
(2008) 07 GAU CK 0030
In the Gauhati High Court

Jitendra Kumar Thakuria and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 02-07-2008

Acts Referred:

Assam Directorate Establishment (Ministerial) Services Rules, 1973 — Rule 10, 12, 22
Constitution of India, 1950 — Article 14, 142, 16, 226

Citation : (2009) 4 GLR 702 : (2008) GLT 603 Supp

Hon'ble Judges : Jasti Chelameswar, C.J;B.K. Sharma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The appellants who were the respondents in the writ petition [WP(C) No. 1669/2000] being aggrieved by the judgment and order passed therein, have preferred this appeal.

2. The writ petition was filed by the present respondents challenging the appointments of the appellants as Complier/Lower Division Assistant in the office of the Directorate of Health Services, Assam. They were so appointed by orders dated 6.12.1999. Further prayer made in the writ petition was to complete the selection process which was initiated vide employment notice dated 20.10.1997.

3. The writ petitioners had responded to the employment notice dated 26.10.1997 which was published by the official respondents inviting applications for the posts of Compiler/Lower Division Assistant. The selection was to be made as per the provisions of the Assam Directorate Establishment (Ministerial) Service Rules, 1973. Although the employment notice was issued and the applications were received, but no selection was held.

4. In the first part of November, 1999 the then Director of Health Services, Assam (Mr. B.C. Kora) went on leave up to January, 2000 for the treatment of his daughter outside the State and one Dr. J.K. Das, Addl. Director of Health Services took over chare of Director of Health Services. However, subsequently

such charge was given to one Dr. S.N. Thakuria, respondent No. 4 in the writ petition. Such charge was given by order dated 9.12.1999. The said Director In-Charge surreptitiously appointed the respondents No. 5 to 19 as Complier/Lower Division Assistant without holding any selection. In the writ petition, it was averred that such appointed was made even without any clearance from the State Level Empowered Committee clearance of which was mandatory at that point of time for any appointment. Be it stated here that such committee was comprised of by the Chief Secretary, Addl. Chief Secretary and Commissioner and Secretary of Finance and Planning Development Department and Secretary of Personnel Department.

5. It is on the aforesaid background the writ petition was filed making a challenge to the appointments of the appellants with a further prayer for completing the process of section which was initiated by the aforesaid employment notice.

6. It appears that neither the official respondents nor the private respondents who are appellants herein filed any affidavit in opposition. The writ petition was disposed of by judgment and order dated 12.8.2002 upon hearing the Learned Counsel for the parties. The private respondents who are the appellants herein could not make out any case to justify that they had been appointed in accordance with the provision of law. This aspect of the matter finds mention in the impugned judgment and order. Accordingly it was provided that the official respondents would take a final decision in respect of the employment notice and thereafter to go for appointment after selection only in accordance with recruitment rules. To carry out the entire exercise, the respondents were given three months time. Now even after expiry of about six years, such process is yet to be materialized.

7. The present appellants by filing the review petition being R.P. No. 66/02 sought for review of the aforesaid judgment and order. In the review petition, certain inter-departmental communications were brought on record. It was contended that in the year 1999 a decision was taken to fill up certain vacancies in the department considering the day to day difficulties and as there was shortage of staff. It was contended that the Screening Committee was constituted to make appointment against the existing vacant posts of Complier/Lower Division Assistant. According to the review petitioners/appellants the said Screening Committee conducted a regular selection and selected them and they were appointed. As regards the approval of the State Level Empowered Committee, it was contended that such approval was obtained ex post facto.

8. The review petition was disposed of by order dated 8.12.2004 with the direction that the direction as contained in the aforesaid judgment and order should be complied with within a period of three months. Being aggrieved, the appellants who were the respondents in the writ petition and review petitioners have filed this appeal. Be it stated here that they are still continuing in their services on the basis of the interim orders of this Court.

9. In the appeal, appellants have reiterated their stand in the review petition. The whole basis of their claim is that since they were selected by the Screening Committee, there was due compliance of the recruitment rules and consequently there is no question of holding any further selection so far as they are concerned.

10. We have heard Mr. B.C. Das, Learned Senior Counsel assisted by Mr. A.K. Purkayastha and Mr. B. Sinha, Learned Counsel for the appellants as well as Mr. D. Saikia, Learned Standing Counsel for the Health Department. We have also heard Mr. A.K. Borah, Learned Counsel representing the writ petitioners/respondents.

11. Mr. Das in his persuasive pursuits argued that irrespective of the issues involved in the proceeding, since the appellants, by now, have rendered about 8/9 years of service, their such service should not be disturbed at this stage. He also submitted that since there was semblance of selection when the petitioners were selected by the duly constituted Screening Committee, their such appointments could not be said to be wholly illegal. He has placed reliance on the two decisions of the Apex Court reported in H.C. Puttaswamy v. Hon''ble Chief Justice of H.C. Puttaswamy and others Vs. The Hon''ble Chief Justice of Karnataka High Court, Bangalore and others, and Anil Baipadithaya and others Vs. State of Karnataka and others,

12. Mr. D. Saikia, Learned Standing Counsel, Health Department fairly admitted that the selection as contemplated in the recruitment rule was not held and that the writ petitioners did not get equal opportunity as they were not invited for any selection although they were also the aspirants.

13. Mr. A.K. Borah Learned Counsel representing the private respondents/writ petitioners strenuously argued that under no circumstances, the appellants could be shown any leniency, they being the product of nepotism and favouratism. He submitted that when the candidates who had applied pursuant to the aforesaid employment notice, were waiting for call to the selection, the then In-Charge Director of the Health Service surreptitiously appointed the appellants to the deprivation of all others and in such a situation the appellants are not entitled to any relief from this Court.

14. We have considered the rival submissions made by the Learned Counsel for the parties as well as the materials on record. There is no manner of doubt that the appellants were appointed de hors the recruitment rules. There is some dispute relating to the employment notice dated 26.10.1997. Immediately after issuance of the notice, the Govt. in the Personnel Department intimated the Director that the advertisement deserved to be cancelled as the Director was not the competent authority to advertise the posts. However, it was provided that since the last date of submission of applications was over in the meantime, the said applications should also be taken into account when regular advertisement would be published by the competent authority. By letter dated 28.10.1998, the Director of Health Service requested the Govt. to allow him to make temporary

appointments till the vacancies were filled up by regular process of selection. In the communication, it was indicated that large number of applications had been received in the Directorate of pursuant to the aforesaid employment notice/advertisement. The said letter was followed by another letter dated 19.12.1998 with the same request. Thereafter, by order dated 28.10.1999 the employment notice/advertisement was cancelled. By letters dated 5.1.1999 and 29.10.1999 the Government of Assam emphasized for filling up the vacant posts immediately.

15. The aforesaid communications and orders find mention in the review petition copies of which have also been enclosed to the review petition.... It appears that the Screening Committee was constituted for appointment of the Compiler/Lower Division Assistant by order dated 15.11.1999 and the said Screening Committee recommended 14 candidates for appointment as Lower Division Assistant and 3 candidates as Compiler. It is on the above basis, the appellants came to be appointed.

16. From the minutes of the Screening Committee meeting held on 3.12.1009, it appears that the said committee only scrutinized the applications and recommended the 17 candidates. The emphasis of the Health Directorate for filling up the vacant posts due to paucity of man power as indicated by the Director in his aforesaid communication was also noted. Admittedly the Screening Committee did not scrutinize all the applications received pursuant to the employment notice. Nothing has been placed on record as to how it is only the aforesaid 17 candidates including the respondents were only recommended and as to what made the Screening Committee to exclude the other candidates from the purview of such selection, if at all the task undertaken by the Screening Committee could be said to be of any semblance of selection.

17. From the materials on record what" has transpired is that fault was found in respect of the employment notice, as according to the Government, same was not issued by the competent authority. At the same time, it was emphasized that the applications received pursuant to the advertisement should also be considered alongwith the applications which would be received pursuant to the regular advertisement to be issued by the competition authority. Thus, the candidates who responded to the employment notice had a right to be considered for appointment in accordance with the recruitment rules, but they were deprived of the same and the appellants were picked up for appointment to the deprivation of all others.

18. Although the advertisement was subsequently cancelled, nothing has been placed on record to suggest that the applications already received pursuant to the employment notice would not be considered in case of issuance of regular advertisement. However, the occasion for issuance of regular advertisement did not arise since in the meantime the 17 candidates including the appellants were appointed.

19. The aforesaid 17 candidates are the beneficiaries of the anomalous situation

created by the official respondents. Firstly they issued the employment notice/ advertisement and thereafter cancelled the same. In between they also took the decision to consider the applications alongwith the applications which might be received pursuant to regular advertisement. When the matter rested thus, the Director of Health Services emphasized on the need for early filling up of the posts. The request made was to fill up the posts on temporary basis till regular selection was held. The task undertaken by the Screening Committee will have to be considered in that context. Such selection of the Screening Committee under no circumstances can be said to be in due compliance of the recruitment rules. Even for such temporary employment no prescribed procedure was followed and it was on pick and choose basis the appellants were appointed. Such selection, in our considered view cannot confer any indefeasible right to the appellants to continue in their services.

20. The recruitment rule holding the field is the Assam Directorate Establishment (Ministerial) Service Rules, 1973 Rule 10 of the rules provides that appointment shall be made to the post of LDA by the appointing authority by (i) direct recruitment; (ii) by selection strictly on the basis of merit for amongst the typists of the service with requisite qualification and experience and (iii) by selection on the basis of suitability from amongst the Grade-IV staff of the office with requisite qualification and experience. The proportion of vacancies to be filled up in any year shall be 70:20:10 respectively.

21. Rule 12 prescribes the methodology of direct recruitment in terms of which the assessment of vacancies to be made by appointing authority. The Director of Employment and Craftsmen Training, Assam, shall conduct competitive examination at such intervals and in accordance with such instructions as the Government may from time-to-time direct. The Director of Employment and Craftsmen Training shall forward the names of suitable persons in order of preference and shall get the character and antecedents of the selected candidates verified from the DIG of Police.

22. The question which arises for consideration in this proceeding is as to whether the above procedure was followed Or not towards appointing the appellants and if not what consequence would follow. As noticed above, the Director of Health Services had issued the employment notice with which the Government found fault. However, since the last date of receipt of applications was already over, it was decided that the candidatures already offered would be considered alongwith the fresh applicants when the regular advertisement would be issued. Subsequently the employment notice was cancelled. The Screening Committee, which purportedly selected the appellants is not within the purview of the recruitment rules. Nothing has been stated as to on what basis, the appellants alone were picked up for appointment. If it is on the basis of the applications already received, the Screening Committee could not have ignored the other candidates. Thus what has emerged is that the appellants were appointed de hors the recruitment rules.

23. Mr. Das, Learned Counsel for the appellants, has emphasized on the long length of service of the appellants. When the very basis and foundation of their appointment is on illegality, continuation of their services on the basis of such illegality is of no consequence. The decisions on which, Mr. Das has placed reliance are simply misplaced. It has been said a long time ago that a case is only an authority for what it actually decide, and what not logically follows from it (see Lord Halsbury in *Quinn v. Leather* 1901 AC 495). The ratio of any decision must be understood in the background of the facts of that case.

24. In *H.C. Puttaswamy (supra)*, the Ape Court was concerned with the selection and appointment of clerical staff of Karnataka High Court. It was found that appointments were made without consulting the Public Service Commission and thus was held to be improper. However, in view of the fact that the appointees continued for more than 10 years in their services, the Apex Court saved their appointments, although did not approved the course of action adopted by the Chief Justice of the High Court towards their appointments.

25. The second case relied upon by Mr. Das, Learned Counsel for the appellants is in respect of admission in professional courses. Although it was found that admission was secured by the appellants by showing incorrect rankings in collusion with the members of selection scrutiny committee, the Apex Court while decrying and condemning the fraud committed by the appellants saved their admissions as their such admission was not challenged by any other eligible candidates nor they deprived any other merited students of their legitimate seats. Same is not the case on hand. The appellants have deprived the other eligible candidates and their appointments have also been challenged by the deprived candidates.

26. In *State of Punjab and others Vs. Surinder Kumar and others*, the Apex Court reiterated that a decision is available as a precedent only if it decides a question of law. It is futile to suggest that since the Supreme Court under somewhat similar circumstances saved the services and admissions of the persons concerned, this Court exercising its power of judicial review under Article 226 of the Constitution of India must also adopt the same kind of approach. In *Surinder Kaur (supra)* the Apex Court was concerned with regularization of the services of temporary lecturers. Finding fault with the direction of the High Court to allow them to continue into services, it was observed, thus:

It is, therefore, futile to suggest that if the Supreme Court has issued an order which apparently seems to be similar to the impugned order, the High Court can also do so. There is still another reason while the High Court cannot be equated with the Supreme Court. The Constitution has, by Article 142, empowered the Supreme Court to make such orders as may be necessary "for doing complete justice in any case or matter pending before it", which authority the High Court does not enjoy. The jurisdiction of the High Court, while dealing with a writ petition, is circumscribed by the limitationsDiscussed and declared by the judicial decisions, and it cannot transgressed the limits on the basis of whims or

subjective sense of justice varying from judge to judge. Though the High Court is entitled to exercise the judicial discretion in deciding writ petitions or civil revision applications, but this discretion has to be confined in declining to entertain petitions and refusing to grant relief, asked for by petitioners, on adequate consideration; and it does not permit the High Court to grant relief on such a consideration alone.

27. The appellants have been continuing in their services on the strength of the interim order passed by this Court. As has been held by the Apex Court in the case of *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, such litigious employment is of no consequence. The appellants are not in their services on the strength of merit of their case, but have been continuing on the strength of the interim order passed by this Court. The wide power under Article 226 of the Constitution of India are not intended to be used for the purpose of perpetuating the illegality, irregularity or impropriety committed by the official respondents.

28. The Learned Counsel for the appellants put must emphasis on the humanitarian aspects of the matter. As has been held by the Apex Court in *Ahmedabad Municipal Corporation Vs. Virendra Kumar Jayantibhai Patel*, the sympathy or equality is out of place especially, where the selection is governed by statutory rules. If the plea of the appellants is to be accepted, it will be open for the Department to favour any person or to appoint any person without following the procedure provided in the recruitment rules, which would also lead to nepotism and arbitrariness. In this context, the following observations of the Apex Court in *Uma Devi's* case are worth noting.

4. But, sometimes this process is not adhered to and the constitutional scheme of public employment is bypassed. The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution of

India. Whether the wide powers under Article 226 of the Constitution is intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognized by our Constitution, has to be seriously pondered over. It is time, that courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance, tends to defeat the very Constitutional scheme of public employment. It has to be emphasized that this is not the role envisaged for High Courts in the scheme of things and their wide powers under Article 226 of the Constitution of India are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any sight to be absorbed or made permanent in the interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be

possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

45. While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not ware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain - not at arm's length - since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least some employment temporarily, contractually or casually, would not be getting even employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequence flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionally and equality of opportunity enshrined in Article 14 of the Constitution.

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

29. The appellants being the product of favouritism and nepotism and when the procedure envisaged in the recruitment rule has been given a complete goodbye, depriving other eligible candidates, such appointments cannot be protected under any circumstances. In any public employment, there must be equal opportunity to all eligible candidates. The Director of Health services while communicating with the Government regarding need for temporary appointment himself admitted that large number of applications had been received in response to the employment notice. However, those large numbers of aspirants were kept at the bay and it is the appellants who were picked up as backdoor entrants for providing employment. This is clearly opposed to the mandate of Articles 14 and 16 of the Constitution of India.

30. Above being the position, which has emerged both on facts and law, we have no hesitation to dismiss the appeal, which we accordingly do. It is, however, provided that in the event of making any regular selection following the recruitment rules, the case of the appellants as well as the private respondents should also be considered at par with other eligible candidates. If by the time such regular selection is made, they become over aged, their case may be considered by condoning the age bar invoking the power of relaxation as provided in Rule 22 of the aforesaid rules.

31. Writ appeal is dismissed leaving the parties to bear their own costs. Interim order passed earlier, stands vacated.