

(2006) 08 GAU CK 0111
In the Gauhati High Court
Case No : Writ Appeal No. 5 of 2002

Gokul Mohan Hazarika and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 24-08-2006

Acts Referred:

Assam Civil Services (Class-I) Rules, 1960 — Rule 19, 3, 4, 7

Citation : (2009) 1 GLR 849 : (2003) 2 GLT 657

Hon'ble Judges : B. Sudershan Reddy, C.J.;B.P. Katakey, J

Bench : Division Bench

Advocate : P.K. Goswami and A.M. Buzarbaruah, for the Appellant; Babita Goyal, for the Respondent

Final Decision : Allowed

Judgement

B.P. Katakey, J.—The Appellants, who are directly recruited as Assam Civil Services Class I officers in the year 1986, filed the writ petition in Civil Rule No. 1869 of 1995 challenging the draft gradation list, as on 1.1.1993, of the officers of Assam Civil Services, for placing them after the promotees of that year, i.e., 1986 and also challenging the amended provision contained in proviso to Rule 4 of the Assam Civil Services (Class I) Rules, 1960, amended by the Assam Civil Services (Class-I) (Amendment) Rules, 1986 and notified on 21.7.1986. Though the Appellants in the said writ petition have challenged the vires of said amended provision, the claim of the Appellants is basically the fixation of seniority, which according to them ought to have been fixed in terms of the unamended provision of Assam Civil Service (Class I) Rules, 1960, as stood prior to 1986 amendment, as the process for direct recruitment was initiated and selection was completed prior to the amendment of the said Rules, The learned Single Judge by the impugned judgment and order, by placing reliance on the decision of the Apex Court in Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and others, dismissed the writ petition filed by the Appellants basically on the ground that though the process for selection was initiated before the amendment of 1986,

the Government having taken a conscious decision not to make any appointment till the rule is amended, no interference can be made Hence, the present appeal.

2. The facts in brief is that the Government of Assam on 7.3.1984 requested the Assam Public Service Commission (APSC) to make selection for direct recruitment to 30 number of posts in each category of ACS Class I and ACS Class II and accordingly an advertisement was issued by the APSC on 2.5.1984 for that purpose. The Government of Assam in the meantime vide communication dated 24.11.1984 informed APSC about relaxation of upper age limit by two years and accordingly a revised advertisement was issued by the APSC on 28.11.1984 incorporating the relaxation of two years in the upper age limit. Pursuant to such process of selection the written test as required under Assam Civil Services (Class I) Rules, 1960 ("1960 Rules") was conducted by the APSC, between the period of 5.6.1985 to 1.8.1985 and declared the result of the written examination on 22.2.1986. The APSC conducted the viva-voice test from 25.4.1986 to 30.5.1986 of those candidate who qualified in such written examination. After such process of interview, the APSC on 27.6.1986 send the list of candidates to the Government recommended for appointment as ACS Class I and ACS Class II officers. The Government of Assam thereafter by the impugned notification dated 21.7.1986 amended the proviso to Rule 4 of 1960 Rules, whereby the quota for promotion from ACS Class II to ACS Class I was left to the discretion of the Governor and the earlier quota of 50 per cent each between the promotees and direct recruit was done away with. By the said amendment the eligibility criteria for promotion from ACS II to ACS I was also reduced from 8 years to 5 years. By notification dated 11.9.1986, 129 ACS Class II officers were promoted to ACS Class I, which includes the present private Respondents and thereafter during the month of October 1986 the Government appointed 45 selected candidates in ACS Class I (Jr. Grade) pursuant to the recommendation of the APSC dated 27.6.1986. A decision for merger of ACS Class I and ACS Class II was thereafter taken by the Government and accordingly on 16.12.1989 both ACS Class I and ACS Class II were merged into a common class, i.e., ACS Class I. A draft gradation list was published in the month of June 1993 wherein all 129 ACS Class II officers who were promoted to ACS Class I vide notification dated 11.9.1986 were placed above those 45 directly recruited ACS Class I officers, who were recruited in the month of October 1986 pursuant to the APSC recommendation dated 27.6.1986.

3. It appears from the record of this writ appeal that in the order dated 7.11.2005 the submission of the learned Counsel for the Appellants that they do not want to proceed against the Respondent Nos. 6, 14, 16, 19, 23, 28, 41, 71, 72 and 77 on the ground that they have either retired from service or died in the meantime, has been recorded. The learned Counsel for the Appellant on 3.8.2006 also filed a memo to the effect that the Respondent Nos. 4, 7, 12, 13, 65, 74 and 75 have either expired or retired from service, therefore, prays for deletion of their names. In view of the above, the names of those persons are deleted from the list of Respondents.

4. We have heard Mr. P.K. Goswami, learned senior Counsel appearing on behalf of the Appellants and Mrs. Babita Goyal, learned State Counsel for the Respondent Nos. 1, 2 and 3. None appears for the other Respondents despite service of notice.

5. The contention of the learned senior Counsel for the Appellants is that as the selection process for direct recruitment to ACS Class I was initiated prior to the 1986 amendment, the Government on 7.3.1984 having sent the requisition to the APSC for making such selection, pursuant to which the written test as well as viva voice test was conducted by the APSC as required under Rule 4 read with Rule 7 of the 1960 Rules, as stood prior to the 1986 amendment, and the APSC also having sent its recommendation to the Government on 27.6.1986 recommending the list of candidates found suitable for such appointment, the seniority of such ACS Class I officers who were either recruited directly or by promotion has to be fixed in terms of the 1960 Rules, as stood prior to 1986 amendment, even if promotion from ACS Class II to ACS Class I was made after coming into force such 1986 amendment, as 1986 amendment was notified on 21.7.1986, i.e., after the selection by the APSC was complete, whereby the quota of 50 per cent fixed under 1960 Rules between promotees and the direct recruit was done away with and also relaxing eligibility criteria for promotion from ACS II to ACS I. According to the learned senior Counsel the proviso to Rule 4, as stood prior to amendment fixed the quota between the promotees and direct recruits and the seniority, therefore, has to be fixed in terms of Rule 19, which stipulates that the members of the service recruited in a year by promotion shall be senior to members recruited in the same year and in the same batch under Clause (a) of Rule 4. The learned senior Counsel submits that since quota has been fixed and recruitment by way of direct recruitment and promotion were made in the same year, i.e., year 1986, and the number of direct recruits being 45, equal number of promotees made in the year 1986 will be senior to those 45 direct recruits of 1986, which includes the present Appellants. According to the learned senior Counsel in the draft gradation list said position has not been maintained and all 129 promotees of the year 1986 were placed above those 45 direct recruits of the same year.

6. Mr. Goswami, has contended that though in the writ petition vires of proviso to Rule 4 as stood amended by notification dated 21.7.1986 has been challenged, the Appellants are not pressing that prayer and in fact that prayer was not pressed before the learned Single Judge also as the Appellants are entitled to get their seniority fixed in terms of the 1960 Rules as stood prior to the 1986 amendment. The learned senior Counsel has further contended that in the writ proceeding though neither the State Respondents nor the private Respondents filed any affidavit or produced any record to show that the Government has taken any conscious decision not to fill up the post in ACS Class I, prior to making 1986 amendment, the learned Single Judge ought not to have dismissed the writ petition filed by the Appellants on the ground that such conscious decision was taken by the Government, by applying the ratio of Dr. K. Ramalus

case (supra), which according to the learned senior Counsel is not applicable in the facts of this case. The learned senior Counsel in support of this contention has placed reliance on the decisions of the Apex Court in Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, , N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others, ; Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and others, and B.L. Gupta and Anr. v. M.C.D. (1998) SCC 223.

7. Mrs. Goyal, the learned State counsel appearing on behalf of the State Respondents has contended that the seniority has to be fixed as per Rule 19 of 1960 Rules, which was not amended by 1986 amendment and was amended only in the year 1989. According to the learned State counsel Rule 19 provides for fixation of seniority of the promotees recruited in a given year over the direct recruit of that year, and therefore, no illegality has been committed by the State Respondents in publication of draft gradation list placing all 129 promotees of the year 1986 above the direct recruits of that year. It has further been submitted by the learned State counsel that the seniority list, which has been challenged in the writ petition being in the draft stage only, in any case, such draft seniority list is not open to challenge when the final seniority list is yet to be published.

8. The facts narrated above are not in dispute. Neither the State Respondents nor the private Respondents filed any affidavit controverting the statements made in the writ petition, either before the learned Single Judge or before this Court in the writ appellate stage. The State Respondents have also not produced any record either before learned Single Judge or before this Court.

9. The first question in the present case which requires consideration of this Court is, whether the provision of unamended 1960 Rules will apply relating to the fixation of the seniority between the direct recruits and the promotees made in the year 1986, process of which was initiated prior to the amendment of the said 1960 Rules by 1986 amendment rules. The undisputed fact is that the 1960 Rules was amended vide notification dated 21.7.1986 in so far as it relates to the quota fixed for appointment by promotion and direct recruitment to ACS Class I service, which prior to amendment was 50 per cent each. Admittedly the process for direct recruitment to ACS Class I service was initiated on 7.3.1984, on which date the Government sent the requisition to APSC for making selection and recommendation. The said process culminated into the selection and recommendation made by the APSC in 27.6.1986, which the Government has accepted and ultimately appointed 45 candidates in ACS Class I service vide various orders issued in the month of October 1986. Just before such appointment, but after APSC sent its recommendation, 1960 Rules was amended vide notification dated 21.7.1986 as stated above and the Government thereafter on 11.9.1986 promoted 129 numbers of ACS Class II officers to ACS Class I service. The present dispute regarding the seniority arose thereafter.

10. It is the consistent view of the Apex Court that when the process of selection is initiated under any Rules, before making any amendment, such appointment has to be in terms of the rule as stood prior to any such amendment, meaning

thereby, in terms of the rules which existed when the process of recruitment was initiated. The Apex Court in *N.T. Bevin Katti* (supra) referring to the earlier decisions including *Y.V. Rangaiah* case has held that where the proceedings for selection are initiated by issuing advertisement, the selection should normally be regulated by the then existing rules or Government orders and any amendment of the rules or the Government orders pending selection should not affect the validity of the selection made by the selection authority or the Public Service Commission, unless the amendment rules or the amendment Government orders issued in exercise of its statutory power, either by express provision or by necessary implication indicate that amending rules shall be applicable to the pending selection. The said view has also been reiterated in *V.L. Gupta* (supra), wherein the Apex Court has observed that the seniority shall also have to be fixed according to the seniority rules which were applicable at the time of initiation of process for selection. The only exception to the said rule, as held by the Apex Court in *Dr. K. Ramalu* (supra) is that even where the vacancies arise when the unamended rule was in force, if the Government takes a conscious decision not to fill up any of the pending vacancies until the process for amendment of the rule is complete, which they had started on administrative grounds, those vacancies cannot be directed to be filled up in terms of the unamended rule, after the rules are amended.

11. In the instant case it is not the case of the Respondents that after the initiation of the process for selection by direct recruitment, when the unamended 1960 Rules were in operation, the Government took a conscious decision not to fill up those posts till the rule is amended. Nothing has been placed before this Court to show, that the Government ever at any point of time even intimated the APSC not to proceed with the selection process till such amendment, as contemplated, is made. Therefore, the decision in *Dr. K. Ramalu* case, on which the, learned Single Judge has placed reliance, is not applicable in the facts and circumstances of the instant case. In view of the facts narrated above, the principle of law laid down in *N.T. Bevin Katti*, *Y.V. Rangaiah* as well as *V.L. Gupta* are applicable in the case in hand, and, hence, the unamended 1960 Rules will govern the recruitment. Consequently, the seniority of the direct recruits and promotees, who were appointed in the year 1986, shall have to be fixed in terms of such Rules.

12. Proviso to Rule 4, as stood prior to 1986 amendment, which is held to be applicable in the present case, provides for fixation of quota for recruitment from two sources, i.e., promotion and by direct recruitment, at 50 per cent each of the total number of vacancies to be filled in a year. Rule 19 which was in force even after the amendment made vide notification dated 21.7.1986 amending the proviso to Rule 4, provides that in case of recruitment in a year by promotion and direct recruitment, the promotees shall be senior to the direct recruits made in the same year. In the instant case, 45 officers including the present Appellants, were recruited directly in the month of October 1986, pursuant to the recommendation made by the APSC on 27.6.1986 and, therefore, by applying

the unamended provision of Rule 4 of 1960 Rules, equal number of promotees are to be promoted to ACS Class I and their seniority has to be fixed above the seniority of those 45 direct recruits by operation of Rule 19 of 1960 Rules. The contention of the learned State counsel, that all the 129 promotees are to be placed above 45 direct recruits, made in the year 1986, in the seniority list, by virtue of Rule 19 of the Rules, cannot be accepted in view of the quota fixed for recruitment from both the sources under proviso to Rule 4, which has to be read with Rule 19 for the purpose of fixation of seniority. It is not the case of the Respondents that quota rule has completely been broken down and, therefore, the rota rule for the purpose of fixation of seniority will not be applicable. Admittedly the recruitment from both the sources were made in the year 1986 and, therefore, 45 promotees who were promoted to ACS Class I in the year 1986 will be senior to 45 direct recruits, including the Appellants, who were directly recruited in the month of October 1986, i.e., in the same, year, as the "year" has been defined as "calendar year" in Rule 3(i) of 1960 Rules. The stand of the State Respondents that entire batch of 129 promotees will be senior to 45 direct recruits made in the year 1986 is contrary to the 1960 Rules and cannot be held to be legal and valid.

13. It has been contended by the learned State counsel that since the final gradation list is yet to be published, the writ petition is premature. The said contention also cannot be accepted at this stage, as the same was not raised before the learned Single Judge and as it has been decided by the learned Single Judge that the Appellants position in the seniority list would be after those 129 promotees pertaining to year 1986, as well as in view of the specific stand of the learned State counsel before this Court that those promotees are senior to 45 direct recruits, by virtue of Rule 19 of 1960 Rules. Moreover the provisional gradation list though was published in the year 1993 has not been finalized till date and on the other hand the State Respondents have acted on such provisional gradation list for all purposes, without finalizing the same.

14. In view of the aforesaid discussions we have no alternative but to set aside the judgment and order dated 26.3.2002 passed by the learned Single Judge and direct the State Respondents to fix the seniority of all 45 direct recruits including the Appellants, made in the year 1986 just below the first 45 promotees, promoted to ACS Class I service on 11.9.1986.

15. The appeal as well as the writ petition filed by the present Appellants are accordingly allowed to the extent indicated above. No costs.