
(2008) 09 GAU CK 0032
In the Gauhati High Court
Case No : Writ Petition (C) No. 16 (K) of 2008

David Tsela and Others

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 23-09-2008

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2009) 2 GLR 56

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : C.T. Jamir, Wati Jamir, N. Longkumar, Akum Jamir and Wati Walling, for the Appellant; Y. Longkumar and R. Iralu, for the Respondent

Final Decision : Allowed

Judgement

P.K. Musahary, J.—Heard Mr. C.T. Jamir, learned Counsel for the Petitioners. Also heard Mrs. Y. Longkumer, learned Govt. Advocate for the State-Respondents and Mr. R. Iralu, learned Counsel appearing for private Respondent No. 4.

2. The Petitioners, altogether 9 in Nos., are working as Lecturers in the Department of Information Technology and Technical Education ("I.T. & T.E."), Nagaland, Kohima. The services of the writ Petitioner Nos. 3-9 including the private Respondent No. 4 were regularized and inter so seniority of the regularized persons was also fixed. The name of the private Respondent No. 4 figures at Sl. No. 8 showing his date of joining as on 31.8.1998. The Petitioner Nos. 1 and 2 were recruited through Nagaland Public Service Commission and they joined their service on 28.6.2001 and 4.7.2000 respectively. By another notification dated 25.1.2007 (Annexure-C to the writ petition), the State Government determined the seniority of the Petitioner Nos. 3-9 and the private Respondent No. 4, as under:

As regards the Petitioner Nos. 1 and 2, since they are recruited through Nagaland Public Service Commission, their seniority has been fixed from the date

of their joining as indicated above. According to the date of joining of the Petitioner Nos. 1 and 2 and the seniority fixed amongst the Petitioner Nos. 3-9 and private Respondent No. 4, the accepted position is that private Respondent No. 4 is the junior most in the cadre of Lecturer.

The Department of Information Technology and Technical Education, Nagaland, Kohima, made a proposal for creation of a post of Assistant Director on the basis of an application made by the private Respondent No. 4 on 23.1.2007 (Annexure-R-1 to the affidavit of Respondent No. 4) addressed to the Director of Information Technology and Technical Education. The matter was placed before the Department of Personnel & Administrative Reforms and the same was recommended by it. The matter was ultimately placed before the Cabinet for approval. The Cabinet Memorandum was prepared vide No. ITTE/4-8/04 dated 9.10.2007 (Annexure-F to the writ petition) for seeking approval of the Cabinet to creation of one post of Assistant Director in the Technical Education Sector under the Directorate of Information Technology and Technical Education, Nagaland, Kohima. In the said, Cabinet memorandum, specific proposal was given for according approval to the appointment of one Sri Vipulhou Lhoungu, Controller of Examination, i.e., private Respondent No. 4, for appointment to the said post on the basis of his educational qualifications and experience. The Cabinet under Agenda No. 20 accorded approval to the, creation of one post of Assistant Director in the Technical Education Sector under the Directorate of Information Technology and Technical Education, Nagaland. This is reflected in the communication No. CAB-2/2003 dated 19.11.2007 (Annexure-G to the writ petition) and the same is quoted below:

GOVERNMENT OF NAGALAND CABINET SECRETARIAT (CABINET CELL)

OFFICE MEMORANDUM

Sub: rewarding the minutes of the Cabinet meeting held on 15.11.2007.

The undersigned is directed to forward herewith an extract copy of the minutes (Agenda No. 20) of the meeting of the Cabinet held on 15th November, 2007 for kind information and necessary action.

Encl: As stated above (Appendix)

Sd/- T. Semy Deputy Secretary to the Govt. of Nagaland

To

The Secretary, (IT&TE)

Agenda No. 20: Creation of 1 (one) post of Assistant Director in the Technical Education Sector under the Directorate of IT&TE.

The Cabinet approved the creation of 1(one) post of Assistant Director in the Technical Education Sector under the Directorate of IT&TE.

Thereafter, the Secretary to the Government of Nagaland, Department of

Information Technology & Technical Education, vide notification No. ITTE/4-8/2004 dated 21.12.2007 (Annexure-J to the writ petition) appointed the private Respondent No. 4 to the newly created post of Assistant Director purportedly on the basis of Cabinet approval communicated to the said Department and on the basis of clearance given by the P&AR Deptt. This appointment is the subject-matter of challenge in the resent writ petition.

3. Mr. C.T. Jamir, learned Counsel for the Petitioners, submits that the private Respondent No. 4 who has been appointed to the newly created post of Assistant Director is the junior-most person in the cadre of Lecturer and he has been picked-up by the Respondent-authorities and appointed to the said post without resorting to any process of selection/recruitment and as such, the same is illegal which must be interfered with and quashed by this Court. The learned Counsel further submits that as per the Cabinet decision reflected in the communication dated 19.11.2007, the Cabinet approved only the creation of a post of Assistant Director and it has not given any approval to the appointment of the private Respondent No. 4 to such post. The approval to the creation of one post of Assistant Director was recommended by the Department of Personnel & Administrative Reforms and the same was also approved by the Finance Department. The said Departments never approved the appointment of any particular person including the private Respondent No. 4 to the aforesaid post of Assistant Director and therefore, the appointment of the said Respondent purportedly made on the basis of approval of the P&AR Deptt., Finance Deptt. and State Cabinet, is not correct. Since the State Cabinet has not approved the appointment of private Respondent No. 4, the impugned action of the Respondent authorities in appointing the said Respondent in a pick-and-choose manner is arbitrary and illegal and the same must be set-aside.

4. An affidavit-in-opposition has been filed by the State-Respondents. The stand of the Respondent authorities is reflected in paragraph-5 of the said counter which is quoted below:

5. That with regard to the statements made in paragraphs 8 and 10 of the petition, the deponent states that procedurally clearance of the P&AR Department and the Finance Department for Cabinet approval is relevant for post creation purposes only. However, in the proposal contained in the Cabinet Memo dated 9.10.2007, the two issues were clearly indicated for its approval i.e., the creation of the post of Assistant Director in the Directorate of ITTE as well as appointment of Respondent No. 4 to the newly created post. The Cabinet has only depicted the subject of the proposal which is understood that the proposal was approved in toto. Accordingly, the Respondent No. 4 was appointed to the newly created post with the approval of the Appointing Authority.

It has been submitted by Mrs. Y. Longkumer, learned Govt. advocate that the approval of the Cabinet to the appointment of private Respondent No. 4 is implied because the Cabinet Memoranda was prepared for approval of creation of the post of Assistant Director as well as the appointment of private Respondent

No. 4 itself.

5. Countering the submissions of Mr. C.T. Jamir, learned Counsel for the Petitioners, Mr. R. Iralu, teamed Counsel appearing for private Respondent No. 4 submits that it is the private Respondent who represented before the authorities concerned for creation of post of Assistant Director which was taken-up and later culminated to the creation of the said post after due consideration by the P&AR Deptt. and approved by the Finance Deptt. and ultimately, by the State Cabinet. According to Mr. Iralu, learned Counsel, although the name of the private Respondent No. 4 is placed at the bottom of the inter se seniority list, the said Respondent is the only suitable candidate as he was serving in the administrative set-up as a Controller of Examination in the said Department of Information Technology & Technical Education and the others, though admittedly senior to the said Respondent, are not from the administrative set-up. Considering the experience of the private Respondent No. 4 in the administrative setup, he was rightly appointed to the post of Assistant Director by the despondent authorities and the same, as such, cannot be faulted as illegal or arbitrary. The learned Counsel further contends that, this Court may not interfere with such appointment of private Respondent No. 4 which was made only on the basis of the Cabinet decision.

6. I have carefully considered the submissions made by the learned Counsel representing the parties and also examined the materials placed before this Court in the shape of Annexures to the writ petition as well as to the affidavits filed by the respective parties. From the Cabinet Memorandum dated 9.10.2007 (Annexure-F to the writ petition), it is clear that the appointment of private Respondent No. 4 was placed before the Cabinet. On principle, the Cabinet dealt with the question of approval to the creation of one Post of Assistant Director in the Technical Education Sector under the Directorate of I.T. & T.E. without considering the appointment of any individual candidate including the private Respondent No. 4 and after approving the creation of the said post, the Cabinet left the matter of appointment to the said post of Assistant Director un-approved. There is no indication, in any manner, in the communication dated 19.11.2007 that the appointment of private Respondent No. 4 was approved by the Cabinet. In the Cabinet Memorandum, generally several proposals are made by the Departments) for discussion and taking decision by the Cabinet on the important matters. In this case, the Cabinet thought it proper in its wisdom to approve the creation of a post of Assistant Director and the same was accordingly approved. The Cabinet did not think it proper in its wisdom to approve the appointment of a particular person including the private Respondent No. 4 to the said newly created post and as such, the same was not approved. That being the position, the appointing authority has taken a wrong view and decision to appoint private Respondent No. 4 on the purported approval of the Cabinet. Having clearly found that the appointment of private Respondent No. 4 was not approved by the Cabinet, the appointing authority is not legally authorized to appoint the said Respondent in any manner. Moreover, there is no material to show that prior to

appointment of private Respondent No. 4, the Departments of P&AR and Finance, Govt. of Nagaland, accorded approval to the said appointment as has been stated in the impugned appointment order.

7. The general procedure followed in the matter of appointment/recruitment is that, for filling-up a particular post, a panel of eligible candidates, if it is by promotion, is to be prepared with eligible candidates for consideration and the same is placed before the Selection Committee/Board for consideration and final selection. It is stated at the Bar that there is no Rule framed by the State Government governing appointment of this particular post. It may be so but the aforesaid general procedure in the matter of recruitment is to be observed or followed and failure to comply with such general procedure, the appointment of a candidate should be termed as illegal and de hors the Rule. This is exactly what has happened in the present case. Admittedly, the Department did not prepare any panel of eligible candidates and the appointment of the private Respondent No. 4 was made giving a total go-bye to the normal selection procedure. In view of above I have no hesitation to come to a conclusion that the appointment of private Respondent No. 4 is illegal and unauthorized which must be quashed and accordingly, the impugned appointment order dated 21.12.2007 (Annexure-J to the writ petition) is hereby quashed and set-aside.

8. From the averments made in paragraph-8 of the counter affidavit filed by the Respondent authorities, it is found that Service Rules of the concerned Department is in, the draft stage and the same is under examination and consideration of the State Government. It is also stated that the standing Government notifications/memoranda are applied in the Department of I.T.&T.E. wherever applicable. The copy of the draft Service Rules has not been placed before this Court. However, it can be presumed that the Government must have taken due care to frame the Rules as per the provisions under Article 309 of the Constitution of India. We have come across in several cases that pending approval to draft Service Rules, they are being used as guidelines in service matters including recruitment. The State-Respondents may use the aforesaid draft Service Rules as guidelines. In view of above, it is directed that the Respondent No. 3, i.e., the Director of Department of I.T.&T.E. shall prepare a panel of candidates including the name of private Respondent No. 4 and the same shall be forwarded to the Respondent No. 2 i.e. Secretary to the Government of Nagaland, Department of I.T.&T.E. within a period of 1(one) month from the date of receipt of a copy of this order and the Respondent No. 2, thereafter, upon receipt of the said panel list from Respondent-Director, shall constitute a Departmental Promotion Committee/Selection Board to consider and finalize the selection for appointment to the post of Assistant Director in the concerned Department, in accordance with law, within a period of 2(two) months from the date of receipt of the said panel list.

9. With the above directions & observations, the present writ petition stands allowed to the extent as indicated above.