
(2006) 04 GAU CK 0077
In the Gauhati High Court

Hugie Zeliang and Another

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 12-04-2006

Acts Referred:

Citation : (2009) 6 GLR 605 : (2006) 4 GLT 143

Hon'ble Judges : M.B.K. Singh, J;I.A. Ansari, J

Bench : Division Bench

Judgement

I.A. Ansari, J.—The appellant Nos. 1 and 2 herein were, initially, appointed, on 9.3.1982 and 4.12.1982, respectively, in the scale of pay of Rs. 260,425, as Computer, in the Directorate of Evaluation, which falls under the Department of Planning and Coordination, Government of Nagaland. While the appellant No. 1 was promoted to the post of Evaluation Inspector/Investigator (Class-II Gazetted) on 5.12.1987, in the scale of pay of Rs. 640,1445, the appellant No. 2 was promoted to the post of Evaluation Inspector/Investigator on 3.7.1987, with effect from 22.6.1987, in the same scale of pay as mentioned hereinbefore. By Notification, dated 27.6.1993, the appellant No. 2 was promoted to the post of Evaluation Officer ("EO") in the scale of pay of Rs. 1,800-3,700 and has continued in the same capacity till date; whereas the appellant No. 2 was promoted, vide Notification, dated 10.6.1994, to the post of EO (Class-II Gazetted), on officiating basis, in the scale of pay as indicated hereinbefore and has continued till date.

2. The private respondent Nos. 3 and 5, both of whom were Inspector of Statistics (Class-III Non-Gazetted), which fall under the Directorate of Economics and Statistics, came to be appointed as EO, on 31.10.1986, on deputation, for a period of 2 (two) years in the scale of pay of Rs. 930-2080. The private respondent Nos. 4 and 6, who were Assistant Teachers, came to be appointed as EO, on deputation, on 3.11.1986 and 2.12.1981 respectively.

3. By the impugned Notification, dated 19.12.2002, when the private respondents 3, 4, 5 and 6 were permanently absorbed in the Directorate of

Evaluation, with effect from their respective dates of joining the post of E.O. on deputation, the appellants, feeling aggrieved by the absorption of the private respondents with retrospective effect, came to this Court with a writ application, which gave rise to WP(C) No. 12(K)/03. and sought for, inter alia setting aside and quashing of the impugned Notification, dated 19.12.2002, aforesaid, their case being that they were appointed, in the Directorate of Evaluation, as computer and, thereafter, they were promoted, in course of time, to the posts of EO, but by absorbing the private respondents in the post of EO, with retrospective effect, the private respondents were made senior to the appellants.

4. In support of their case, the appellants, as petitioners in the writ petition, placed reliance on two Office memoranda, dated 12.8.1975 and 13.9.1986, and contended that in the light of the requirements of the office memoranda aforementioned, the private respondents could not have been legally absorbed with retrospective effect inasmuch as the office memoranda aforementioned made it clear that the absorption, on deputation, was not to be, generally, adhered to, and even if a deputationist was to be absorbed, the absorption must not be done without consultation with, and without obtaining clearance from, the Nagaland Public Service Commission ("NPSC") or the Departmental Promotion Committee (in short, "DPC"), and even when a deputationist was decided to be absorbed, his absorption would be effective from the date on which the decision to absorb the deputationist was taken and not with retrospective effect. It was also contended by the petitioners/appellants that the cabinet decision, arrived at on 23.10.2002, approving the proposal for absorption of the private respondents as EO with retrospective effect, was in violation of the two office memoranda aforementioned.

5. The writ petition was resisted by the State as well as the private respondents, their case being, in brief, thus: The Directorate of Evaluation was bifurcated from the Directorate of Planning and Coordination on 11.12.1968 and, to the new Directorate so created, officers from Planning and also other Departments of the Government of Nagaland were brought, on deputation, to man the newly created Directorate of Evaluation. The private respondents too were brought into the Directorate of Evaluation between the year 1981-87 and after they were so brought on deputation, the periods of deputation of the private respondents kept on being extended from time to time inasmuch as their services were found necessary by the Directorate of Evaluation. In course of time, the private respondents ceased to have lien in their parent Departments. The private respondents did not receive any deputation allowance, which is indicative of the fact that they were regular appointees in the Department of Evaluation for many years. The process to absorb the private respondents had commenced, sometime, in the year 1987-88, but the same, eventually, ended with the cabinet decision, which was arrived at, on 18.12.2002, in terms of the cabinet memorandum, dated 23.10.2002, the cabinet decision being to approve the proposal for absorption of the private respondents with retrospective effect.

6. By the impugned judgment and order, dated 6.4.2004, passed in WP(C) No. 12(K)/03, the learned single Judge dismissed the writ petition on the ground that since the private respondents had been serving for about 15 years in the Directorate of Evaluation, their lien in their parent Department had ceased to exist and the office memoranda, dated 12.8.1975 and 13.9.1986, aforementioned were merely guidelines for general observation, the cabinet was competent to take policy decision to absorb the private respondents with retrospective effect, particularly, when the private respondents could not have been sent back to their parent Departments and that the order of absorption, with retrospective effect, merely settled what already existed. Feeling aggrieved by the decision so rendered, the writ petitioners are before us as appellants.

7. We have heard Mr. T. Koza, Learned Counsel for the appellants, and Mrs. Y. Longkumer, learned Government Advocate appearing on behalf of the respondents 1 and 2. We have also heard Mr. C.T. Jamir, Learned Counsel appearing on behalf of the private respondents 3 to 6.

8. While considering the present appeal, what needs to be carefully noted is that the fact that office memoranda, dated 12.8.1975 and 13.9.1986, existed at the time, when the cabinet decision to approve the absorption of the private respondents, with retrospective effect, was taken is not really in dispute. It is, therefore, necessary to take note of the contents of these two office memoranda in order to ascertain as to whether the absorption of the private respondents is in violation of the said two office memoranda and whether such violation is permissible in the facts and circumstances of the present case.

9. In view of the above, we reproduce herein below the office memoranda, dated 12.8.1975 and 13.9.1986, aforementioned:

GOVERNMENT OF NAGALAND HOME DEPARTMENT ADMINISTRATION REFORMS
(O & M) BRANCH

No. AR-2/10/70 Dated Kohima, the 12th August. 1975 OFFICE MEMORANDUM

Subject: Seniority of the Employees who are on Deputation to another Department of the State Government are subsequently confirmed.

The Undersigned is directed to refer to this Department's Office memorandum No. 11/APA/2/65 dated the 27th January, 1967 and to say that a question has been raised whether an employee of the State Government who is appointed on deputation to another post/service in a different Department under the State Government and is subsequently confirmed in the deputation post will count his service for seniority from the date of confirmation in the deputation post or from the date of joining the post on deputation. It has been decided that in such cases services for seniority shall be counted from the date on which decision is taken to absorb the deputationist in the deputation post.

Sd/- I. Longkumer Secretary to the Government of Nagaland.

GOVERNMENT OF NAGALAND PERSONAL AND ADMINISTRATIVE REFORMS
DEPARTMENT (ADMINISTRATIVE REFORMS BRANCH)

No. AR-7.8.1986 Dated Kohima 13th September, 1986. OFFICE MEMORANDUM

Sub: Filling up of vacancies on Deputation - regular absorption of Deputationist

Instances have been brought to the notice of the Government that, often appointments on deputation basis to various posts are being made by the concerned appointing authorities without proper advertisement/circulation of the vacancy and the following the laid down procedure for selection of candidates. It has also been brought to the, notice of the Government that, while absorbing the deputationists in the Department on a regular basis, the Department do not consult/obtain clearance of the NPSC/DPC as it required. This in effect amounts to, circumventing/contravening the provisions of the rules and orders in force.

After careful consideration of the matter and with a view to enforce uniform procedure in the matter, it has now been decided that henceforth, appointment on deputation basis, when considered necessary and justified, shall be made only after duo advertisement/circulation of the vacancy asking for applications, in selection of the candidate by the selection Board.

Similarly in case of regular absorption of the deputationist in the Departments the concerned appointing authority should obtain the prior clearance of the NPSC in case of the post coming under the purview of NPSC under the NPSC (LF) regulation, in the prior clearance of the DPC in other cases which do not come within the purview of NPSC.

These instruction may be strictly be adhered to.

Sd/- T.P. Imchen Additional Secy. To the Government of Nagaland.

10. From a careful reading of the Office Memorandum, dated 12.8.1975, what becomes transparent is that when a deputationist, such as, the private respondents, are, subsequently, decided to be absorbed, their seniority in the service of the borrowed Department would not be counted from the date on which they were brought, on deputation, to the borrowed Department, but from the date on which the decision to absorb the deputationist is taken. In the light of the conditions subject to which absorption, on deputation, is permitted by the Office Memorandum, dated 12.8.1975, there can be no escape from the conclusion that in terms of this Office Memorandum, the private respondents could not have been absorbed as EO with effect from their respective date of appointment on deputation. They could have, at best, be absorbed with effect from the date on which the decision to absorb them was taken. In the case at hand, the decision to absorb the private respondents was, admittedly, taken by the cabinet on 18.12.2002. Therefore, in the light of the requirements of the Office Memorandum, dated 12.8.1975, aforementioned, the absorption of the private respondents, even if valid, could not have been given effect to from their respective dates of appointment, on deputation, to the posts of Evaluation Officer

in the Directorate of Evaluation. Such absorption could have, at best, been with effect from 18.12.2002, i.e., date on which the cabinet decided to absorb the private respondents.

11. Coupled with the above, what also cannot be ignored is that the office memorandum, dated 13.9.1986, aforementioned made it clear that even if a deputationist was required to be absorbed on regular basis, it was not possible to do so without consulting or obtaining clearance from the NPSC or DPC, as the case may require. In the case at hand, there was, admittedly, no consultation with the NPSC nor was there any DPC held for considering the question of absorption of the private respondents. In the face of the contents of the Office Memorandum, dated 13.9.1986, aforementioned, it is clear that the very absorption of the private respondents is contrary to the requirements of the Office Memorandum, dated 13.9.1986, aforementioned.

12. What emerges from a combined reading of the Office Memoranda, dated 12.8.1975 and 13.9.1986, aforementioned is that unless, otherwise, permitted by law, the absorption of the private respondents, in the cadre of Evaluation Officer, in the Directorate of Evaluation, being in violation of the Government's own instructions, issued on 13.9.1986, is invalid and even if their absorption were not interfered with, their absorption could have, at best, been made effective from 18.12.2002 i.e., the date on which the cabinet decided to absorb the private respondents. The learned Single Judge has expressed the opinion that since there was no service rules in existence and the office memoranda, dated 12.8.1975 and 13.9.1986, were mere guidelines, the cabinet was free to take a policy decision and since the cabinet has taken the decision to absorb the private respondents with retrospective effect, the decision is valid. Can the conclusion so drawn by the learned single Judge be sustained is the question, which is raised in this appeal.

13. While considering the above aspect of the matter, what needs to be noted is that the Cabinet decision reads, "Absorption of deputationist service in respect of 5(five) District Evaluation Officer in the Evaluation Department. Approved as proposed."

14. We have carefully read and re-read the Cabinet Memorandum, dated 23.10.2002, which has been approved by the cabinet on 18.12.2002 and what we note is that this Cabinet Memorandum, nowhere, indicated to the cabinet that office Memorandum, dated 13.9.1986, aforementioned existed prohibiting absorption, on deputation, without consultation with, or clearance from, the NPSC or the DPC, as the case may be, and that even when one is decided to be absorbed on deputation, the absorption cannot be with retrospective effect but, at best, with effect from the date on which the cabinet decides to absorb the deputationist.

15. From the facts, as noticed above, it is more than abundantly clear that the Cabinet decision suffers from complete non-application of mind to the factors,

which were relevant for consideration, and cannot, but be held to be arbitrary. The office memoranda, dated 12.8.1975 and 13.9.1986, aforementioned are essentially executive instructions issued by the Government under Article 162 and, in the absence of Recruitment Rules, these instructions govern the field. If these instructions are to be superseded, the Government has to take a conscious decision after applying its mind to the existing relevant Government instructions. In the case at hand, there was absolutely no application of mind to the factors, which were relevant for the purpose. When a decision-making process suffers from non-consideration of the relevant factors, the decision-making process cannot be upheld and the decision reached, as a result of such an exercise, cannot be sustained. When an executive authority takes a decision by taking into consideration any irrelevant factor or by keeping excluded from its consideration a relevant factor, the decision, arrived at, in either case, would be nothing, but arbitrary. In the case at hand, the Government has not, admittedly, taken into account the relevant factors, namely, the existence and effect of the existence of the two Office Memoranda aforementioned. In such a case, one cannot help, but observe that the cabinet decision, dated 18.12.2002, is arbitrary.

16. Let us, now, examine if the Government, while arriving at its decision to absorb the private respondents with retrospective effect, took into account any irrelevant factor. We note, as already noticed by the learned single Judge, that the private respondents had been working as deputationist for periods ranging from 11 to 16 years and their lien in their parent departments had ceased. Can these two conditions be regarded as factors, which were relevant for the decision to accord seniority, with retrospective effect, to the private respondents?

17. While considering the above aspect of the case, what is pertinent to point out is that the private respondent No. 6 was brought, on deputation, as Evaluation Officer on 2.12.1981 and the private respondents 3, 4 and 5 were brought, on deputation, as Evaluation Officer on 31.10.1986, 3.11.1986 and 9.4.1986, respectively. All these persons were, thus, brought on deputation, when the Office Memorandum, dated 12.8.1975, aforementioned already existed. These private respondents, therefore, at the time, when they had come as Evaluation Officer, on deputation, to the Directorate of Evaluation, knew that if they were ever absorbed, their absorption would not be retrospective, but prospective. Thus, the private respondents, knowingly that they would not, and cannot, be absorbed with retrospective effect, continued to remain on deputation. There is neither any pleading nor any material on record to indicate that the private respondents were, by force or against their will, retained on deputation. Knowing full well that they would not be absorbed with retrospective effect, when the private respondents chose to continue and remain, on deputation, without bothering to go back to their parent Departments, they cannot, now, plead that they be absorbed with retrospective effect, because their lien in their parent Departments no longer survive. The private respondents are responsible for the situation in which they have placed themselves.

18. Coupled with the above, the private respondents cannot be said to have been placed in any disadvantageous position, for, the private respondent Nos. 4 and 6 were mere Assistant Teachers with scale of pay of Rs. 275-475 and the private respondents 3 and 5 were Inspectors of Statistics with scale of pay of Rs. 930-2,080. Thus, the private respondents, on the date of coming, on deputation, to the borrowed Department were non-Gazetted Officers. In fact, the private respondent Nos. 4 and 6, being Assistant Teachers, were not even Officers. However the private respondents joined the posts of Evaluation Officer, which is a Gazetted post, in the scale of pay of Rs. 1,800-3,700. It is, thus, clear that even the scales of pay of the posts, which the private respondents had held before they came on deputation, were much lower than what the pay scale of the Gazetted post of EO carries.

19. Hence, the private respondents, who have been brought, on higher grade, on deputation, could not have been absorb 3d to the detriment of the persons already serving, on being directly recruited, the Directorate of Evaluation and made thereby senior to the direct appointees in the Directorate of Evaluation. The private respondents, knowingly and willingly, allowed their lien to be snapped and they cannot be allowed to be beneficiaries of the wrong, which these private respondent and the Government have committed by arbitrarily ignoring the Government's own instructions on the subject. Hence, the fact that the private respondents have been serving the Directorate of Evaluation for long periods, ranging from 11 to 16 years, are, in the facts and attending circumstances of the present case, wholly irrelevant. Since this irrelevant factor formed the basis of the decision, which the cabinet arrived at on 18.12.2002, the cabinet decision cannot survive, for, this decision was nothing, but arbitrary.

20. When the Government has issued instructions in exercise of its power under Article 162, it cannot arbitrarily ignore its own instructions and absorb the deputationists in violation of its own instruction, on consideration of factors, which were not relevant. If we allow the absorption of the private respondents to survive, it would be tantamount to putting seal of approval on the illegality, which the Government has committed. When a Government employee holds a deputation post, which is of the same or of equivalent grade in his parent Department, the service rendered by such an employee, in his parent Department, in the light of the decision rendered by the Apex Court in S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others, may be counted for the purpose of fixing his seniority, while absorbing him in the borrowed Department. However, in the absence of any rule, framed under Article 309, when a person has been brought, on deputation, to a grade, which is higher than the post, which the deputationist held in his parent Department, it is impermissible to give him the benefit of the past services in the parent or borrowed Department, while absorbing him on regular basis in a higher grade, particularly, when the executive instructions, issued under Article 162, in this regard, point to the contrary.

21. It is also worth noticing that the cabinet Memorandum, dated 23.10.2002, aforementioned merely proposed absorption on regular basis with retrospective effect. This cabinet Memorandum, nowhere, clarified as to what was the meaning of the words "retrospective effect". The proposal conveyed by the cabinet Memorandum to the cabinet was, thus, wholly vague. This cabinet Memorandum cannot be said to have suggested that the private respondents be absorbed with effect from their respective dates of appointment on deputation to the posts of EO in the Directorate of Evaluation. This is yet another circumstance, which indicates complete non-application of mind by those, who had framed the cabinet Memorandum; hence, the cabinet decision, which is based on such a cabinet Memorandum as aforementioned, can be safely said to suffer from the same vice with which suffered the Cabinet Memorandum aforementioned.

22. In short, when the private respondents came on deputation, they knew that in terms of the Office Memorandum, dated 12.8.1975, aforementioned, they would not be absorbed with retrospective effect and though they were borrowed, on deputation, for barely 2 (two) years, they continued without bothering to go back to their parent Departments and in consequence thereof, their lien in their parent Departments ceased. This happened, because the private respondents, knowing fully well that they would not be absorbed with retrospective effect, continued, on their own volition, to remain, on deputation, in the borrowed Department. The learned single Judge has observed, in the impugned judgment and order, that the cabinet considered all aspects of the matter. However, we are constrained, to observe, for the reasons discussed above, that the conclusion, so reached by the learned Single Judge, is factually incorrect and not borne by materials on record. The learned single Judge has also observed that the office memoranda, dated 12.8.1975 and 13.9.1986, are mere guidelines. This also, in our firm view, is not correct. These two office memoranda were instructions issued by the Government under Article 162 and they, being policy decisions, ought to have been, ordinarily, adhered to, and the same ought not to have been ignored except for good and sufficient reasons. In this regard, however, no convincing and plausible reason could be offered by the respondents.

23. The learned single judge has also observed that the decision reached by the cabinet cannot be said to be against the two office memoranda. This conclusion too, as already indicated hereinbefore, is not correct.

24. The learned single judge has further observed that the private respondents cannot be sent back. If the private respondents cannot be sent back to their parent Departments and the remedy lies in absorbing them, they can be absorbed, in terms of the office Memorandum, dated 12.8.1975, aforementioned, with effect from the date, when decision to absorb them was taken, particularly, when the private respondents knew all along that as per the relevant Government policy, they would not be absorbed with retrospective effect unless the policy is changed. Since there is no change in the Government policy, the Office memoranda, dated 12.8.1975 and 13.9.1986, aforementioned still survive.

25. Because of what has been discussed and pointed out above, we find it difficult to uphold the conclusions reached by the learned single Judge. We, therefore, set aside the impugned judgment and order, dated 6.4.2004. The impugned cabinet decision, dated 18.12.2002, as well as the impugned Notification, dated 19.12.2002, are hereby set aside and quashed. The Government is, however, given the liberty to absorb the private respondents, if so required, with effect from the date, when the decision to absorb them was taken on 18.12.2002.

26. With the above observations and directions, this appeal shall stand disposed of.

27. No order as to costs.