
(2010) 08 GAU CK 0005
In the Gauhati High Court
Case No : WP (C) No. 96 (K) of 2008

B. Narola

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 02-08-2010

Acts Referred:

Citation : (2011) 5 GLR 577

Hon'ble Judges : Brojendra Prasad Katakey, J

Bench : Single Bench

Advocate : Wati Jamir, Mr. N. Lkr, Mr. Akum Jamir and Mr. Wati Walling, for the Appellant; Apok Pongener, Government Advocate, Nagaland, for the Respondent

Final Decision : Allowed

Judgement

B.P. Katakey, J.—The petitioner who has been engaged as Work Charged Lower Division Assistant in Fazl Ali College, Mokokchung, w.e.f. 15.9.1994 and working as such till date, by the present writ petition is challenging the decision of the Government of Nagaland in the Department of Higher Education approving the proposal for engagement of the respondent No.4 as the L.D. Assistant on temporary basis against the vacancy caused due to retirement of the regular incumbent Smt. Moalemla, who has been granted invalid pension and which decision has been conveyed by the Deputy Secretary of the said Department to the Director of Higher Education vide communication dated 14.3.2007 and also the consequential order of appointment dated 27.3.2007 issued by the Additional Director and Head of the Department of Higher Education appointing the said respondent as L.D. Assistant in the said college against the said vacancy, purely on temporary basis subject to termination with 1(one) month notice from the either side. The petitioner has also prayed for a direction to the State respondents and its officials to consider her case for regularization in service pursuant to the Government's policy decision as reflected in the office memorandum dated 22.9.2004 issued by the Addl. Chief Secretary to the Government of Nagaland.

2. Heard Mr. Wati Jamir, the learned counsel for the petitioner, Mr. L.S. Jamir, the learned Addl. Advocate General for the respondent Nos. 1, 2 and 3 and Mr. A. Pongener, the learned counsel appearing for the respondent No.4.

3. The learned counsel for the petitioner referring to the averments made in the writ petition as well as in the rejoinder affidavit filed by her and also the office memorandums dated 26.2.2001 and 22.9.2004 issued by the Chief Secretary as well as the Addl. Chief Secretary to the Government of Nagaland, respectively, has submitted that since the Government of Nagaland has taken a policy decision for regularisation of services of work charged employees against 50% of the regular vacancies in the respective cadre, the authority ought to have considered the case of the petitioner for regularisation as L.D. Assistant against the vacancy caused due to retirement of Smt. Moalemla, but the Government of Nagaland as well as the Director has appointed the respondent No.4 on temporary basis, even though vide office memorandum dated 26.2.2001 such temporary appointment has been banned and in terms of the office memorandum dated 22.9.2004 the remaining 50% of the regular vacancy is required to be filled up by following the due process of recruitment. It has been submitted that the appointment of the respondent No.4 has not preceded by any selection and in complete violation of the office memorandums dated 26.2.2001 and 22.9.2004. The learned counsel, therefore, submits that while setting aside the order of appointment of the respondent No.4 and also the approval granted by the Government, which has been communicated vide communication dated 14.3.2007, the State respondents may be directed to consider the case of the petitioner for regularisation in service pursuant to the policy decision and the scheme formulated for regularisation of the work charged employees as reflected in the office memorandum dated 22.9.2004.

4. Mr. Jamir, the learned Addl. Advocate General appearing for the respondent Nos.1, 2 and 3 has submitted that under the office memorandum dated 22.9.2004 the department wise vacancy is required to be ascertained and 50% of such vacancies are required to be filled up from amongst the work charged employees by way of regularisation subject to his/her fitness for the vacant post and the remaining 50% of such vacancies are required to be filled up in accordance with the rules of recruitment. It has further been submitted that while 50% of such vacancies which are required to be filled up for regularisation of work charged employees are to be filled up first, but it is not always necessary that all those posts which come within the 50% of the quota are to be filled up by the work charged employees as the same is subject to fitness and in case the required work charged employees are not found, the remaining vacancies within 50% can be filled up by recruitment under the rules subject to clearance by P and AR Department. The learned Add. Advocate General submits that the identification of such 50% vacancies to be filled up by work charged employees in Higher Education Department has not been made till date and the respondents State shall definitely undertake such exercise and consider all the eligible work charged employees for regularisation within the quota fixed vide office

memorandum dated 22.9.2004 and in such identification it may be that the post against which the respondent No.4 has been appointed temporarily, may not be required to be filled up by way of regularisation of work charged employees.

5. The learned counsel appearing for the respondent No.4 at the outset has submitted that the present writ petition filed by the petitioner is not maintainable, the same being hit by the principle of *res judicata*, as the petitioner had earlier approached this court in WP(C) No.192(K)/2002, which writ petition along with other writ petitions though was initially allowed by a Single Bench of this court, the relief granted in that batch of writ petitions were, however, set aside by a Division Bench of this court in WA No.26(K)/2005 and batch vide judgment and order dated 28.4.2006. The learned counsel further submits that unless the Government pursuant to its policy decision as reflected in the office memorandum dated 22.9.2004 undertakes the exercise of identifying the 50% of the posts which are required to be filled up by work charged employees, it cannot be said that the post against which the respondent No.4 has been appointed temporarily is required to be filled up by way of regularisation of work charged employees. The learned counsel, however, has submitted that the respondent No.4 cannot object to the prayer of the petitioner for consideration of her case for regularisation in service, but not at the cost of the respondent No.4. The learned counsel further submits that unless the entire exercise pursuant to the policy decision as reflected in the office memorandum dated 22.9.2004 is undertaken by the Government, services of the respondent No.4 may not be disturbed.

6. I have considered the submissions of the learned counsel for the parties and also perused the pleadings of the parties. Though no affidavit-in-opposition has been filed by the respondent Nos.1, 2 and 3, the learned Addl. Advocate General has made the submission as noticed above.

7. The contention of the learned counsel for the respondent No.4 that since the writ petitioner earlier approached this court, the present petition is hit by the principle of *res judicata*, is not acceptable, as it is evident from the judgment and order dated 28.4.2006 passed in WA No.26(K)/2005 and batch that what was challenged was the order dated 26.9.2002 passed by the Director of Higher and Technical Education whereby and whereunder the work charged employees named in Annexure A to the said order were directed to be terminated and the employees named in Annexure B to the said order were allowed to be retained on fixed pay. The present writ petitioner's name appeared in Annexure B to the said order. The claim of the writ petitioner for regularisation on the basis of the office memorandum dated 22.9.2004, was not in issue and not decided. The matter in issue in the present case is relating to the appointment of the respondent No.4 which according to the writ petition is illegal and also for a direction to the State respondents to consider the case of the petitioner for regularisation of the petitioner as per the Government decision dated 22.9.2004.

8. The petitioner claims that she has been engaged as L.D. Assistant in Fazl Ali

College w.e.f. 15.9.1994 and is still continuing in the said capacity. The Government of Nagaland has taken a policy decision for regularisation of the services of the work charged employees and formulated the scheme for that purpose, which has been circulated vide office memorandum dated 22.9.2004 issued by the Addl. Chief Secretary. As per the said policy decision each department having work charged employees is required to maintain the list of work charged employees in order of their length of service. The department wise identification of the available regular vacancy is required to be made in each year and 50% of such regular vacancies of similar nature arising in a year are to be reserved for regularisation of work-charged employees subject to the fitness for the vacant posts. The remaining 50% of the regular vacancies occurred in a year is required to be filled up as per the normal rules of the recruitment. It necessarily means that when there is no recruitment rules in respect of a particular post, the public policy relating to the recruitment has to be followed i.e. by open selection. For better appreciation the clauses (i) to (x) of the said office memorandum are reproduced below : -

(i) Each Department having work-charged employees should maintain a list of work-charged employees in various categories in order of their length of service.

(ii) Regularisation of work-charged employees will be done against available regular vacancies.

(iii) 50% of all regular vacancies of similar nature arising in a year will be reserved for regularisation of work-charged employees, and the remaining 50% will be filled up as per normal rules of recruitment.

(iv) Work charged employees will have the right to be considered first for regularisation against 50% of all future vacancies of similar nature in the Department for which they possess the requisite qualification. Such regularisation will be considered on the basis of seniority-cum-merit. This means that the senior most work-charged employee in the relevant category will be regularised subject to his/her fitness for the vacant post.

(v) In case no work charged employee is found suitable for regularisation in terms of the above clause (iv) the Department will obtain clearance of P and AR Department before making any fresh appointment against the quota reserved for work-charged employees explaining the circumstances for not being able to fill up the vacancy through regularisation of work charged employee.

(vi) No age bar would apply in cases for regularisation if the Work-Charged employee is below the superannuation age.

(vii) Regularisation work-charged employees will be entitled to count in full their continuous work charged service towards pension benefits.

(viii) Those Departments which have not approached the Nagaland work-charged and casual Employees Commission should do so immediately to get the optimum strength of work-charged employees fixed for their Departments. They should

take all possible measures including pursuing VRS option vigorously to bring down the strength of work-charged employees to the level recommended by the commission.

(ix) Adequate provision for payment of work-charged employees should be made in the budget and regular monthly payment of work-charged wages ensured.

(x) All new work-charged appointments should be banned. Any person accepting work charged service in the Government would be doing so at his/her own risk. Any new work-charged appointment should be treated as illegal and strict action taken against the appointing authority. In case of any unforeseen situation requiring new work-charged appointments, specific approval of the cabinet must be taken.

9. It appears from the scheme of regularisation as reproduced above that the authority is required to work out the regular vacancies that may arise in a particular year and thereafter to fill up 50% of such regular vacancies from amongst the work-charged employees strictly in order of seniority and subject to fitness and remaining 50% by normal rule of recruitment. In the eventuality of not having sufficient number of work charged employees for the purpose of regularisation against the quota, such vacancies can be filled up as per the normal rule of recruitment subject to clearance of the P and AR Department.

10. It is not in dispute that the petitioner's case is yet to be considered though time and again she has prayed for regularisation in service in terms of the office memorandum dated 22.9.2004. The petitioner, on 22.4.2008 also filed an application addressed to the Director of Higher Education seeking regularisation which was forwarded by the Principal-In-charge of the College to the Director on the same day, i.e., on 22.4.2008. But for the reasons best known to the State respondents such application has not been considered by the authority till date though the claim was for regularisation in service pursuant to the policy decision as reflected in the office memorandum dated 22.9.2004.

11. It also appears that though under the office memorandum dated 22.9.2004 the vacancy arose in a particular year is either to be filled up by way of regularisation of work charged employees or by following the normal rule of recruitment, the respondent No.4 has been appointed vide order dated 27.3.2007, after such appointment was approved by the Government which was communicated by the Deputy Secretary to the Director vide communication dated 14.3.2007. The appointment to a post under the Government cannot be made by following the pick and choose policy. It is not in dispute that in the State of Nagaland a large number of graduates are unemployed and are eligible for consideration for appointment as L.D. Assistant. The authority, however, for the reasons best known to them has appointed the respondent No.4 as L.D. Assistant on temporary basis, without initiating any process of selection and recruitment and thereby depriving the other eligible candidates from offering their candidature. The appointment of the respondent No.4, therefore, cannot be

held to be legal and valid.

12. In view of the aforesaid discussion, the State respondents are directed to identify the posts of L.D. Assistant available in Higher Education Department, in a year and to fill up 50% of such posts by way of regularisation of the work-charged employees, subject to fitness, pursuant to the policy decision taken by the Government of Nagaland as reflected in the office memorandum dated 22.9.2004, after taking into consideration the present vacant posts also and also considering the case of the petitioner along with other similarly placed persons, strictly in terms of such policy decision. The remaining posts shall be filled up through normal process of recruitment and in terms of the rules of recruitment and in case there is no rules framed then by open competitive examination, after due advertisement. In case the post of L.D. Assistant, which fell vacant due to retirement of Smt. Moalemla, against which the respondent No.4 has been temporarily appointed, is found to be the post required to be filled up by work-charged employees, the said post shall accordingly be filled up. The entire exercise is directed to be completed within a period of 4(four) months from the date of submission of the certified copy of this order passed today before the Commissioner and Secretary to the Higher Education Department by the writ petitioner.

13. Since the respondent No.4 has joined the service and working in the college, till such exercise is done within the aforesaid period of time, the respondent No.4 shall be allowed to continue in the present capacity without, however, undertaking any exercise for her regularisation in service, though it has been held that her appointment is not legal and valid, as the college may suffer for the want of the LDAs. It is needless to say that the State respondents shall also not disturb the present status of the petitioner until such exercise is completed.

14. The writ petition is according allowed to the extent as indicated above. No costs.