the Circular dated 16.08.2003 sought to be relied upon by the Department places ASI above the rank of Havildar and such promotion has been laid down to be on the criteria of seniority-cum-merit. Therefore, there being apparent contradiction, the said Circular otherwise also cannot have any role in the present promotion.

21. Reiterating that there is no scope for the Department to make any contrary argument by overlooking the law laid down by the Hon'ble Division Bench in WA No.6/2014 vide judgment dated 06.10.2015 the learned Senior Counsel submits that the said law having attained finality, the arguments of the Department are in fact contemptuous. Reference has been drawn to paragraphs 9, 12, 13 and 16 of the judgment dated 05.10.2012 passed by the learned Single Judge in WP(C) No.3070/2010 to bring home the contention that it was the admitted stand of the Department that Rule 40 of the Assam Police Manual Part-III would hold the field.

22. Referring to the judgment dated 06.10.2015 of the Hon'ble Division Bench, passed in WA No.6/2014 (State of Assam & Ors. Vs. Shri Kumud Gogoi), it has been contended that in view of the law categorically laid down in paragraphs 11, 12 and 13, none of the contentions of the Department are even liable for consideration.

23. The earlier round of litigation in WP(C) No.3070/2010, which was decided vide judgment dated 05.10.2012 in favour of the petitioner is based on similar facts. The said finding of the learned Single Judge has been given a seal of approval by the Hon'ble Division Bench in the appeal preferred by the State in WA No.6/2014 vide judgment dated 06.10.2015. The Hon'ble Division Bench in paragraphs 11, 12 and 13 laid down as follows: -

"11. We have considered the rival submissions in the light of judgment in question as well as the Rule 40 of the Assam Police Manual Part-III. For ready reference same is also reproduced below:-

"40. Promotion of Assistant Sub-Inspector to the rank of Sub-Inspector of the Unarmed Branch:

Not more than 50 percent of the appointments of Sub-Inspector in the Unarmed Branch may be filled by Promotion from the rank of Assistant Sub-Inspector.

The officers selected for Promotion will be ordinarily go through the prescribed course of training along with the cadets appointed direct. An Assistant Sub-Inspector who has completed his departmental examinations and has acted satisfactorily as Sub-Inspector may be exempted from under-going training, or may be permitted to undergo a shortened course in drill and discipline before appointment as Sub-Inspector.

An Assistant Sub-Inspector must ordinarily have served with credit for full 3 years in the department and be sufficiently well educated to make him eligible

for promotion".

12. On going through the judgment under challenge in the light of Rule 40 of Assam Police Manual, we have found that Rule 40 of the Assam Police Manual Part -III requires that in order to sit in a departmental examination for promotion to the post of Sub-Inspector of Police, a police officer must have 3 years of experience in the rank of ASI/ Head Constable. It does not speak anything about such a police officer requiring to serve at least 5 years in the Unarmed Branch of the police only.

13. In other words, any police officer who had 3 years experience as ASI/Head Constable in the department regardless of his being in Unarmed Branch/Armed Branch shall be entitled to sit in the departmental examination for promotion to the post of Sub-Inspector of police. Being so, the writ petitioner/respondent who has such experience is entitled to sit in the aforesaid departmental promotion al examination."

24. The Hon'ble Division Bench in unequivocal terms has observed that Rule 40 of the Assam Police Manual Part-III would hold the field and reiterated that any police officer who had three years of experience as ASI/Head Constable in the Department regardless of he is being in the Unarmed Branch/Armed Branch shall be entitled to sit in the Departmental examination for promotion to the post of Sub-Inspector of Police. In the opinion of this Court, after such categorical determination, there is no scope at all of the Department to take any contrary stand, more so when the aforesaid decision has been allowed to attain finality. Though a frail attempt has been made by Shri Nath, learned State Counsel by contending that ratio of a case has to be seen from the perspective of the facts, nothing has been shown as to how the facts of the decided case is different from the facts in hand.

25. There can be no difference of opinion with the settled position of law that an executive instruction in the form of a Circular cannot override the statutory Rules in force. That apart, even on facts, it is the expressed stand of the Department put on record vide an affidavit-in-opposition dated 25.06.2020 filed in WP(C) No.2632/2020 in which the present promotion was the subject matter of challenge that the present promotion was done by strictly adhering to Rule 40 of the Assam Police Manual Part-III as well as the guidelines of the Gauhati High Court.

26. This Court also finds force in the argument of Shri Dutta, learned Senior Counsel that the Circular dated 16.08.2003 is otherwise redundant. It is seen that as per the said Circular, the post of Havildar is a feeder post for promotion to the rank of ASI whereas the requisition for the present promotion places the post of Havildar and ASI at par. This Court has also noted that the aforesaid Circular dated 16.08.2003 also contains a clause for promotion to the rank of SI (Steno). As per the same, the eligibility criteria is completion of three years of service in the rank of ASI (Steno) which appears to be in consonance with the

statutory requirement of Rule 40. The contention of the State that there is no specific challenge to the Circulars dated 16.08.2003 and 03.12.2013 cannot be regarded as a relevant submission, as such Circulars cannot override the statutory Rules, namely, Rule 40 of the Assam Police Manual Part-III. This Court has also taken into consideration the submissions made on behalf of the candidates that the present grievance is only with regard to holding them eligible for consideration for promotion.

27. In view of the aforesaid facts and circumstances, this Court is of the opinion that a case for interference in exercise of powers under Article 226 of the Constitution of India is made out. Accordingly, the writ petition is allowed and the relief granted to the writ petitioner would also be available to the respondent nos.6 to 10, who were impleaded. As observed earlier, the candidates have been allowed to sit in the examination on the strength of the order dated 07.02.2020 which, however, directed for keeping the result of such examination in sealed cover. As the writ petition has been allowed, the said embargo is lifted and the respondent authorities are directed to declare the results of the petitioner and the newly impleaded respondent nos.6 to 10 and all such candidates who are similarly placed and whose results have been kept in sealed cover. It is needless to say that the results would be declared strictly in accordance with merit of each of the candidates. The writ petition along with IA Nos.1270/2020 and 1319/2020 are accordingly allowed.

28. No order as to cost.