

(2001) 09 GAU CK 0014

In the Gauhati High Court

Case No : W.A. No. 249 of 2001 Arising out of W.P. (C) No. 187 (AP) of 2000 Old No. in Principal Seat is W.P. (C) No. 2475 of 2000

Doi Sora and Others

APPELLANT

Vs

Chairman, A.P. Public Service Commission and Others

RESPONDENT

Date of Decision : 25-09-2001

Acts Referred:

Constitution of India, 1950 — Article 320(3)

Citation : (2001) 3 GLT 357

Hon'ble Judges : J.N. Sharma, J;A.H. Saikia, J

Bench : Division Bench

Advocate : C. Baruah, P.J. Saikia, P.C. Deka and S. Keot, for the Appellant; N.N. Saikia, A.G., for the Respondent

Judgement

J.N. Sarma, J.—This appeal has been filed against the judgment dated 6.6.2001 passed by the learned Single Judge of this Court.

2. We have heard Sri C. Baruah, learned advocate for the Appellants and Sri N.N. Saikia, learned Advocate General, Arunachal Pradesh for the Respondent No. 3. None appears for the Respondents No. 1 and 2 though the learned advocate made an appearance by filing Vokatnama.

3. The brief facts of the case are follows:

4. A writ application was filed by 15 persons (this writ appeal has been filed by 10 persons) against Chairman, Arunachal Pradesh Public Service Commission, Itanagar, Secretary, Arunachal Pradesh Public Service Commission, Itanagar and Chief Engineer, Public Health Engineer & Water Supply, Itanagar. This writ appeal itself is not maintainable in the absence of necessary parties inasmuch as the Public Service Commission, Itanagar was not made a party and even the State of Arunachal Pradesh was not made a party. But at this stage we are not inclined to throw it on this technical ground as the matter has travelled a long distance.

5. It is not known what is the qualification of these Petitioners as the writ

application is absolutely silent with regard to that. Be that as it may, a requisition was sent by the department of Public Health Engineer & Water Supply, Arunachal Pradesh to the Arunachal Pradesh Public Service Commission (hereinafter called the Commission) to do the needful for appointment to the post of some Junior Engineer vide Annexure-A to the writ application. The relevant portion of the Annexure-A is quoted below:

With reference to your letter No. PSC-R/8/98, Dtd. 13/8/98, I am directed to inform you that at present there are 26 (twenty six) clear vacant post of Junior Engineers, (Civil) and 27 (twenty seven) resultant/anticipated vacant posts available in PHE & WSD against direct recruitment quota.

6. From a perusal of this portion it will appear that there were 26 vacancies at that point of time and 27 were resultant/anticipated vacancies available in the department against the direct recruitment quota. In terms of this requisition on 23rd March, 1999 the Public Service Commission published an advertisement and the relevant portion of the advertisement is quoted below:

Applications are invited from the citizens of India for filling up of 26 (twenty six) posts of Junior Engineer (Civil) under the Department of Public Health & Engineering Govt. of Arunachal Pradesh in the scale of pay of Rs. 4,500-125-7000/- PM plus other allowances as admissible to the employees of Arunachal Pradesh Govt. from time to time. Out of 26 (twenty six) post 23 (twenty three) posts are reserved for APST. The vacancy and reservation position are subject to variation.

7. So, the advertisement was made for 26 posts and the last line of this paragraph reads that the vacancy and reservation position are subject to variation. We have mentioned it in order to appreciate the contention raised by the learned advocate for the Appellant Mr. Baruah, it will be dealt later on

8. The Appellants alongwith the Ors. appeared in the written test, they were qualified and were called for viva voce test on 11.2.2000 and the Appellants appeared in the interview. The Commission sent a recommendation only for 26 candidates to the department. There was a requisition on 2.3.2000 by the department to send a further list of 27 candidates but that was turned down by the Commission. A representation was filed by the Petitioners on 30.3.2000 but there was no reply and as such this writ application was filed with the following prayers:

To issue writ as to why Respondent authority shall not be directed to furnish more merit panel list of 27 qualified candidates in terms of the requisition letter No. PHE/Sectt-135/98 dated 30.10.98 and office Memo No. PHE/Sectt-135/98 dated 2.3.2000 issued by the Under Secretary, Govt. of Arunachal Pradesh Public Health Engineer, Itanagar.

9. An affidavit-in-opposition was filed on behalf of the parties and the Public Service Commission took a definite stand that the advertisement was issued only

for the posts which were existing/vacant. The Commission did not advertise or select the candidates for the resultant anticipated vacancies. Further, once the selection was made and the list was published there is no question of selecting further candidates and as such the Commission suggested the department to submit a fresh requisition for the 27 resultant/anticipated vacancies enabling the Commission to initiate the selection process. The learned Single Judge interalia found as follows:

- i) That the Petitioners have applied for the post, appeared for the interview, both written and viva voce and did not raise any objection nor challenged the advertisement or the selection process and have instead acquiesced themselves to the entire process of selection and took the chance of being selected for the said 26 posts to which the advertisement and selection were made.
- ii) That in the instant case, the letter dated 2.3.2000 requisitioning for Anr. additional 27 candidates for filling up anticipated/resultant vacancies was made after the results were declared and the list of 26 candidates were already forwarded to the Department.

Accordingly, it was found by the learned Single Judge that the action taken by the APSC in forwarding the names of 26 candidates was done in accordance with the requisition by the Department and the Commission was not bound to make the selection for the anticipated/resultant vacancies. Accordingly, the writ petition was dismissed.

10. At the time of admission only one question was argued and that is available in the order dated 20.7.2001. That portion of the order is quoted below:

It is entirely argued that irrespective of the number of posts advertised, the Public Service Commission was obliged to send the list of all the successful candidates found suitable in order of merit and the Public Service Commission could not have stopped at No. 26, i.e., the posts advertised reliance is placed on the instructions issued by the Government contained in the Arunachal Pradesh Gazette dated 19th July, 1988. This according to the learned Counsel for the Appellants, is for the purpose that whatever are the anticipated vacancies in the year may be filled up from the merit list so sent by the Public Service Commission.

11. We have looked the writ petition, the writ petition contains only 12 paragraphs and nowhere in the writ petition this question was agitated nor it was agitated before the learned Single Judge. The writ petition is absolutely silent with regard to that point which is now sought to be agitated. It is not based on any pleading whatsoever. Paragraph 1 of the writ petition is with regard to the person being citizens of India. Paragraph 2 of the writ petition is with regard to the requisition sent by the Department. Paragraph 3 of the writ petition is with regard to the advertisement issued by the Department. Paragraph 4 of the writ application is with regard to the interview and written test. Paragraph 5 of the writ application is with regard to the selection of 26 candidates. Paragraph 6 of

the writ petition is with regard to the requisition sent by the Department for Anr. 27 candidates. Paragraph 7 of the writ petition is with regard to the representation submitted by the Petitioners. In paragraph 8 there is a statement which reads as follows:

The Public Service Commission mandatorily ought to have complied with the terms of the said requisition and thereby would have had prepared and furnished panel list of 53 (fifty three) qualified candidates in order of merit in the interview held on 21.8.99 and 11.2.2000 and the same panel merit select list should have been sent to the authority of the Department of Public Health Engineer & Water Supply. But the Arunachal Pradesh Public Service Commission had not done so, instead of furnishing of qualified merit panel list of 53 candidates it furnished qualified merit panel list of 26 candidates without complying with the requisition of the Department of Public Health Engineer. Itanagar thereby the Petitioners were dropped out who would also have been included in the qualified merit panel list if the Public Service Commission would have prepared merit panel list of 53 (fifty three) candidates, therefore the non-furnishing of qualified merit panel list of 53 candidates by the Public Service Commission is violation and against the terms of the requisition dated 30.10.98 given by the Department of Public Health Engineer & Water Supply and is most illegal, without right and jurisdiction.

12. There is only a vague plea that the principle of natural justice has been violated and the legal right of the Petitioners has been violated but what legal right of the Petitioners has been violated, there is not even a whisper with regard to that in the writ application. Mr. Baruah, learned advocate for the Appellants now urges that in view of the instruction No. 4(a) the Commission is to sent the appointment authority the names of all successful candidates in order of merit found suitable for appointment to such post after evaluation of the answer-scripts and conducting interview.

13. It may be stated herein that there is a set of instruction, which reads as follows:

Instruction regarding direct recruitment through the Public Service Commission issued by the Governor, subject to the provisions of Regulations made under Article 320(3) of the Constitution.

Instruction No. 1 (a), (b) and 4(a) are quoted below:

1 (a) The appointing authority will inform the Public Service Commission of the number of vacancies reserved for Scheduled Castes or Scheduled Tribes.

(b) In the case of services in which permanent vacancies occur throughout the year, the number of vacancies to be reported to the Commission should be the number likely to occur during the recruiting year, and no vacancy which occur after the end of that year, shall be filled without a further reference to the Commission.

4(a) In case of recruitment by competitive examination. Commission will send to

the appointing authority the names of all successful candidates in order of merit found suitable for appointment to such post after evaluation of the answer scripts and conducting interview.

14. A bare perusal of the requisition will show that the requisition was not sent in terms of the Instruction 1(b) quoted above. It is clearly stated that there is requisition only for 26 candidates and 27 are anticipated/resultant vacancies and the Commission in its own wisdom issued an advertisement for 26 posts with a rider as indicated that the vacancy position is subject to the variation. The dictionary meaning of the word variation is change/modify. Subject to variation cannot and shall not mean to increase of double the number which was originally advertised. The advertisement being for 26 posts the Commission could have sent only 26 names. Further, a bare perusal of instruction 4(a) quoted above will show that it is directory in nature and not mandatory and it must be followed in order to maintain transparency and fairness and not for any other purpose. Transparency and fairness in this case was never challenged. So, this instruction quoted above does not help the learned Counsel for the Appellants. The law regarding filling up of post has been settled by catena of decisions and here we only rely on a decision of the Apex Court reported in 1994 Sup. (2) SCC 591 (Gujarat State Dy. Executive Engineers" Association v. State of Gujarat and Ors.) wherein the Supreme Court pointed out inter alia as follows:

For instance, if an examination is held say for selecting 10 candidates for 1990 and the competent authority prepares a waiting list then it is in respect of those 10 seats only for which selection or competition was held. Reason for it is that whenever selection is held, except where it is for single post, it is normally held by taking into account not only the number of vacancies existing on the date when advertisement is issued or applications are invited but even those which are likely to arise in future within one year or so due to retirement etc. It is more so where selections are held regularly by the Commission. Such lists are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon.

15. In this particular case the advertisement was issued for 26 posts and these 26 posts were filled up and thereafter the other persons who participated in the selection can have no right whatsoever to claim for appointment to other posts beyond the posts advertised. The function of the Public Service Commission ceases as and when the recommendation is made for the advertised posts and the advertised posts are filled up and that process of selection itself will come to an end and that is the stand taken by the Commission and they have stated that if there is need for further candidates requisition may be sent to them and they will advertise the posts accordingly.

16. Mr. C. Baruah, learned advocate for the Appellants in support of his contention places reliance on the following decisions:

i) Miss Neelima Shangla, Ph. D. Candidate Vs. State of Haryana and Others, He relies on paragraph 2. That was a case with regard to the appointment in the judicial branch of the Haryana Civil Service, and there was a specific Rule i.e., Rule 8 which reads as follows:

There is no limit to the number of names borne on the High Court Registrar but ordinarily no more names will be included than are estimated to be sufficient for the filling of vacancies which are anticipated to be likely to occur within two years from the date of selection of candidates as a result of an examination.

The Supreme Court in paragraph 2 pointed out as follows:

The Public Service Commission is not required to make any further selection from the qualified candidates and is, therefore, not expected to withhold the names of any qualified candidates. The duty of the Public Service Commission is to make available to the Government of complete list of qualified candidates arranged in order of merit. Thereafter the Government is to make the selection strictly in the order in which they have been placed by the Commission as a result of the examination. The names of the selected candidates are then to be entered in the Register maintained by the High Court strictly in that order and appointments made from the names entered in that Register also strictly in the same order.

This law was laid down by the Apex Court in view of the rule quoted above. There the question was that the number of posts were not mentioned in the advertisement and rule itself requires that the number of candidates to be sent must be sent so that the anticipated vacancy may be filled up within a period of two years. This case does not help the learned advocate for the Appellants.

ii) The State of Haryana Vs. Subash Chander Marwaha and Others, This case instead of helping the Appellants goes against them. The Supreme Court pointed out interlia as follows:

The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect.

That also was passed on the basis of a rule and the same rule i.e. Rule 8 was considered in this case also. So, this case is of no help to the Appellants.

iii) Virender S. Hooda and Others Vs. State of Haryana and Another, . That was a case with regard to the wait listed candidates. The right of the wait listed candidates shall spring up only when the posts are not filled up by the selected candidate. That is not the position in the case in hand.

iv) Benny T.D. and Others Vs. Registrar of Cooperative Societies and Another, That was a case where the appointments were made in absence of the vacancy advertised and the Supreme Court pointed out that it does not necessarily lead

to an inference that appointments were made in excess of the cadre strength because more vacancies will arise during the period the recruitment process takes place. That is not the situation in the case in hand. Here in this case the selection was made for 26 posts and the facts of that case are absolutely different. In the case before the Supreme Court the appointment was made and the appointment was challenged only on the ground that the appointment having been made beyond the posts advertised is illegal and the Supreme Court turned down that plea holding as above. This case is also no help to the Appellants.

v) *N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others*, . That was a case where the advertisement was issued for appointment and during the process of selection the rule was amended and two questions were raised before the Supreme Court: (i) where selection process is initiated by issuing advertisement inviting applications, selection normally should be regulated by the rule or order then prevailing. When advertisement expressly states that appointment shall be made in accordance with existing rule or order, subsequent amendment in the existing rule or order will not affect the pending selection process unless contrary intention is expressly or impliedly indicated where amended rule or order makes it expressly clear that the pending selection would not be governed by the amendment, there is no question of applying the new rule or order to the pending selection. (ii) A person applying for appointment if otherwise qualified in accordance with the existing rules or order and in terms of advertisement inviting application acquires a vested right to be considered for selection in accordance with that rule or order. As the Supreme Court pointed out that service rules or Government orders are always prospective unless indicated to the contrary by express language or by necessary implications. This case is of no help to the Appellant.

vi) *Dr. P.K. Jaiswal Vs. Ms. Debi Mukherjee and others*, That was a case when a vacancy arose in the post of Assistant Director General (Prevention of Food Adulteration) in the Ministry of Health and Family Welfare of the Govt. of India, a requisition was sent by the Government to the Union Public Service Commission for selection of a candidate for filling the vacancy in accordance with the recruitment rules then operating which provided for the said post being filled in by direct recruitment only. However, before the Commission could advertise the post the Govt. informed the Commission not to proceed with the process of selection because it was examining the question of opening up an avenue for promotion from Assistant Secretary to the post in question. Notwithstanding the said communication, the Commission advertised the post. The Appellant applied for the post and was called for interview by Commission. Thereupon the Respondent who was then serving as Assistant Secretary, and was hoping to be promoted as Assistant Director General on the amendment of the recruitment rules, approached the Central Administrative Tribunal and obtained an interim order staying the process of selection initiated by the Commission. In the meantime two further layers above that of Assistant Secretary came to be created providing for higher pay scales by an amendment of the rules. The

Tribunal ultimately disposed of the petition with a direction to the concerned Ministry to provide promotional avenues to the applicant who had functioned in the post of Assistant Secretary for several years and had held the charge of Assistant Director General as and when the occasion arose. On behalf of the Appellants two contentions were made: Firstly, once the process for selection had started it was not open to the Government as well as the Tribunal to freeze the process and the Commission was entitled to complete the selection; and secondly, the fact of the creation of two layers by the amendment of the relevant rules had been totally overlooked by the Tribunal even though its attention was drawn to the same by counsel for the Appellant. Dismissing the appeal and in the background of this case it was held by the Supreme Court as follows:

If the Commission issues an advertisement at the behest of the Government and pursuant thereto calls a candidate for interview, the candidate has a right to be considered for selection but not a right to be selected or to appointment to the post in question. The right to selection crystallises only after the candidate is called for interview pursuant to the advertisement.

That case is also of no help to the Appellant.

vii) *Miju Kena Vs. State of Arunachal Pradesh and Another*, Date of judgment 26.6.2001. Where the learned Single Judge of this Court held that if the Department initiates the process of selection by issuing advertisement and the selection process is initiated under the existing rules the authority is duty bound to declare the result. Results were not declared after holding the interview on the ground that the Govt. intends to amend the rules under which selection process was initiated. Once the interviews were conducted the candidates have a right to demand declaration of result and to be considered for selection under the existing rules pursuant to which selection process was initiated. This is a correct decision. This case is also of no help to the Petitioner. We asked Mr. C. Baruah, learned advocate for the Appellant specifically that what is the legal right that has been violated and how prejudice has been caused to him regarding his legal right. Mr. Baruah submits that the authority did not adhere to Instruction Nos. 1 (a)(b) and 4(a) and regarding process he submits that if 27 more candidates are recommended by the Commission he would have fair chance of being selected. Be that as it may on the facts stated above we do not find any infirmity in the judgment of the learned Single Judge. As a matter of fact, the learned Single Judge granted more relief in the last part of the judgment which was even not asked for by the writ Petitioners. That was done by the learned Single Judge in order to give some benefit to these persons. We do not like to interfere with that part of the judgment. That part of the judgment shall hold the field.

17. The appeal shall stand dismissed.