

(2010) 06 GAU CK 0017
In the Gauhati High Court
Case No : Writ Petition (C) No. 3355 of 2007

Dhaniswar Basumatary

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 09-06-2010

Acts Referred:

Assam Public Services (Appointment of Family Members of Persons Killed By
Extremists/Terrorists) Rules, 1992 — Rule 3, 4
Constitution of India, 1950 — Article 309
Evidence Act, 1872 — Section 108

Citation : (2011) 1 GLR 461 : (2010) 3 GLT 443

Hon'ble Judges : R.S. Garg, C.J.; Brojendra Prasad Katakey, J

Bench : Division Bench

Advocate : D. Choudhury, A.K. Choudhury and U.K. Das, for the Appellant; B. Goyal and Das, for the Respondent

Judgement

1. This order shall finally dispose of WP(C) No. 3355/2007, WHO No. 5095/2007 and WHO No. 5096/2007.

2. It appears that the matters have been placed before us because the learned Single Judge in his order dated 29.6.2007 passed in WHO No. 3355/2007 observed that the Petitioner was claiming the relief in view of the order dated 12.3.2007 passed by the High Court in WHO Nos. 6403 of 2006 and 6405 of 2006. The learned Judge observed that the order dated 12.3.2007 passed in WHO Nos. 6403 and 6405 of 2006 were required to be reviewed in view of the order dated 18.6.2007 passed by the High Court in WHO No. 5061 of 2006 reviewing its earlier order dated 13.11.2006.

3. Before coming to the controversy it is to be noted that Assam Public Services (Appointment of family members of persons killed by extremists/terrorists) Rules, 1992 was promulgated under Notification No. ABP.181/91/65 dated 8.4.1992 observing that in exercise of powers conferred by the proviso to Article 309 of the Constitution of India, the Government of Assam was pleased to make

the said rules regulating the appointment in public services under the Government of Assam of the next of kin of persons who had been killed in violent activities in the hands of the extremists since 1.1.1985. From a perusal of the said preamble of the rules, it would clearly appear that the said rules were brought into force with a laudable object that the kin and kith of the persons who died in the violent activities or in the hands of the extremists do not suffer unnecessarily.

Rule 3 provided that the Rules shall apply to all the services and posts under the Government of Assam, recruitment to which is made through the Commission or otherwise than through the Commission.

Rule 4 provided that subject to the provisions of the Rules whenever any recruitment to services and posts referred to in Rule 3 was made, only one affected candidate from one family who applied and was eligible (emphasis supplied) under the normal rules should be given appointment to a Government job, or job under State Government Undertaking/Board. It is also to be noted that on 29.7.1995 in partial modification of the Office Memorandum No. RR.82/90/6 dated 25.4.1991 relating to the sanction of ex gratia to the next of kin killed in extremists/terrorists violence, the Government of Assam was pleased to formulate a policy with immediate effect to grant ex gratia of Rs. 1,00,000 to the next of kin of persons killed. However, it is to be noted that the Office Memorandum dated 29.7.1995 is not a part of the Rules. The Office Memorandum was independent of the Rules and was to govern the cases where somebody had died in the extremists activities/terrorists violence.

4. It appears that said 1992 rules were repealed by the State Government on 22.6.2004 vide Notification No. ABP.121/92/Pt-V/135 and by another Notification No. ABP.121/92/Pt-V/136 of even date a policy was brought into existence observing that in place of 1992 Rules, the government had decided to give relief to the affected families as provided under the said notification.

5. The notification provided that a preference to the members of the affected families in recruitments to the government and semi government jobs shall be given. Preference to such certified persons in selection of beneficiaries under self-employment generation scheme shall be given. The ex gratia payment shall stand enhanced to Rs. 3,00,000. Alternative means of livelihood to families of earning victims of extremists violence shall be determined by the district authorities after assessing the economic conditions of each family separately and free education to the children of the poor affected families till they become eligible to earn would be provided. Even at this stage it is to be understood that 1992 rules were framed under proviso appended to Article 309 and those were, therefore, statutory rules. However, the subsequent notification dated 29.7.1995 and the notification dated 22.6.2004 are administrative instructions.

6. It is to be noted that a person can claim a right under the statutory rules either for appointment and/or for grant of ex gratia payment if the Rules so

provide. It is not in dispute before us that 1992 Rules did not provide for any ex gratia payment but they provided that kith and kin of the deceased would be entitled to make an application for his appointment and such appointment would be offered provided he proves his eligibility. Even under 1992 Rules, the appointment was not as a course. Such a person was required to make an application and then he was also required to show his eligibility for appointment to the particular post for which such an application was filed.

7. The question arose before this Court that in a case when an application was filed before 22.6.2004 whether repeal of the Rules would adversely affect the right of consideration for appointment and whether in such case the fate of the pending application or the right of appointment, would be lost in view of repeal of 1992 Rules.

8. In the matter of Ms. Manju Narzary v. State of Assam, WP(C) No. 29471 2005 decided on 28.9.2005 a learned Single Judge observed that if a request for appointment was pending on the date on which the old rules were repealed, having regard to the statutory object of such claim cannot be rendered non est in law by repealing notification. It was also observed that the directions contained in the notification dated 22.6.2004 to return the pending applications before the Deputy Commissioner reveals the intention of the authorities concerned to have the same processed afresh in terms of the parameters contained therein. The said order passed in WP(C) No. 2947/2005 on one side directed that the application made prior to 22.6.2004 was to survive after coming into force of the new policy but at the same time, observed that the intention of the authorities concerned to have said application processed afresh in terms of the parameters contained in the notification dated 22.6.2004. In our opinion, the observations made in the matter of Ms. Manju Narzary [WP(C) No. 2947/2005] insofar as the claim that any application pending before 22.6.2004 would survive are correct observations, but the learned Single Judge made a wrong observation and recorded a wrong finding in observing that such pending application was required to be considered in light of the notification dated 22.6.2004.

9. If the rules provided that only one affected candidate from one family who applied and was eligible under the normal rules shall be given appointment then making of such an application by an eligible person was a must to confer a right upon the person for consideration of application for appointment. The consideration for appointment is based upon two criteria, namely, making of an application and to show that such candidate was eligible under the normal rules for appointment to a government job. If a person who had a right to make an application prior to 22.6.2004 did not make an application then his right to make an application would be lost and in such case, he cannot come to the court saying that he is entitled to appointment in accordance with the Rule 4 of 1992 Rules. However, such a person who has not made application under 1992 Rules would not become absolutely helpless or remediless, because the government itself has said that after repeal of the 1992 Rules, it had decided to consider

certain measures in place of the said rules to give relief to the affected families. After repeal of the rules if the government wanted to provide some relief and succor to the affected families, then on enforcement of the policy after 22.6.2004 the State would not be entitled to say that on one side they would refuse appointment and at the same time, they would also refuse ex gratia payment of Rs. 3,00,000.

10. The learned Counsel for the State, however, contended that on 5.8.2004 the State government in continuation of its scheme dated 22.6.2004 had observed that the measures are prospective and the cases which have already been decided as regards ex gratia payment etc., before issuance of the letter should not be opened again. In our opinion, the letter dated 5.8.2004 does not take into consideration that the persons who could not make application before 22.4.2004 would lose their right of making application for appointment, however, appropriate ex gratia payment has to be made in their favour. Once it is held that all persons who are held entitled under 1992 Rules for appointment and under 1995 notification for ex gratia payment then as a corollary it has to be held that they would be entitled to be considered under the scheme dated 22.6.2004.

11. In WP(C) No. 5095/2007 it is noticed that the person was last heard in 1995 and similarly in WP(C) No. 5096/2007 it is said that the person was last heard in 1990 and, therefore, there has to be a presumption u/s 108 of the Indian Evidence Act of their civil death and in such cases the right to make application accrued in favour of the dependent/claimant before coming into force of the scheme of 2004, therefore, they are entitled to appointment. In our opinion, if entire latitude is extended in favour of the Petitioners and it is presumed in WP(C) No. 5095/2007 that the person is presumed to be dead in 2002 and also in WP(C) No. 5096/2007 the person is presumed to be dead in 1997, then too the Petitioners would not be duty bound to inform us that they had made application prior to 22.6.2004 and such application was made by one eligible person.

12. As there is nothing on record to show, suggest or prove that applications were made prior to 22.6.2004, we hold that the Petitioners lost their right to make application, but, however, they would certainly be entitled to the benefits flowing from the scheme dated 22.4.2004. The Petitioners would be entitled to enhanced amount of ex gratia payment after adjustment of the amount already paid to them and they would also be entitled to benefit of preference in appointment and also under self-employment generation scheme as provided in the said scheme.

13. If the Petitioners have not made any application till date, they would be entitled to make application to the competent authority claiming indulgence of such authority for consideration of their cases. In light of the above observations, we do not think that we are still required to delve into the reference made to us because in our opinion, our order would clarify all the disputes.

14. All the petitions are accordingly disposed of.