
(1989) 08 GAU CK 0009
In the Gauhati High Court
Case No : Civil Rule No. 575 of 1982

Jatish Chandra Bhattacharjee

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 03-08-1989

Acts Referred:

Citation : (1991) 1 GLJ 273

Hon'ble Judges : A.Raghuvir, C.J. and W.A.Shishak, J

Bench : Division Bench

Advocate : G.K.Talukdar, D.P.Chaliha, U.Das, J.P.Bhattacharjee, P.K.Goswami,
Advocates appearing for Parties

Judgement

A.Raghuvir, C.J.

Jatish Chandra Bhattacharjee the writ petitioner was appointed a Ranger on April 1, 1953 in Forest Department of the State of Assam. On March 20, 1972 on the recommendation of the Assam Public Service Commission he was promoted temporarily as Assistant Conservator of Forests (A.C.F.) The promotion was made under Rule 4(c) of Assam Forest Service (Class 1) 1942 Rules. These Rules were promulgated under section 241 of the 1935 Government of India Act and are continued to date under Article 313 of the Constitution of India. On May 8, 1973 under Rule 4 (a) of 1942 Rules A.C. Dutta, D. Hazarika, N.K. Sarma, T.K. Das and H. . Saikia the five were temporarily appointed direct as ACS. Under clause (b) appointment is contemplated of holders of diploma from European University which due to historical reasons is obsolete as no appointments are made now under that clause. The State Government published a combined seniority list of ACFs direct recruits and promotee on April 30, 1978 in that the petitioner is shown correctly senior to the five direct recruits.

On November 26, 1979 the State Government promoted T.K.. Das N.K. Sarma and H,K. Saikia, the three direct recruits ignoring the petitioner who was senior to all the three direct recruits. Thereupon the petitioner questioned their

promotion in an appeal Case No. 73 ATA/79 before the Assam Administrative Tribunal. Again S. Dutta and S.N. Buragohain, ACFs who were direct recruits and juniors to the petitioner were promoted as DCFs ignoring the petitioner. All the five were impleaded in Case No. 73 ATA/79.

When ACFs were promoted to the next Class I of DCFs the establishment in the Forest Department applied a circular issued by the Government of Assam on February 15, 1961 having retrospective effect from October 1, 1959. We call this document for short a circular. There was another document called "minutes"* relevant to the promotion of DCFs. The minutes is an abstract of agreement arrived at a conference presided by a Minister of the State Government and some ACFs of the Forest Department on February 5, 1979. In the circular and the minutes the two documents recite the appointment be made 3:1. The former 3 has reference to direct recruits and 1 has reference to promotees in the cadre of ACFs. Similarly the 3 has reference to the direct recruits and 1 has reference to promotees in the cadre of DCFs.

The petitioner before the Assam Administrative Tribunal in Case No. 73 ATA/79 complained that senior promotees ACFs were ignored and direct recruit ACFs are promoted out of turn to the post of Deputy Conservator of Forests illegally under the circular and under minutes. The two documents violate the right of senior promotees of ACF cadre and affected their fundamental rights under Chapter III of the Constitution.

The Assam Administrative Tribunal earlier in Case No. 35 ATA/77 on April 11, 1976 held the ACFs who were promoted earlier in point of time were senior to those who were appointed direct later to that of senior. The circular was thus declared non est. in law as it contained executive instructions and in effect and in law cannot override 1942 Statutory Rules. This decision we call it first Tribunal decision. The same Tribunal in the impugned order of Case No. 73 ATA/79 on December 2, 1981 the appeal case of the petitioner did not follow the earlier decision. We call the latter decision as second Tribunal case which is assailed in the instant writ petition.

In the two decisions of the Tribunal a like issue was decided under the Assam Forest (Class I) Rules of 1942. Before the first Tribunal the State Government represented that in the absence of prescribing a quota among the direct recruits and promotees the State Government fixed the seniority of ACF officers under the impugned circular on February 15, 1951. In the two cases the direct recruits and the State of Assam were resisting the promotees and both relied on the circular before the Tribunal while the promotees contended the circular is non est. in law. In the first Tribunal case the promotees succeeded and in the second Tribunal case the promotees were not successful in their contention. The first Tribunal held the impugned circular was an executive order not issued under Article 309 of the Constitution of India therefore was a mere executive instruction and in law executive order could not have amended a Statutory Rule. On that reasoning the seniority of ACFs was ordered to be fixed as per dates of

appointment under Rule 15 of the 1942 Rules i.e. those ACFs who were appointed earlier either promotees or direct recruits to have precedence over persons who were appointed later including direct recruits. In the order of first Tribunal Rule 15 was not referred but the order passed was to that effect. The Government of Assam was ordered not to enforce the circular in fixing the seniority of ACFs. For facility of reference Rule 15 is extracted and reads : "15. (a) Directly recruited Assistant Conservator of Forests on probation, on joining their first appointment, shall be graded in accordance with the position in order of merit on completion of their course of training at Dehra Dun or elsewhere, (b) Members of the service appointed by promotion shall rank in the general list immediately below the last directly appointed recruits, above those appointed at the same time, and inter se according to their seniority in the subordinate service." When a direct recruit and promotee are appointed at one or the same clause (b) is to be applied.

The Government accepted the decision of the first Tribunal case we hold so as it was not assailed in any Court. Notwithstanding when the occasion arose for appointment to the post of DCFs again the circular was resurrected. Again the promotees were superseded and junior direct recruits were promoted to the post of DCFs ignoring the claims of the senior promotees. The decision of the first Tribunal was in vain cited in the, second Tribunal case. The Tribunal held the validity of a Government circular cannot be decided by the Administrative Tribunal and contrary to the decision of the first Tribunal case approved out of turn promotion orders of the direct recruits and dismissed the appeal of the petitioner. While passing the order the Tribunal also misread the appointment order of the five direct recruits. We have earlier stated the five direct recruits were appointed temporarily. The Tribunal held the five were appointed to substantive posts and were holders of a cadre post. This conclusion was reached obviously not on reading of the order of appointment dated May 8, 1973. The order does not recite five direct recruits were appointed to substantive posts or they were cadre post holders on appointment. The construction placed on the appointment order by the Tribunal to say the least is not warranted and in any event conclusion is not self explanatory.

The circular by now it is clear is the crucial document not only for determining the seniority of promotees or direct recruits of ACFs but also is a crucial document for the promotion post of DCFs. The promotees were striving to avoid the circular on the other hand, the State Government of Assam and direct recruits were supporting the circular before the Administrative Tribunal. Such a stance and assertions are reiterated on behalf of the contestants in this Court.

The reasoning of the Tribunal in the second Tribunal case was that the validity of circular cannot be decided by the Tribunal. There is no rational basis for reaching such a conclusion. Though a doubt may occur about the Tribunal's power to decide vires of a statutory provision but as to the executive order at no point of time in our jurisprudence no doubt was entertained as to powers of the Tribunal.

The stance of the Tribunal is vigorously assailed by the petitioner in this Court. The direct recruits and the State Government again with vigour resisted the promotees in this Court.

When the writ petition was filed the petitioner impleaded 16 respondents including the five direct recruits named earlier. Respondents 9 to 16 who were juniors to him pending the Tribunal appeal were promoted to the post of DCFs. They were not impleaded before the Tribunal but are impleaded in the writ petition. Thereafter in Misc. Case No. 154/82 on August 16, 1982, in Misc. Case No. 177/82 on September 18, 1982, in Misc. Case No. 166/86 on April 6, 1986 and in Misc. Case No. 167/86 on April 3, 1986 a large number of ACFs (who were appointed directly) and promoted to the post of DCFs were allowed to intervene in the writ petition. Now one can visualise how battle lines are drawn in the instant writ petition. When skirmishness between the promotees and direct recruits became intermittent, this Court on September 24, 1983 directed the State of Assam to disclose the cadre strength of Assistant Conservator of Forests on March 20, 1972 when the petitioner was promoted to ACF post and the cadre strength when respondents 6 to 21 were appointed as ACFs on May 4, 1984 when information was not obtained in full measure this Court accorded three more weeks for filing additional affidavit which is awaited even to this day.

We may recount another feature of this case before the issue is taken up. The feature relates to the practice followed in India in civil proceedings. A litigant in India is entitled to plead inconsistent pleas. The State Government ordinarily does not exercise such a privilege though available in law to the State like any other litigant. Before the first Tribunal case the stand of the State Government was that the circular was not consistent with the Statutory Rules. That stand was varied before the second Tribunal case and the State contended the seniority of ACFs is to be determined as per the impugned circular. We would have given more details of this posture of the State indicating the inconsistency in their stand. Since a litigant is entitled to plead alternatively may also contrary pleas in civil proceedings therefore we leave the subject at that stage in this case. This is another aspect which we had to reckon during the debate. With this long preface we turn to the issue in the instant writ petition.

The writ petitioner contends the impugned circular is not consistent with Rule 4 of 1942 Rules therefore the circular has to be quashed. The learned counsel for the State Government cited the case of Sant Ram Sharma vs. State of Rajasthan, AIR 1976 SC 1910 and argued that the Government true it cannot amend or supersede statutory Rules by administrative instructions. But if the Rules are silent, so argued the learned Government Advocate, on any particular point if statutory rules are silent such gaps can be filled up by executive instructions not inconsistent with the statutory Rules. The writ petitioner placing reliance on P. D. Agarwal vs. State of UP, AIR 1987 SC 1676 in particular para 19 demonstrated that a memorandum (executive instructions) when it purported to amend the United Provinces Services of Engineers (Buildings and Roads Branch)

Class I (Statutory) Rules, 1936 the Apex Court held a memoranda cannot override Statutory Rules.

The learned counsel for the direct recruits while supporting the Government cited the decision in *S. L. Sachdev vs. Union of India*, AIR 1981 SC 411 and relied on para 13 of that judgment. We extract that passage without any comment. Para 13 brings out the argument of the promotees. "Apart from this consideration, we are unable to understand how the Director General could issue any directive which is inconsistent with the Recruitment Rules of 1969 framed by the President in the exercise of his powers under Article 309 of the Constitution. Those rules do not provide for the kind of classification which is made by the Director General by his letters to the Heads of respective Circles of the length of service in the new organisation. Any directive which goes beyond it and superimposed a new criterion on the Rules will be bad as lacking in jurisdiction. No one can issue a direction which, in substance and effect, amounts to an amendment of the Rules made by the President under Article 309. That is elementary. We are unable to accept the learned Attorney General's submission that the directive, of the Director General is aimed at further and better implementation of the Recruitment Rules. Clearly, it introduces amendment to the Rules by prescribing one more test for determining whether UDCs drawn from the Audit Offices are eligible for promotion to the Selection Grade/Head Clerks cadre."

In the instant case we are to decide the scope and ambit of the impugned circular whether the circular supplements the gaps in 1942 Rules or whether circular in tenor is contrary to Rule 4 of 1942 Statutory Rules. We are of the view and hold the circular is contrary to the Statutory Rules and to show it is contrary to statutory Rule not much effort is needed as facts in the instant case are proof positive to bring out that result.

Whenever a proportion or quota is to be maintained in a service cadre ratio among the promotees and direct recruits is incorporated in the Statutory Rules. See Assam Education Service Rules, 1980, Rule 5 prescribes direct recruitments upto 75 percent and the balance promotees. Instances are legion. We avoid numerous examples with a view to avoid bulk to this opinion. Now Rule 4 may be seen. Under clause (a) direct recruitment is made and under clause (c) promotions are made. The candidates under (a) and (c) both are appointed to the post of ACFs. Rule 4 does not prescribe a quota between the two. In rare cases when direct recruits and promotees are appointed on one and the same day Rule 15 (b) is applied otherwise a candidate appointed earlier is senior to a candidate appointed later in point of time.

The petitioner is appointed on March 20, 1972 earlier to five direct recruits who were appointed on May 8, 1973. The circular recites and directs the direct recruits be treated seniors. Because of circular direct recruits who were appointed on May 8, 1973 were promoted to DCF Post first and the petitioner who was appointed on March 20, 1972 is promoted later. Why? The answer of the State Government is the circular recites direct recruits are to be appointed first.

It is seen the circular is inconsistent with Statutory Rules 4 and 15 of 1942 Rules. It is one of cardinal principles of our rule of law the Executive orders cannot amend statutory rules. One feature of service law often propounded in the cases is stated in (1980) 4 SCO 562, S.L. Sacbdev vs. Union of India. The ratio of this decision propounds the principle that when from various sources officers are recruited like ACFs who are recruited from subordinate services and ACFs are recruited direct all these distinctions (anterior to appointment) are obliterated on or after appointment to the cadre of ACFs. To recognise the anterior distinction like direct recruit or promotee Act for further promotions violate the principle of equality enshrined in Article 14 of the Constitution of India.

A word about the document referred earlier as minutes. The petitioner, the promotees and the State Government, all represented the minutes of the meeting held on February 5, 1979 are of no legal effect and consequence for the promotion to the post of ACFs. The petitioner however impelled by the vigour in the pleadings with which this document was crusted and enforced in the past prayed the document minute be quashed. We declare for the promotion of DCFs post the minutes document for all practical purposes is not to be followed or enforced as we hold the document is non est. in law.

For the aforesaid reasons we quash the second Tribunal decision impugned in the writ petition. The writ petition is allowed. The v State Government is directed to determine the seniority of Assistant Conservator of Forests from the calendar dates of recruitment of the incumbent and thereafter arrange and order on that basis the promotions to the posts of DCFs. The promotions made by this date may not be reverted or disturbed. The seniority in the DCFs posts however is ordered to be arranged as indicated above. No costs.