
(2001) 09 GAU CK 0022

In the Gauhati High Court

Case No : Writ Petition (C) No's. 4303 of 2000 and 3677, 4299, 4324, 4327 and 4354 of 2001

Govinda Sarmah and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 28-09-2001

Acts Referred:

Assam Secretariat Subordinate Service Rules, 1963 — Rule 11, 18, 2, 2(1), 29
Assam Subordinate Excise Service Rules, 1961 — Rule 27
Constitution of India, 1950 — Article 226

Citation : (2001) 3 GLT 112

Hon'ble Judges : P.G. Agarwal, J

Bench : Single Bench

Advocate : P.K. Goswami, S. Sarma, A.N. Choudhury, R. Islam, R. De, J. Deka, M. Bhuyan, B.K. Sharma, U.K. Nair, M. Choudhury and D.K. Sarmah, for the Appellant; A.K. Phukan, A.G., B.J. Talukdar and N.C. Phukan, A.G.A., for the Respondent

Judgement

P.G. Agarwal, J.—All the above six writ petitions have been heard analogously and disposed of by this common judgment. The learned Counsel for both sides submitted that the matter/issue involved is identical.

2. Heard learned Counsel for both sides.

3. The case of the writ Petitioners in W.P.(C) No. 3677/2001; W.P.(C) No. 4324/2001; W.P.(C) No. 4299/2001; W.P.(C) No. 4303/2001 is that as many as 67 persons were appointed as Lower Division Assistant on ad-hoc basis in the Assam Secretariat (Civil) vide order No. S(E)70/2001/3 dated 30.3.2001 and separate orders of appointment were issued to the individuals. It is submitted that appointments were made in consideration of the applications submitted by the Petitioners and appointments were cleared by the State Level Empowered Committee hereinafter referred as Committee. It is further submitted that the appointment of the Petitioners were made by relaxation of the rules as per the decision of the cabinet. Thereafter, Petitioners submitted their joining report of

different date, but they were obstructed from doing so by the members of the Assam Secretariat Service Association. A representation was filed by the said Association, but suddenly on 19.5.2001, the Respondent State issued the following letter, which reads as follows:

Whereas appointment - Orders were issued to 67 persons as per list enclosed as Lower Division Assistants on ad-hoc basis in the Assam Secretariate(c) vide order No. S(E)70/2001/3 dated 30.3.2001.

Whereas an appointment order was issued on ad-hoc basis vide order No. S(E)70/2001/4 dated 30.3.2001 to a person as Loka-Kanya (Junior).

Whereas it appears that all the above appointments were made in gross violation of the provisions of the Assam Sectt. Subordinate Service Rules, 1963 as under the rules, the Chief Secretary is the Appointing Authority of the Lower Division Assistants whereas the appointment-orders were made by the Commissioner & Sectt. Admn, Department without the knowledge of the Chief Secretary;

Also relaxation of the rules for appointment is illegal.

In the above circumstances, the appointments of 67 Lower Division Assistants and one Loka Kanya (Junior) made vide orders quoted above are hereby cancelled.

Sd/- P.K. Bora, Chief Secretary to the Govt. of Assam.

4. The Petitioners in the above writ petitions have challenged the cancellation of the appointments mainly on the ground that no opportunity of hearing was given to them before passing the impugned order of cancellation, and, therefore, violative of the principle of natural justice. Moreover, the Chief Secretary to the Govt. of Assam had no power and jurisdiction to override the decision of the Cabinet which had approved appointments of the Petitioners.

5. W.P.(C)No. 4354/2001 and W.P.(C) No. 4327/2001 relates to appointment of 56 Excise Constables vide different notification dated 21.3.2001 and 27.3.2001. The said appointments were cancelled vide Govt. Notification dated 29th May, 2001. The Petitioners in the above two writ petitions have also challenged the above order of cancellation on the similar/identical grounds. The case of the Respondents is that the appointment were made in violation of rules, regulations governing such appointments and no approval of the committee was taken as required. There was no selection process and the entire process was found to be illegal. Moreover, none of the Petitioners had joined the service in view of the ban imposed by the Election Commission of India and during this period, the services were terminated by the Respondent state.

6. In these cases, there was no dispute at the bar that the order of appointments were issued in respect of LDA by the Commissioner & Secretary to the Govt. of Assam, Secretariat Admn: Estt, Department dated 30th March, 2001. The order of appointments of Excise Constable was issued by the Commissioner and

Secretary to the Govt. of Assam, Excise Department. In the appointment letters itself it is stated that the approval of SLEC has been obtained, but Respondents have filed their affidavit to that effect that the matter never referred to the SLEC and as such, no approval of SLEC was obtained. Sri Goswami, learned Counsel for the Petitioners has submitted that the approval of the SLEC is immaterial, as because, appointment orders were approved by the Cabinet, which is a superior body than SLEC. The proceeding of the SLEC has not been produced although sufficient opportunity was given to the State. Although there is dispute between the parties as regards approval and non-approval of the appointment of SLEC, the same is not material for deciding the issue before us. The order of appointment has been challenged on other ground also.

7. Sri Goswami, learned senior counsel has drawn attention of this Court to the following statement of the Respondent- State in their affidavit-in-opposition.

In this regard it is further stated that as seen from the records made available, the State Govt. had taken a policy decision for recruitment of people who have assisted the Govt. in tackling the problem of militancy and extremism. On this basis, appointments were given to fill up 133 Nos. of posts which included 67 posts of Lower Division Assistants and one Lok-Kanya (Jr) post. Expost facto approval was given by the Cabinet on 16.4.2001 to these appointments made till 31.3.2001 only relaxing the existing rules. But it is stated that as the rules do not provide for such relaxation by the Cabinet, the ex-post facto approval granted by the Cabinet was not backed by law. Accordingly, the appointments made were in clear violation of Rule - 2, 8 and Schedule II of the Assam Sectt. Subordinate Service Rules, 1963 and the cancellation order No. S(E)70/2001/30 dated 19.5.2001 issued by the Chief Secretary is not an arbitrary in nature.

8. Under Rule 2(1) of the Assam Sectt. Subordinate Service Rules, 1963 for short "rules", the Chief Secretary is the appointing authority in respect of the Lower Division Assistant to be appointed in the Secretariat establishment. Admittedly, appointment letters were not issued by the Chief Secretary, but by the Commissioner and Secretary who was not the competent authority under the rules. Sri Goswami however submits that the appointments were made pursuant to a policy decision of the Cabinet, and as such, the order of appointment could have been cancelled by the subsequent policy decision of the same Government or the succeeding Government, but the Chief Secretary cannot sit over the Cabinet decision and as such, the order of cancellation of the appointment is per se bad/illegal.

9. As regards the appointment of LDA, the Rule 8 of the Assam Secretariat Subordinate Service Rules, 1963 stated as follows:

Lower Division Assistant - Appointment to the post of Lower Division Assistant shall be made:

(1) By direct recruitment on the basis of a competitive examination.

(2) By selection from among the typists of the Secretariat who are matriculates or passed the equivalent examination and have rendered at least 4 years of continuous service on the first day of the year in which selection is to be made.

(3) By selection from among the Grade-IV Staff and Record Suppliers of the Secretariat who have pass the Matriculation Examination or the High School Leaving Certificate Examination or the Higher Secondary or equivalent examination and have rendered at least 7 years of continuous service in the Secretariat on the first day of the year in which selection is made.

10. Rule 11 lays down the procedure for selection providing that a Selection Committee is to be constituted for the purpose and Rule 18 provides for the condition of eligibility. Likewise Rule 7 as quoted below lays down the procedure for recruitment to the Cadre of Excise Constables.

Recruitment to the cadre of Excise Constable of the Service shall be made by the following procedure:

(1) All persons in the cadre of Excise Constable shall be directly recruited,

(2) Appointments in the cadre of Constable at the district level shall be made by the Superintendent of Excise of the district where there is no Superintendent of Excise, except the Constables of Excise-Intelligence Branch, the appointments shall be made by the Deputy Commissioner of Excise, Assam.

(3) The Appointing Authority shall make an annual assessment of the requirement of the district or Excise Intelligence Branch and call for applications in prescribed form. The Appointing Authority shall call the eligible candidates for interview and prepare list of suitable candidates for appointment. The list so prepared shall form the select list.

(4) The select list shall remain valid for 12 months from the date of approval of the list and the Appointing Authority shall appoint from the select list in order of merit.

(5) The Commissioner of Excise, Assam, being the head of the department shall be entitled for inter-district transfer of Excise Constables.

11. Thus, we find that neither the appointment of LDA nor the. appointment of Excise Constables were made by the competent authority. There was no selection. Some application forms were collected and at the sweet-will of the concerned authority, appointment letters were issued in compliance of the policy decision as quoted above. Learned Advocate General, Assam has submitted that there was no linkage between the illegal appointments and the policy decisions. The policy decision may be laudable but the action taken should be for furtherance of the said policy decision. Further, the appointments must comply with the requirements of statutory rules. No appointment can be made de horse the rules. Shri Goswami, learned Counsel for the Appellant has placed reliance on the observation of the Apex Court in the case of Sandeep Kumar Sharma Vs.

State of Punjab and others, The Apex Court held that showing of special consideration in appointment to relatives of those police men who have either suffered due to terrorism or have faced terrorism boldly and have contributed towards overcoming it is permissible. The facts of Sandeep Kumar Sarma were however different in the sense that the Petitioner in that case appeared in the written test and also in the viva voce. However, as he did not fulfil the requirement of physical standard, the Govt. relaxed the Rule so far it related to physical standard. The undisputed facts in the present case are that all the appointment orders in respect of LDA were issued on 30th March, 2001 and the appointment letters in respect of Excise Constables were issued on 21st March, 2001. So far the appointment of Lok Kanya (Junior) is concerned, it is submitted that the said appointment was made against a nonexistent post. There was no selection test as required under the Rules. According to the Petitioners, the said appointments were made in relaxation of the rules. Rule 29 of the Assam Secretariat Subordinate Service Rules, 1963 reads as follows:

Power of Government to dispense with or relax any rule. - Where the appointing authority is satisfied that the operation of any of these rules would cause undue hardship in any particular case, he may dispense with or relax the requirement of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner:

Provided that the case of any person shall not be dealt with in any manner less favourable to him than that provided in any of these rules.

The wordings of Rule 27 of the Assam Subordinate Excise Rules are identical.

12. Admittedly, the rules were not relaxed before the order of appointments were issued. As a matter of fact, there is nothing on record to show that particular provisions of the rules were relaxed. However, a Cabinet decision was taken on 16.4.2001, whereby in the matter of special recruitment to different Grade- III and Grade-IV post under the Govt. the Cabinet agreed to give ex-post facto approval to the appointment made, till 31.3.2000 only. The question that arises for determination is whether such ex-post facto approval is sufficient to wipe out illegality in the matter of appointment. The Cabinet no doubt, have the power to relax the Rules in certain circumstances in furtherance of public policy. But this is not a case of relaxation of one or two rules. The entire appointments were dehors the rules, as a matter of fact, the Petitioners were picked up by some unseen hands and offered with the appointment and in order to justify the same, the Govt. took shelter under the hallowed objective. There is nothing on record to show that the appointees were the only persons who helped the Govt. in combating terrorism or that there were other persons whose cases were considered and found not suitable.

13. The time of the appointment is also relevant. The appointments were made just on the eve of the General Election to the Assembly, as a result of which, in spite of the order of appointments, the Petitioners could not join their duties in

view of the ban imposed by the Election Commission of India. After the expiry of the ban, when the Petitioners went to join their duties they were served with the order of cancellation of appointment. In the case of Ashwani Kumar and Others Vs. State of Bihar and Others, the Apex Court held that where the appointments have been made illegally and arbitrarily without recognizing the recruitment procedure and were highly arbitrary, the same are not binding on the State. The decision in Aswini Kumar (supra) was relied on in a recent case of Income Tax Officer Vs. Gita Rani Banik, The Court approved the termination of service of the Asstt. Teachers of the Primary Schools, who were appointed indiscriminately without following the statutory rules. I, therefore, hold that ex-post facto approval of the Cabinet does not render these appointments, made contrary to all recognised recruitment procedures and statutory rules, legal or binding on the State.

14. The next submission on behalf of the Petitioners is that the termination of appointment is bad in law, as it has been made without following the principles of natural justice. It is submitted that the Petitioners were entitled to show cause. The question of following the principles of natural justice before cancellation of the appointment letters was considered by this Court in the case of State of Assam v. Margherita Mahakuma Prathamik Brittidhari Shikshak Sanmelani 1996(2) GLJ 376 : 1997(1) GLT 167 wherein this Court observed:

We are, however, of the opinion that if a statute provides that selection can be made only in a particular manner in the eyes of law the selection can only be recognised if any semblance of selection process has started under that statutory provisions. However, if a Court of law comes to the conclusion that there has been no exercise under the statutory rules and in violation of the statutory rules, only for the purpose of making personal gain some orders have been fictitiously issued by the authority as in the present case, the Court is not bound to interfere in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution on the grounds of principles of natural justice. The law is well established that while exercising the powers under Article 226 of the Constitution where the Court exercises its extra ordinary jurisdiction, the Court may not even interfere with a void order. However, in the present case, as we have stated the facts are very shocking for against thirty one posts, 368 appointments have been made. There is not even a semblance of the process of selection which had to be followed under statutory Rule 3 of the Rules, 1977 and as has been observed above, there has been a drain on the State Exchequer by making appointments in this indiscriminate manner after flouting the statutory Rules, 1977. In this situation, we are of the opinion that the principles laid down by the Apex Court in the case of Union Territory of Chandigarh v. Dilbagh Singh and Ors. (supra) will equally apply to the present case under appeal and this Court's extra-ordinary jurisdiction under Article 226 of the Constitution is not to be exercised in favour of such Petitioners.

15. In this case admittedly no notices were issued to the Petitioners before

terminating/cancelling their letters of appointment. As stated above, letters of appointments were not acted upon in the sense that the Petitioners were not allowed to join their services firstly, due to the ban imposed by the Election Commission of India and secondly, due to the opposition of the Assam Secretariat Service Employees Association. Learned Govt. Advocate has further submitted that the non-compliance of the precept of natural justice does not render the impugned order of cancellation bad or that no interference in this case is called for. It is therefore submitted that even if there is breach of the rules of natural justice, the Court may refuse the reliefs.

16. In the case of M.C. Mehta Vs. Union of India (UOI) and Others, the Apex Court considered the development of the rules of natural justice and observed:

It is, therefore, clear that if on the admitted or indisputable facts only one conclusion is possible and permissible, the Court need not issue a writ merely because there is violation of the principles of natural justice.

17. The Apex Court had the occasion to consider the gamut of the principles of natural justice again in the case of Aligarh Muslim University and Others Vs. Mansoor Ali Khan,

As pointed recently in M.C. Mehta v. Union of India there can be certain situation in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of Anr. order which is in itself illegal as in Gadde Venkateswara Rao v. Govt. of A.P., it is not necessary to quash the order merely because of violation of principles of natural justice.

In M.C. Mehta it was pointed out that at one time, it was held in Ridge v. Baldwin that breach of principles of natural justice was in itself treated as prejudice and that no other "de facto" prejudice needed to be proved. But, since then the rigour of the rule has been relaxed not only in England but also in our country. In S.L. Kapoor v. Jagmohan Chinnappa Reddy, J. followed Ridge v. Baldwin and set aside the order of suppression of the New Delhi Metropolitan Committee rejecting the argument that there was no prejudice though notice was not given. The proceedings were quashed on the ground of violation of principles of justice. But even in that case certain exceptions were laid down to which we shall presently refer.

18. Learned Advocate General has also submitted that the issuance of notice following the principles of natural justice would be a useless formality in the present case. Firstly, because the appointments were approved by the erstwhile Cabinet Committee till 31.3.2001. Till that date the Petitioner could not join their duties. In the meantime, the Cabinet has taken Anr. resolution on 21.5.2001, whereby the cancellation of the appointment was approved. Thus no useful purpose would be served by issuing notices as the appointments are already

cancelled by the Cabinet and that there is no extension beyond 31.3.2001.

19. In the case of M.C. Mehta (supra) the Apex Court refused to express any opinion on the correctness of otherwise of the "useless formality" theory and left the matter for decision in an appropriate case. The question again cropped up in Aligarh Muslim University (supra) but the Court merely recorded the divergent views expressed in regard to this theory without making its mind.

20. Hence, without entering into the useless formality theory, relying on the S.L. Kapoor Vs. Jagmohan and Others, it is held that the non-issuance of notice in the present case is not material. In view of the foregoing discussion and admitted/ undisputable facts no interference is called for in the matter of termination/ cancellation of the appointment orders.

21. In the result, the writ petitions stand dismissed. No order as to costs.