
(1999) 12 GAU CK 0010
In the Gauhati High Court
Case No : Civil Rule No. 1 of 1991

Ila Lodhnee Choudhury (Dr.)

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 01-12-1999

Acts Referred:

Constitution of India, 1950 — Article 226
Tripura Health Service Rules, 1974 — Rule 5, 9, 9(1)

Citation : (2000) 1 GLT 151

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : A.K. Bhowmik, for the Appellant; B. Bhattacharjee, S. Chakravorty, S. Deb and T.K. Dey, for the Respondent

Judgement

A.K. Patnaik, J.—In this writ petition under Article 226 of the Constitution, the Petitioner has challenged the promotions of the Respondent Nos. 3,4 and 5 to Grade-II of the Tripura Health Service.

2. The relevant facts briefly are that the Petitioner joined the Central Health Services as Civil Assistant Surgeon, Grade-I, on 19.3.65 and was posted in Tripura. Subsequently, she was re-designated as General Duty Officer, Grade-II, with effect from 20.2.67. The Respondent No. 3 joined the Central Health Services as Civil Assistant Surgeon Grade-I on 4.2.66 and was redesignated as General Duty Officer, Grade-II, with effect from 20.2.67. When the Union Territory of Tripura became a State, the Tripura Health Services was constituted and the Tripura Health Services Rules, 1974, (for short "1974 Rules") came into force with effect from 18.5.74. Rule 9(1) of 1974 Rules provided for initial constitution of service. Under the said Rule 9, the existing members of the Central Health Services who were deputed to Tripura and also existing members of the Tripura Health Department were to be absorbed on the commencement of the rules against such duty posts as may be considered suitable according to their qualification and experience as may be decided by the selection committee.

Proviso to Rule 9(1), however, stated that any member having lien to any other service under the Government of India or any other State Government shall not be so absorbed unless he or she exercised an option to come to the Tripura Health Service and the option once exercised shall be final. The selection committee recommended the absorption of the Petitioner and the Respondent No. 3 in Grade-IV of the Tripura Health Service and on the basis of the said recommendation the Petitioner and the Respondent No. 3 were absorbed in Grade-IV of the Tripura Health Service by notification dated 29.5.76 issued by the Government of Tripura, Health and Family Planning Department. Thereafter seniority lists of officers of Grade-IV of the Tripura Health Service as on 31.3.88 and 1.10.80 were circulated in which the Petitioner was shown senior to the Respondent No. 3 in Grade-IV of the Tripura Health Service. Again another seniority list was circulated under letter dated 13.1.82 by the Director of Health Services, Government of Tripura, Agartala, wherein the Petitioner was shown in the 7th position in the list whereas the Respondent No. 3 was shown in the 8th position. On 25.1.82, the Government of Tripura, Health and Family Welfare Department, issued a notification appointing "both the Petitioner and the Respondent No. 3 to Grade-in of the Tripura Health Service on purely ad hoc basis. The said appointment of the Respondent No. 3 and the Petitioner to Grade-IH of the Tripura Health Service was regularised with effect from 16.6.92 by notification dated 11.4.83 of the Tripura Public Service Commission and on the recommendation of the selection committee. Prior to the appointment of the Petitioner and Respondent No. 3 to Grade-III of the Tripura Health Service, the Respondent Nos. 4 and 5 had been appointed to Grade-III of the Tripura Health Service with effect from 1.1.80 as direct recruits. Accordingly, a seniority list of officers in Grade-III of the Tripura Health Service as on 31.11.86 was circulated by memorandum dated 23.12.186 of the Government of Tripura, Health and Family Welfare Department, wherein the Respondent Nos. 4 and 5 were shown in 5th and 6th position and the Petitioner and Respondent No. 3 were shown in the 12th and 13th position respectively. In the meanwhile, the Respondent No. 3 filed a suit for declaration that he was entitled to be absorbed in Grade-III of the Tripura Health Service in its initial constitution with effect from 18.5.74 and for recovery of pay and allowances on the basis of such absorption in Grade-III of the Tripura Health Service with its initial constitution with effect from 18.5.74 and the said suit TS No. 49/79 re-numbered as TS No. 100/86 was decreed by the learned subordinate Judge, West Tripura, Agartala, by judgment and decree dated 25.11.87. Against the said suit, the State of Tripura as well as the Respondent Nos. 4 and 5 filed TA No. 1/88 and TA No. 5/88 before the learned District Judge, West Tripura, Agartala. But by judgment dated 30.6.88, the said appeals were dismissed. The SID judgment and decree have been challenged before this Court by the Respondent Nos. 4 and 5 in Second Appeal No. 166/88 renumbered as Second Appeal No. 4/90 which has been heard along with this writ petition. Apprehending that the Respondent No. 3 would be treated as Grade-III Officer of the Tripura Health Service with effect from 18.5.74 and would be given seniority over the Petitioner, the Petitioner filed a representation dated

9.11.88 before the Secretary to the Government of Tripura, Health and Family Welfare Department, requesting him to maintain her seniority over the Respondent No. 3. She also served a notice dated 25.5.90 to the Principal Secretary to the Government of Tripura, Health and Family Welfare Department, through her advocate requesting him not to pass any order in favour of the Respondent No. 3 on the basis of the said judgments and decrees of the learned Subordinate Judge and the learned District Judge. Notwithstanding the said notice, the Government of Tripura, Health and Family Welfare Department issued a notification dated 13.9.90 promoting the Respondent No. 3 to Grade-U of the Tripura Health Service on ad hoc basis. But the Petitioner was not promoted to Grade-II of the Tripura Health Service. In the said notification dated 13.9.90, it was, however, stated that the promotion of the Respondent No. 3 was subject to final outcome of the case going on before this Court. By another notification dated 30.9.90, the Respondent No. 4 was promoted to Grade-III of the Tripura Health Service on ad hoc basis. Subsequently, by notification dated 21.11.90, the Respondent No. 5 was promoted on ad hoc basis to Grade-II of Tripura Health Service. During the pendency of the writ petition, a seniority list of officers in Grade-III of the Tripura Health Service as on 1.4.94 was circulated in which the Respondent No. 3 was shown senior to the Petitioner and the Respondent No. 4 and a meeting of the selection committee for regular promotion to the post of Grade-II of the Tripura Health Service was held on 26.9.95 and on the basis of the recommendation of the selection committee, the Respondent No. 3 and the Respondent No. 5 were promoted to Grade-II of the Tripura Health Service with effect from 14.9.90 by notification dated 27.11.95. The Petitioner therefore, filed CM Application No. 425/99 praying for amendment of the writ petition and in the said amendment the Petitioner has prayed for quashing the seniority list dated 9.12.94, the proceeding of the selection committee meeting held on 26.9.95 and the memorandum dated 28.11.95 promoting the Respondent Nos. 3 and 4 to Grade-II of the Tripura Health Service with effect from 14.9.90. The Petitioner also prayed for quashing the notification dated 21.1.97 by which the Respondent No.3 has been appointed to Grade-I of the Tripura Health Service on adhoc basis. The said amendments to the writ petition were allowed by order dated 9.9.99 of this Court.

3. At the hearing, Mr. A.K. Bhowmik, learned Counsel for the Petitioner, submitted that the Petitioner joined the Central Health Services as Civil Assistant Surgeon Grade-I on 19.3.65 whereas the Respondent No. 3 joined the said services as Civil Assistant Surgeon Grade-I on 4.2.66, almost a year after the Petitioner. Hence, the Petitioner was senior to Respondent No. 3 in the Central Health Services. Thereafter, by notification dated 29.5.76, both the Petitioner and the Respondent No. 3 were absorbed in Grade-IV of the Tripura Health Service at its initial constitution on the recommendation of the selection committee in accordance with Rule 9(1) of 1974 Rules and the seniority lists were circulated from time to time by the Government of Tripura, Health and Family Welfare " Department showing the Petitioner as senior to Respondent No. 3 in Grade-IV of

the Tripura Health Service and in Grade-II and Grade-III of the Tripura Health Service. Hence the Petitioner was senior to Respondent No. 3 al through in Grade-IV and Grade-III of the Tripura Health Service. The said seniority of the Petitioner over the Respondent No. 3 in Grade-IV and Grade-III of the Tripura Health Service cannot be disturbed on the basis of the judgment and decree of the learned Subordinate Judge in TS No. 49/79 renumbered as TS No. 100/86 and the judgment and decree of the District Judge in TA No: 1/88 and TA No. 5/88 particularly when the Petitioner was not a party to the said suit and appeals. According to Mr. Bhowmik, if the judgments and decrees in the said suit and appeals are set aside by this Court in Second Appeal No. 4/99 which has been heard alongwith this writ petition, the Respondent No. 3 would continue to be junior to Petitioner in Grade-IV and Grade-III of the Tripura Health Service. Mr. Bhowmik contended that the Petitioner being senior to Respondent No. 3 in Grade-IV and Grade-III of the Tripura Health Service was entitled to be promoted to Grade-II of the Tripura Health Service before the Respondent No. 3 was promoted to Grade-II of the Tripura Health Service. He further contended that the proceedings of the selection committee meeting held on 26.9.95 for promotions would show that the selection committee has considered ACRs of the Officers for a period of five years preceding particular year of recruitment and made over all grading of each of the officers coming within the zone of consideration year wise. The said proceeding of the selection committee would show that the Respondent No. 3 and 4 were selected for promotion against the vacancies for the year 1988. Hence the ACRs of the Petitioner and the Respondent Nos. 3 and 4 for the years 1983, 1984, 1985, 1986 and 1987 were to be considered by the selection committee. Mr. Bhowmik submitted relying on the averments made in paragraph-3 of the additional affidavit that no ACRs of the Petitioner were available for the years 1983, 1984 and 1985 and that the selection committee made its assessment of the work of the Petitioner on the basis of a certificate issued by one Shri Roy, Director of Health Service, Government of Tripura and Shri Anil Mishra, Commissioner in the year 1994. But the Petitioner has never worked under the said two officers and they were not Reporting or Reviewing Officers of the Petitioner. He submitted that ACRs of the Respondent No. 4 for the year 1983 and 1984 were not available and a similar certificate was issued by the Director of Health Services, Government of Tripura and countersigned by the Commissioner. According to him, the selection committee should not have taken into consideration the said certificates which are not ACRs of the Petitioner and the Respondent No. 4 and given over all grading "Good" and at the same time assessed the Respondent No. 3 on the basis of ACRs for five years and given overall grading "Very Good". Mr. Bhowmik vehemently contended that the assessment made by the selection committee, therefore, was not fair to the Petitioner and the proceeding of the selection committee as well as promotions of Respondent Nos. 3 and 4 on the recommendation of the selection committee were liable to be quashed.

4. Mr. S. Deb, learned Counsel for the Respondent No. 3, submitted that the

proceedings of the meeting of the Selection Committee held on 26.9.95 would show that the Selection Committee has given Respondent No. 3 overall grading "Very Good" after consideration of ACRs of Respondent No. 3 for five years proceeding the year 1988 whereas the said Selection Committee has given overall grading "Good" to the Petitioner and the Respondent No. 4 on the basis of similar consideration of ACRs of the Petitioner and the Respondent No. 4. According to him, the Respondent No. 3 was recommended for promotion to Grade-II of the Tripura Health Service by the Selection Committee on the basis of his merit and, therefore, even if Second Appeal No. 4/90 is decided by this Court against the Respondent No. 3 and the judgments and decrees of the Lower Courts are set aside and the Respondent No. 3 is placed below the Petitioner and the Respondent No. 4 in the seniority list of Grade-IE of the Tripura Health Service, the promotion of the Respondent No. 3 to Grade-II of the Tripura Health Service on the basis of recommendation of the Selection Committee cannot be quashed. Mr. B.K. Bhattacharjee, learned Advocate General, Tripura submitted that the State Government of Tripura was prepared to give a fair treatment to the officers of Tripura Health Service including the Petitioner in accordance with any direction for re-consideration given by this Court.

5. I have today delivered judgment in Second Appeal No. 4/90 setting aside the judgments and decree of the trial Court and the First Appellate Court in the suit and the appeals. The consequence is that the Respondent No. 3 is junior to the Petitioner and the Respondent No. 4 in Grade-III of the Tripura Health Service. But seniority of the Petitioner over that of the Respondent No. 3 in Grade-in of the Tripura Health Service does not confer on the Petitioner the right to be promoted before the Respondent No. 3 Rule 5(b) of 1974 Rules provides that promotions from Grade-III to Grade-II of the Tripura Health Service is to be made on the recommendation of the selection committee according to "Merit with due regard to seniority" would mean that a senior candidate will have to be considered and that where the merit of the candidates is equal, the senior amongst such candidates with equal merit would be preferred for promotion. In the present case, the Petitioner who was senior to the Respondent No. 3 in Grade-III of the Tripura Health Service was in fact considered for promotion to Grade-II of the service. But the comparative merits of the candidates had also to be considered. The selection committee in paragraphed) of the proceeding has stated that it has considered the records with particular reference to ACRs for a period of five years preceding to particular year of recruitment for which consideration was made and has made overall grading in respect of each of the officers coming within the zone of consideration year wise. In the said proceedings it has been also made clear the particular year of recruitment for which the Respondent Nos. 3 and 4 have been promoted to Grade-II of the Tripura Health Service was 1988. Hence ACRs for the years 1983, 1984, 1985, 1986 and 1987, five years preceding 1988 are supposed to have been taken into consideration by the Selection Committee. But from the records produced before the Court it appears that in the case of Respondent No. 3, ACRs for the years

1983, 1984, 1985, 1986 and 1987 were available. In the case of the Petitioner, ACRs for the years 1983, 1984 and 1985 were not available and only the ACRs of 1986 and 1987 were available and for the years 1983, 1984 and 1985, a general certificate issued in the year 1994 by the Director of Health Services and countersigned by the Commissioner is available in the records to the effect that the work of the Petitioner during the aforesaid period was good. In the case of Respondent No. 4, ACRs for the year 1983 and 1984 were similarly not available and only ACRs for the years 1985, 1986 and 1987 were available and for the years 1983 and 1984, a general certificate given by the Director of Health Services in the year 1994 and countersigned by the Commissioner was available in the records to the effect that the work of the Respondent No. 4 was good during the aforesaid period. In my considered opinion, for comparing the merits of the Petitioner and the Respondent Nos. 3 and 4 ACRs of all the three officers for five years were acquired to be compared and assessed and if ACRs of five years were not available, the ACRs of those years which were available in respect of all the officers were to be compared and assessed by the Selection Committee. In the instant case, the Selection Committee has taken into consideration the ACRs of five years of the Respondent No. 3 but has taken into consideration the ACRs of two years in the case of the Petitioner and three years in the case of Respondent No. 4 and for the three years in the case of the Petitioner and two years for the Respondent No. 4 has taken into consideration a general certificate issued in respect of the said years issued by the Director of Health Services and countersigned by the Commissioner in the year 1994 several years after 1983, 1984 and 1985 and on the basis of such consideration has given overall grading of "Very Good" to the Respondent No. 3 but only "Good" to the Petitioner and the Respondent No. 4. This has resulted in an assessment which was unfair and prejudicial to the Petitioner. For the year 1986 and 1987, the category gradations given by the Reporting Officer and the Reviewing Officer in the case of the Petitioner, the Respondent No. 3 and the Respondent No. 4 are as follows:

It would be clear from the aforesaid statement that overall grading given to the Petitioner by the Selection Committee in its meeting held on 26.9.95 as "Good" was influenced by the General Certificate issued in the year 1994 by the Director of Health Services and countersigned by the Commissioner that her work during the year from 1981 to 1985 was good, I have already held that the said certificate issued in the year 1994 in respect of the work of the Petitioner in respect of the years 1981 to 1985 cannot be taken into consideration and that in absence of ACRs of the Petitioner for the years 1983, 1984 and 1985, the Selection Committee should have considered the ACRs of the Petitioner and several officers including the Respondent Nos. 3 and 4 for the years, 1986 and 1987 and if the Selection Committee considered only the ACRs of the years 1986 and 1987 which were available for the concerned officers and which also related to the period just prior to the recruitment year 1988 and were most relevant they would have come to a different conclusion with regard to the comparative merit of the Petitioner vis-a-vis the Respondent Nos. 3 and 4 and made their

recommendations accordingly.

6. For the reasons stated above, while I am not inclined to quash the proceedings of the meeting of the Selection Committee held on 26.9.95 and its recommendations for promotion of Respondent Nos. 3 and 4 and the promotions of the said Respondents made to Grade-II of the Tripura Health Service on the basis of the said recommendations. I direct that the ACRs of the Petitioner for the years 1986 and 1987 be placed before the Selection Committee for comparison of merit with ACRs of 1986 and 1987 of the Respondent Nos. 3 and 4 and in case the Selection Committee on such comparison finds the merit of the Petitioner to be better than that of either Respondent No. 3 or Respondent No. 4 or both, it will make its recommendations accordingly for promotion of the Petitioner to Grade-II of the Tripura Health Service and when the said recommendations are accepted by the State Government such promotions of the Petitioner to Grade-II of the Tripura Health Service will be given retrospective effect from the date from which the Respondent Nos. 3 and 4 were promoted to Grade-II of the Tripura Health Service, i.e., from 14.9.90, for the purpose of her seniority in Grade-II of the Tripura Health Service and other notional benefits. But the Petitioner will not be given salary and allowances with retrospective effect prior to 1.8.91, i.e., the date with effect from which she was appointed to Grade-II of the Tripura Health Service on ad hoc basis by the notification dated 31.7.91 of the Government of Tripura, Health and Family Welfare Department. But I am not inclined to quash the notification dated 21.1.97 giving ad hoc appointment to Respondent No. 3 to Grade-I of the Tripura Health Service as it is only an ad hoc appointment and instead direct that the State Respondents will comply with the directions for re-consideration of the case of the Petitioner for promotion to Grade-II of the Tripura Health Service in accordance with this judgment within 2 months from the date of receipt of a certified copy of this judgment from the Petitioner by the Principal Secretary to the Government of Tripura, Health and Family Welfare Department and will soon thereafter take up the regular promotion of officers in Grade-II of the Tripura Health Service to Grade-I of the service in accordance with the rules and the law.

The writ petition is partly allowed. Considering, however, facts and circumstances of the case, the parties shall bear their own costs.