

(2016) 03 GAU CK 0046
In the Gauhati High Court
Case No : W.P.(C) No. 2575 of 2014

Jonali Baruah

APPELLANT

Vs

State of Assam and Ors.

RESPONDENT

Date of Decision : 28-03-2016

Acts Referred:

Citation : (2016) 4 GauLJ 410 : (2016) 4 GauLR 188

Hon'ble Judges : Ujjal Bhuyan, J.

Bench : Single Bench

Advocate : P.K. Tiwari and Mr. H.K. Das, Advocates, for the Appellant; S. Sharma, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Ujjal Bhuyan, J.—Heard Mr. P.K. Tiwari, learned Senior counsel, assisted by Mr. H.K. Das, learned counsel, for the petitioner and Mr. S. Sharma, learned Additional Advocate General, Assam, appearing for the respondents.

2. By filing this petition under Article 226 of the Constitution of India, petitioner seeks a direction to the respondents to fill up three vacancies in the cadre of Deputy Director, Tourism, in accordance with the provisions of Assam Tourism Service Rules, 1995, in a time-bound manner. Further prayer made is to consider the case of the petitioner for such promotion.

3. Petitioner is serving as Tourist Information Officer in the Directorate of Tourism, Assam. In the final gradation list of Tourist Information Officer as on 15.11.2013, petitioner is placed at Serial No.3.

4. Recruitment and conditions of service of persons appointed and belonging to the Assam Tourism Service are regulated by the Assam Tourism Service Rules, 1995 (Service Rules) framed by the State exercising power conferred by proviso to Article 309 of the Constitution. Next higher post above Tourist Information Officer is Deputy Director which is filled up by way of promotion subject to fulfilment of eligibility criteria and on the basis of merit-cum-seniority.

5. Hon"ble Chief Minister, Assam, had directed all the Government departments to prepare a time-bound action plan to fill up the existing vacancies on fast track mode. This is contained in the letter of the Chief Secretary dated 16.09.2013 addressed to all the high Government officials. In connection with the above exercise, Director of Tourism, Assam, had informed the Government in the Tourism Department vide letter dated 23.09.2013 that there were three vacancies in the cadre of Deputy Director and that process was on to fill up the said vacancies which would be completed within two months. Since petitioner had the eligibility for such promotion, she was waiting for consideration of her case for promotion.

6. In the meanwhile, respondent No.2 issued notification dated 04.03.2014 temporarily promoting the officers placed at Serial Nos.1 and 2 in the final gradation list of Tourist Information Officer to officiate as Deputy Director of Tourism under Regulation 4(d) of the Assam Public Service Commission (Limitation of Functions) Regulations, 1951, for a period of one year or till regularisation by Assam Public Service Commission (APSC).

7. Aggrieved, present writ petition has been filed seeking the reliefs as indicated above.

8. Respondents have filed a common affidavit. Stand taken in the affidavit is that though there are three vacancies in the cadre of Deputy Director of Tourism and petitioner is placed at Serial No.3 of the final seniority list of Tourist Information Officer, the 25th position in the roster register in the cadre of Deputy Director which corresponds to the third vacancy is reserved for ST(P) and to accommodate the petitioner in the 3rd vacancy, the said 25th position in the roster would have to be de-reserved. However, Govt. of Assam has not de-reserved the said roster point. An appeal has also been filed by the officer at Serial No.4 Smt. Banti Neog against assignment of lower seniority position to her than the petitioner in the cadre of Tourist Information Officer which is pending. It is however stated that Government will not take any step to fill up any vacancy on adhoc basis and that all the posts would have to be referred to the APSC for regularisation within a period of one year.

9. Petitioner has filed rejoinder affidavit to the counter affidavit filed by the respondents. Besides reiterating the averments made in the writ petition, it is stated that the cadre of Deputy Director consists of only 8 posts. Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Act, 1978, as amended, (Reservation Act) provides for the following percentage of reservation:

ST(P) = 10%

SC = 7%

ST(H) = 5%

Total = 22%

It is contended that 10% reservation for ST(P) in a cadre consisting of 8 posts would come to 0.8 and 7% reservation for SC would come to 0.56; 5% reservation for ST(H) would come to 0.40. By applying the rounding off principle, 1 roster point can be earmarked for ST(P) and SC. But if both the above two categories are granted 1 roster point each, i.e., 2 roster points in a cadre of 8, it would exceed the total reservation percentage of 22% as prescribed by the statute. It is stated that since the criteria for selection for promotion is merit-cum-seniority, all the officers in the feeder cadre having the requisite eligibility are required to be considered to fill up the three vacancies. In so far appeal of Smt. Banti Neog is concerned, it is stated that she had approached this Court by filing WP(C) No.5137/2014 with the grievance relating to her seniority position in the cadre of Tourist Information Officer, which was disposed of on 26.09.2014 by directing the Secretary to the Govt. of Assam, Tourism Department, to consider the appeal filed by her and to dispose of the same by passing a speaking order expeditiously and preferably within two months from the date of receipt of a copy of the said order. That period of two months has long expired without disposal of the appeal, it is contended. In any case, if the said Smt. Banti Neog has the eligibility to be considered for promotion, assignment of lower seniority position would have no bearing to such a consideration. Therefore, pendency of appeal filed by Smt. Banti Neog is inconsequential.

10. Mr. Tiwari, learned Senior counsel for the petitioner, makes three-fold submissions. Firstly, he submits that since promotion is on the basis of merit-cum-seniority, all the officers in the feeder cadre having the requisite eligibility are required to be considered for such promotion which has admittedly not been done. Seniority cannot be the only determining factor in such consideration. Therefore, the officers at Serial Nos. 1 and 2 in the feeder cadre cannot be promoted only on the basis of their seniority when admittedly merit has to get precedence. Moreover, on the pretext of pendency of appeal filed by Smt. Banti Neog, respondents cannot keep in abeyance the promotion exercise for an indefinite period, that too, in the face of specific directive of the Hon'ble Chief Minister to fill up the vacancies in the different departments expeditiously. His second submission is that earmarking of roster points for the reserved categories, i.e., ST(P), ST(H) and SC should be limited to the statutory prescription. Roster points earmarked for the reserved categories cannot exceed the overall limit of 22% as prescribed by the Reservation Act. In the instant case, cadre strength of Deputy Director is 8. Therefore, only 1 post can be earmarked for the reserved category. In this connection, he has placed reliance on a decision of this Court rendered in the case of Binod Kumar Agarwala v. State of Assam, reported in 2014 (4) GLT 174. Finally, Mr. Tiwari submits that following the decision of this Court in Equality Forum v. State of Assam, reported in 2016 (1) GLT 710, reservation in promotion in terms of the Reservation Act would be dependent upon acquiring of quantifiable data by the State with regard to the two compelling reasons, i.e., backwardness of the community and inadequacy of representation and till such data is collected by the State which justify

reservation in promotion, provisions of the Reservation Act would remain in abeyance. There is nothing on record to show collection of such quantifiable data by the State to justify reservation in promotion. Therefore, it is not open to the State to contend that the 25th roster point is earmarked for ST(P) category. This itself is an anomalous situation having regard to the fact that cadre strength of Deputy Director is only 8. There cannot be 25th roster point in a cadre having strength of 8. He, therefore, seeks interference of the Court by issuing appropriate direction to the respondents.

11. Mr. Sharma, learned Additional Advocate General, at the outset, fairly submits that respondents have no issue in filling up the three vacancies on regular basis in terms of the Service Rules. On a query by the Court, he submits that impugned notification dated 04.03.2014 had to be issued so that vacancies in the cadre of Deputy Director are manned by officers on officiating basis till regular promotion is made. He, however, submits that Commissioner and Secretary of the Tourism Department has been entrusted with election duty by the Election Commission of India and he would be free from his election duties after 19th May, 2016 where after the process for filling up the three vacancies in the cadre of Deputy Director can be initiated and concluded.

12. In view of the fair submission made by Mr. Sharma, it may not be necessary to delve deep into the submissions made by Mr. Tiwari; however, before issuing the final directions, it is considered necessary that the legal position may be briefly re-stated.

13. But before that, a reference to some of the relevant provisions of the Service Rules would be in order. Rule 2(i) defines service to mean Assam Tourism Service. Rule 3 defines Class and Cadre. It provides that Assam Tourism Service (Service) shall consist amongst others cadres of Deputy Director and Tourist Information Officer. Rule 6 deals with method of recruitment. It provides that the cadre of Deputy Director shall be filled up by way of promotion in accordance with Rules 14 and 15. Rule 14 provides that subject to suitability as may be decided by the Selection Committee and by the appointing authority in accordance with the procedure laid down in Rule 15, a member of the service shall be eligible for promotion to the corresponding higher cadre in the manner provided in the said Rule. From the cadre of Tourist Information Officer, the next higher cadre is Deputy Director. In other words, the cadre of Tourist Information Officer is the feeder cadre for promotion to the next higher cadre of Deputy Director. A member of the service shall be considered for promotion to the cadre of Deputy Director if he has rendered service in the cadre of Tourist Information Officer for a minimum period of five years on the 1st January of the year of promotion. Certain other eligibility criteria are also mentioned in the said Rule. The general procedure for promotion is laid down in Rule 16. The authority is required to prepare a list of officers in order of seniority eligible for promotion. In other words, the zone of consideration would comprise of all eligible officers in the feeder cadre in order of seniority. Selection is made on the basis of merit-

cum-seniority to be considered by the Selection Committee. Rule 17 provides that in case of appointment by direct recruitment or by promotion, there shall be reservation in accordance with the provisions laid down in the Reservation Act.

14. In this case, we are concerned with promotion from the cadre of Tourist Information Officer to Deputy Director.

15. From a careful analysis of the provisions of the Service Rules as discussed above, it is evident that all those officers in the cadre of Tourist Information Officer who have attained eligibility for promotion to the cadre of Deputy Director shall form the zone of consideration to be considered for such promotion. From within the zone of consideration, selection has to be made by applying the criteria of merit-cum-seniority. Therefore, the Selection Committee is required to first finalise the list of eligible candidates and thereafter consider their cases by applying the criteria of merit-cum-seniority where obviously merit would play the determinative role. As candidly submitted by the learned Additional Advocate General, promotions carried out by the impugned notification dated 04.03.2014 were only officiating in nature and not promotions carried out as per the Service Rules, necessitated due to administrative exigencies. Therefore, the three vacancies in the cadre of Deputy Director are still available which are required to be filled up by following the procedure laid down in the Service Rules.

16. On the point of reservation in promotion, this Court in Equality Forum (supra) after surveying the law on this aspect, held as follows:

"66. The Hon'ble Supreme Court declared that it was of the firm view that a fresh exercise in the light of the Constitution Bench judgment in M. Nagaraj (supra) is a categorical imperative. It has been clarified that Articles 16 (4-A) and 16(4-B) are enabling provisions which enable the State to make provision for reservation in promotion for SCs and STs subject to fulfilment of the conditions precedent which are constitutional requirements.

67. Thus, from a careful analysis of the pronouncements of the Apex Court in M. Nagaraj (supra), Suraj Bhan Meena (supra) and Uttar Pradesh Power Corporation Limited (supra), what is discernible is that the quantifiable data regarding backwardness and inadequacy of representation has to be acquired in respect of the promotional cadres. It has been stated and re-stated by the Apex Court that the requisite quantifiable data would be scrutinised in each case. In other words, the quantifiable data has to be both service and cadre specific. What the One-Man Commission has done is that it has made a general statement about backwardness of SCs and STs and has not provided quantifiable data either on backwardness or on inadequacy of representation having regard to the promotional posts. Whether there is adequate representation or not has to be decided cadre-wise having regard to the service where the cadre is placed. Once it is found that in a particular cadre there is adequate representation of SCs and STs, providing for reservation to such communities in promotion to such cadre would not be justified.

68. It is true that following the law laid down by the Apex Court in Indra Sawhney, SCs and STs are deemed to be backward. It is further true that the concept of creamy layer is not applicable to SCs and STs. However, having said that, Court is of the considered opinion that the above factors would be relevant only at the time of initial recruitment. At the time of promotion, in the event reservation is sought to be introduced, then an assessment of backwardness of the said communities having regard to their representation in the promotional cadre(s) would have to be carried out.

69. Backwardness of SCs and STs vis-a-vis promotion would have to be determined cadre-wise. If in a particular cadre, SCs and STs are not adequately represented, they may be considered as backward in so far that particular cadre is concerned. Conversely, if in a particular cadre, SCs and STs are adequately represented, then they may not be considered as backward for the purpose of promotion to that particular cadre. Therefore, it is quite evident that the concepts of backwardness and inadequacy of representation in the context of reservation in promotion are inter-twined.

70. The Full Bench of the High Court of Tripura in Jayanta Chakarabarty & Ors. v. State of Tripura & Ors. [WP(C) No.189/2011 and other connected cases] decided on 09-04-2015 has taken the following view:-

"..... backwardness of SCs and STs in the context of promotion in Government service will be closely interlinked to their inadequacy of representation in that particular Government service. We are of the view that this backwardness would be directly related to the inadequacy of the representation of the SCs and STs in the promotional cadres. In case, the SCs and STs are adequately represented in the cadre whether by means of reservation or on the basis of merit, then they cease to be backward for the purposes of getting benefit of reservation in promotion and this will have to be determined on cadre to cadre basis".

I am in respectful agreement with the above view of the Tripura High Court.

71. The factum of SCs and STs being appointed/promoted against the open/unreserve posts in the State services is also a relevant factor to be considered while ascertaining both backwardness and inadequacy of representation.

72. Ascertainment of backwardness and inadequacy of representation of SCs and STs in the promotional cadres based on quantifiable data is a continuous process and cannot be a onetime exercise. As pointed out by the Apex Court, the situation has to be assessed and reviewed on each occasion when reservation in promotion is contemplated.

73. There is one more aspect, which needs to be mentioned. While examining the question of overall efficiency in the administration because of reservation in promotion, what is seen from the report of the One-Man Commission is that it has made an observation that there is no relaxation of eligibility criteria in

matters of promotion for candidates belonging to SCs and STs. They must have the eligibility at par with the unreserve candidates and only then can they be promoted against posts earmarked for a particular category. In the understanding of the Court what Article 335 visualizes is impact on overall efficiency in the administration because of reservation in promotion. What is, therefore, required to be assessed is the effect on administrative efficiency due to the presence of reserve category candidates in the cadre because of accelerated promotion on account of reservation in promotion. Whether the presence of the reserve category candidates in the particular cadre on account of accelerated promotion due to reservation has impacted the administration adversely is required to be assessed by applying objective measurable standards. No doubt, it is a difficult task but nonetheless it has to be carried out if the State desires to provide for reservation in promotion.

74. As held in *M. Nagaraj* (supra), implementation of the scheme of reservation in promotion and collection of quantifiable data for the same to form an opinion on backwardness and inadequacy of representation and to harmonise the same with the constitutional limitation of efficiency in administration under Article 335 is a categorical imperative. Collection of data and the opinion based thereon rendered by the One Man Commission do not conform to the norms laid down by the Apex Court in *M. Nagaraj*. Therefore, there can be no manner of doubt that the exercise carried out by the One-Man Commission does not fulfil the mandate laid down in *M. Nagaraj* (supra). The cabinet memorandum prepared by the WPT and BC Department while forwarding the recommendation of the One Man Commission to the Cabinet for approval also completely missed the point by stating in paragraph 8 thereof that the general established fact is that SCs and STs are comparatively lagging behind the general category in many areas like justice, social, economic and political fields; otherwise, the reservation provision would not have come into existence in the Constitution. Therefore, according to the WPT and BC Department, further analytical study in this regard in the name of collecting quantifiable data would be denial of justice to the SCs and STs. I am afraid the WPT and BC Department had completely misdirected itself and had totally overlooked the mandate of the Apex Court in *M Nagaraj*, which has vitiated the cabinet memorandum and the consequent approval of the Cabinet to such recommendation. Though State has made provision for reservation in promotion by enacting the 1978 Act, which was amended in the year 2012, implementation of the same would depend on acquiring of quantifiable data with regard to the 2 (two) compelling reasons, which exercise has to be carried out cadre-wise in the context of the service where the cadre is placed. That having not been done, the report of the One-Man Commission would be of no legal consequence and would not enable the State to give effect to the provisions of the 1978 Act as amended in so far reservation in promotion is concerned. At the cost of repetition, it is reiterated that if the State desires to give effect to the provisions of the 1978 Act as amended in the year 2012 by providing for reservation in promotion, it would have to justify the same with the help of

quantifiable data to show presence of the 2 (two) compelling reasons, backwardness and inadequacy of representation, cadre-wise in the context of the service where the cadre is placed, which would then have to be harmonised with efficiency in administration as mandated under Article 335."

17. By invoking the enabling provisions, State of Assam has made provision for reservation in promotion by enacting the Reservation Act. But the same can be made applicable only subject to fulfilment of the two conditions precedent, viz, backwardness of the community and inadequacy of representation as explained in Equality Forum (supra). If the State wants to give effect to the provisions of the Reservation Act, it would have to justify the same with the help of quantifiable data to show presence of the two compelling reasons, i.e., the two conditions precedent. Therefore, reservation in promotion cannot be claimed as a matter of right nor can the State provide for such reservation in the absence of quantifiable data on the two compelling reasons.

18. That being the position and having regard to the submissions made by the learned Additional Advocate General, Court is of the view that without entering into the other contentions advanced on behalf of the petitioner, the following directions may now be issued to the respondents:

(1) Respondent Nos.2 and 4 are directed to carry out the promotion exercise from Tourist Information Officer to Deputy Director of Tourism against the three vacancies by following the provisions of the Assam Tourism Service Rules, 1995, and also keeping in mind the law laid down by this Court in Equality Forum (supra) as extracted above;

(2) Case of the petitioner and all other eligible candidates shall be considered for such promotion;

(3) Such exercise shall be carried out within a period of three months from the date of receipt of a certified copy of this order.

19. With the above directions, writ petition is disposed of.

20. No costs.