
(2008) 08 GAU CK 0063
In the Gauhati High Court

I. Ayangla Imchen

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 06-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Nagaland Higher Education Service Rules, 2003 — Rule 4, 8

Citation : (2009) 5 GLR 741 : (2008) 4 GLT 750

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Judgement

P.K. Musahary, J.—By this application under Article 226 of the Constitution of India, the petitioner challenges the validity of the order dated 1.9.2006 (Annexure-F to the writ petition) passed by the Principal Secretary, Government of Nagaland, Higher Education Department.

2. To state the brief facts; the petitioner was appointed as a Lecturer through Nagaland Public Service Commission ("NPSC") w.e.f. 9.12.1978 in the Department of Higher and Technical Education and was subsequently placed as a Selection Grade Lecturer w.e.f. 9.12.1994 vide an order No. EDS/THE/1-12/94 dated 31.8.1995 issued by the Commissioner and Secretary to the Government of Nagaland, Department of Higher and Technical Education. She was transferred and posted at Dimapur Government College. Thereafter, the petitioner was transferred and posted as Principal of Sao Chang College, Tuensang by a Government Notification dated 19.10.2001 but she declined the post and presently serving as senior Grade Lecturer at Dimapur Government College.

3. The petitioner, being the senior most selection Grade Lecturer applied for appointment to the post of Joint Director of Higher Education under the provision of Nagaland Higher Education Service Rules, 2003 ("Rules"). The name of the petitioner was recommended along with the names of other two Senior Grade Lecturer for the said post and a proposal/panel was sent by the Additional Director, Higher Education to the respondent, Commissioner and Secretary vide

letter No. HED/ADMN-APPTT/2005-06 dated 24.3.2006 (Annexure-E to the writ petition). The name of the private respondent No. 3, a Selection Grade Lecturer, was not recommended for the said post but she was transferred and posted as Joint Director of Higher Education against the vacant post vide impugned order No. EDS/THE/9-2/98 dated 1.9.2006.

4. Mr. Taka Masa, learned Counsel appearing for the petitioner submits that the respondent No. 3 is comparatively much junior in the cadre of selection Grade Lecturer and she does not come to the zone of consideration for the post of Joint Director and for that reason, her name was not included in the panel of eligible candidates sent by the Director to the Government. According to Mr. Taka Massa, the post of Joint Director of Higher Education is required to be filled up by selection from amongst the selection Grade Lecturer/Readers on the basis of merit cum seniority in accordance with Rule 8 read with Schedule II(3)(i) of the rules. The respondents-authorities did not consider the case of the petitioner and other candidates whose names found placed in the panel sent by the Additional Director as aforementioned and appointed/posted the respondent No. 3 de hors the rules in a pick and choose manner and as such submits Mr. Taka Massa, learned Counsel for the petitioner, that the impugned order dated 1.9.2006 posting the respondent No. 3 as Joint Director is illegal and liable to be quashed.

5. No counter affidavit has been filed by the State respondents and also by the private respondent No. 3. No records have also been produced by the respondents-authorities in this case.

6. Mr. B.N. Sarma, learned senior Counsel appearing for the State-respondents submits that no counter affidavit is required for disposal of this matter because there is no controversy on facts and the matter is required to be disposed for on the basis of provision under the existing Service Rules namely, Nagaland Higher Education Service Rules, 2003. Mr. Sarma, learned senior Counsel refers to Rule 4 which provides gradation of post under Nagaland Higher Education Service comprising of 5(five) grades. Rule 4(i)(c) provides for Selection Grade which consists of several posts namely Joint Director, Selection Grade Lecturer, Reader and Selection Grade Librarian. These posts carry the same scale of pay of Rs. 12,000-420-18,300 (UGC) as per Schedule I attached to the said rules. The post of Joint Director, according to Mr. Sarma, is not a promotional post as the post of Joint Director and the Selection Grade Lecturer/Reader belong to the same grade with equal status and pay scale. Drawing attention to the impugned order dated 1.9.2006, it is submitted that the State respondents simply transferred the private respondent No. 3 from Science College, Jotsoma and posted her in the Directorate of Higher Education against the vacant post of Joint Director without, any extra remuneration. The respondent-authorities are authorized/empowered by the existing rule to allow any person from the Selection Grade of the Nagaland Higher Education Service as Joint Director and as such the respondent No. 3 was transferred and posted as Joint Director for which no selection or promotion is required to be made. It is the prerogative/discretion of the

executive to transfer and post a public servant at any place in the interest of public service without affecting the status/rank, salary, etc. According to Mr. Sarma, the present writ petition is misconceived and the same is liable to be dismissed being devoid of any merit for interference with the impugned order.

7. Moreover, Mr. Sarma has drawn attention of this Court to a Government Notification No. EDS/THE/12-1-95 (Pt.) dated 21.2.2304 (which was not annexed to the writ petition but placed at the time of hearing only) in regard to tenure of posting of teaching faculty and other officers under Higher and Technical Education Department. This Notification under the sub-head posting in the Directorate provides as follows:

The posting in the Directorate of H&TE will be done by the government on the basis of merit and capability of the officers" and not in seniority. The normal tenure of posting in the Directorate shall be limited to 3 (three) years only, except in the case of Additional Director and Director.

8. In his reply Mr. Taka Masa, learned Counsel for the petitioner submits that the post of Joint Director may belong to same grade and may carry the same pay scale with the other posts including the Selection Grade Lecturer but the post of Joint Director is attached with higher status, responsibility, lucratively and considered as a priced post in the Selection Grade cadre being part of the administration in the Higher Education Department. For filling up of such an important post, the respondent authorities, according to Mr. Taka Masa, must resort to selection from amongst the Selection Grade Lecturer on the basis of merit and seniority to prevent the possible arbitrary, unfair and bias selection in the name of transfer and posting by the executive.

9. I have given due consideration to the submissions made by the learned Counsel for the petitioner and also respondent-authorities. It is correct that the rules do not shown that the post of Joint Director is a higher post to be filled up by promotion from Selection Grade Post like Selection Grade Lecturer/Reader/ Selection Grade Librarian but the Schedule-I of the rules contains a footnote which says that "all administrative posts such as Additional Director, Joint Director and Principals are to be manned by Selection Grade Lecturer/Readers who will be drawn from within the over all sanctioned strength of the post of Lecturers". From this it is evident that the post of Joint Director in the cadre of Selection Grade is one of the administrative posts in the Higher Education Department. This post, therefore, attaches higher status and responsibility then the other posts in the same grade. Such a post, in my considered opinion, cannot be filled up unless some fair selection is made by the Government, either through a Selection Board, DPC or NPSC although existing rules do not specifically provide for such selection in the matter of appointment or posting of a joint Director.

10. From the letter dated 24.3. 2006 (Annexure-E to the writ petition) issued by the Additional Director addressed to the Commissioner and Secretary, Higher

Education Department, it is found that the NPSC requested the Department of Higher Education to submit the proposal for filling up the resultant vacancy of Joint Director for consideration of the DPC and for compliance of the same, a panel of names of 3(three) senior most Selection Grade Lecturer namely Smt. I. Ayangla Imchen of Dimapur Government College, Smt. Pangerlemla of Fazl Ali College, Mokokchung and Smt. Imlinochela of Dimapur Government College was sent to Government with relevant particulars and ACRs. It is an admitted position that the name of the respondent No. 3 was not included in the said panel.

11. In the seniority list in respect of Lecturer (UGC Scale) of various Government Colleges as on 1.1.1987 as circulated by the Joint Secretary, Education Department (Annexure-C to the writ petition), the petitioner's name is placed at serial No. 33 showing her date of first joining in Government service on 9.12.1978 while the name of the respondent No. 3 is placed at serial No. 48 showing her date of first joining in Government service on 1.6.1982. The names of other empanelled candidates, Smt. Pangerlemla and Smt. Imlinochela also placed at serial Nos. 38 and 39 respectively in the said seniority list. The respondent No. 3 is admittedly junior to all the empanelled Selection Grade Lecturer. No reason has been shown by the respondent-authorities as to on what consideration a comparatively much junior Lecturer like the respondent No. 3 from the Selection Grade Lecturer has been posted as Joint Director without considering the case of senior Lecturers empanelled for the said purpose. No reason has been assigned why the process initiated by the Director of Higher Education has been abandoned after preparation of the said panel and picked up the respondent No. 3 in a haste. It is not the case of the government that the persons empanelled including the petitioner, are not fit to occupy the post of Joint Director. No attempt has been made by the State respondents before this Court to place any valid reason for ignoring the panel or for that matter the case of the petitioner as the senior most Selection Grade Lecturer and picking up the respondent No. 3. Is it not an act, of arbitrariness and unfairness? On careful perusal it is found that a copy of the impugned posting order has been endorsed to the PS to Chief Minister and the PS to Minister, Higher Education, Nagaland which speaks a lot about the possible political interference or undue influence and extraneous consideration in the matter of transfer and posting of respondent No. 3 as Joint Director, otherwise there is hardly any reason to intimate the Chief Minister and the Education Minister through their P3. The manner in which the impugned order was passed and issued shows the attitude of a colonial administration where the executive simply carries out the unfair discretionary, and arbitrary orders at the cost of fair play in action and rule of law.

12. The existing rules may not provide for selection in the matter of posting of Joint Director but can an unfair discretion by the executive be allowed to cause unjust denial of right to rather equally eligible Or senior members of the cadre/ grade who have been formally recommended by the Director of the concerned department just to satisfy the whims and caprice of the political elements in power taking advantage of the absence of guidelines and precedents. Time has

come to interfere with the exercise of unguided discretion and action of the executive in the matter of posting of Joint Director from the Selection Grade Lecturer and issue direction to frame guidelines in this respect to ensure fairness and justice to all.

13. The post of Joint Director is undoubtedly an administrative post with higher responsibilities and it is desirable that the most competent person from eligible members of the concerned cadre is selected on merit and seniority basis. The existing rule is silent about such selection but it does not mean that the State is debarred from making selection through a Selection Board or DPC. In absence of Statutory Rules, the executive is empowered to issue executive instruction. There are number of decisions of the Apex Court in this regard and it would be appropriate to refer to the case of Sant Ram Sharma Vs. State of Rajasthan and Another, , in which it is held that in absence of statutory rules regulating promotion to selection grade post, the government is competent to issue administrative instruction as long as those instructions are not inconsistent with the rules already framed. This principle of law was upheld by 5-Judge Bench of the Apex Court in the case of Lalit Mohan Deb and Others Vs. Union of India (UOI) and Others,

14. I am reminded of the well settled law that every State action; in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution of India and the basis to the rule of law, the system which governs us. Amongst the catena of decisions in this regard, I would refer to a decision rendered by 3-Judge Bench of the Apex Court in A.P. Aggarwal Vs. Govt. of N.C.T. of Delhi and Another, in which it is held that it is not open to the government to ignore the panel which was already approved and accepted by it and resort to a fresh selection process without giving any reason for resorting to the same. In the present case, the Director of . Higher Education prepared the panel, although not provided by the rules, for the purpose of selecting a suitable person from the selection Grade Cadre to fill up the post of Joint Director, which was quite in fairness and to avoid any evil that might arose from the unguided and unlimited discretion assumed by the state respondents. Then the said panel has been ignored and the respondent No. 3, a junior person was posted as Joint Director the evil of un fairness and arbitrariness has visited leading to unjust denial of right of the petitioner of being considered for posting to the said administrative post. It would lead me to hold that the impugned order dated 1.9.2006 transferring and posting the respondent No. 3 without giving the due consideration to the panel submitted by the Director of Higher Education, by a pick and choose method, is unjust, unfair, arbitrary and illegal and the same is liable to be quashed and accordingly it is quashed.

15. The respondent-authorities shall issue a detailed guidelines for/selection of candidates within a period of 2(two) months from the date of receipt of this order from the concerned grade for posting or filling up the post of Joint Director consistent with the existing Rules and initiate fresh process of selection as per

the guidelines so framed. The entire exercise of selection and posting of Joint Director, shall be completed within a period of 4(four) months from the date of receipt of this order.

16. It is needless to say that the petitioner's case may also be considered along with the cases of other similarly situated and eligible candidates for transfer and posting as Joint Director in the Directorate of Higher Education Department, Nagaland.

17. With the above directions/orders, this petition stands disposed of.

18. Let the copy of this judgment and order be sent to the Principal Secretary to the Government of Nagaland, Higher Education Department for his needful.