
(2015) 03 GAU CK 0072

In the Gauhati High Court

Case No : Writ Petition (C) No. 353 (AP) of 2013

Kampu Dolo

APPELLANT

Vs

State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 18-03-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 309

Citation : (2015) 3 GLT 231

Hon'ble Judges : Rumi Kumari Phukan, J

Bench : Single Bench

Advocate : P. Taffo, N. Danggen, J. Doji, M. Molo and O. Duggong, for the Appellant; T. Bayor, S/C and K. Jini, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Rumi Kumari Phukan, J—This petition under Article 226 of the Constitution of India has been moved by the petitioner praying for setting aside and quashing the orders No. Hort/E-462/2012 dated 11th October, 2012 issued by the Commissioner (Horticulture), Govt. of Arunachal Pradesh, whereby placing the service of the private respondent No. 4 in the Department of Rural Development and the Order No. CD-275/2012 (E) dated 22nd October, 2012, issued on 05.11.2012 by the Secretary (RD), Govt. of Arunachal Pradesh, granting approval to continue the private respondent No. 4 as Joint Director (Agri & Allied) in the Department of Rural Development without creation of the said post in the Department of Rural Development. The fact of the case, in brief, is that the petitioner is presently working as Deputy Director of Rural Development Department under the Govt. of Arunachal Pradesh and his promotion to the next higher post of Joint Director is governed by the Recruitment Rules framed under Article 309 by the Govt. of Arunachal Pradesh, which is called as "the Joint Director (RD) Group-A post (Recruitment) Rules, 1995. As per the said Recruitment Rules, the post of Joint Director (RD) is to be filled up by promotion from the post of Deputy Director (TRYSEM) in the pay scale of Rs. 2200-4000/-

with five years regular service in the grade failing which by deputation/transfer from analogous posts of State/Central Govt. The private respondent No. 4, who was holding the post Horticulture Development Officer of the Horticulture Department, which is not equivalent to the post of Deputy Director and therefore, the petitioner, who was holding the post of Deputy Director is a subsequent feeder post for promotion to the post of Joint Director (RD).

2. The private respondent No. 4 was initially placed to the Rural Development Department initially for the period of 3 years from the date of joining with the condition that the pay and allowance of the officer as admissible from time to time will be drawn from the Department of Horticulture, Govt. of Arunachal Pradesh during the period of his service in the R.D. Department as HDO (Selection Grade) vide order dated 11.10.2012 issued by the Commissioner (Horticulture), Govt. of Arunachal Pradesh, Naharlagun. By a subsequent order dated 22.10.2012, the private respondent No. 4 has been accorded approval for utilization of services of the incumbent as Joint Director (Agri & Allied) for a period of 3 years with effect from the date of his joining with the condition that the pay and allowance of the officer will continually be drawn from the Department of Horticulture, Govt. of Arunachal Pradesh, as per the existing arrangement as stipulated in the above said order. The other terms and condition not stipulated herein shall be governed by the govt. orders to be issued from time to time. Thereafter, vide order dated 27.11.2012, the Director, Rural Development Department, has issued an order, in the interest of public, whereby the private respondent No. 4 has been temporarily allotted to look after the works of Joint Director, MGNREGA(MIS) and IWMP (Agri & Allied) and the petitioner has been given to look after the works which have already been allotted to him earlier.

3. Heard Mr. P. Taffo, learned counsel for the petitioner and also heard Mr. T. Bayor, learned Standing Counsel for the Rural Development Department/respondent Nos. 1 & 2. Mr. K. Jini, learned counsel appearing on behalf of the private respondent No. 4. None appears on behalf of the respondent No. 3.

4. The learned counsel for the petitioner, Mr. Taffo, has submitted that the private respondent No. 4, who was holding the post of Horticulture Development Officer, in the Horticulture Department of the State has been placed and accorded approval for utilization of the services of the incumbent as Joint Director (Agri & Allied) initially for the period of 3 years in the Rural Development Department although, there is no existing such post in the Department. The learned counsel for the petitioner has also submitted that as per the Recruitment Rules, 1995, the post of Joint Director (RD) should be filled up by promotion from the post of Deputy Director (TRYSEM) with five years regular service in the grade. The private respondent No. 4 has been placed against the non-existing post of Joint Director (Agri & Allied) in the Rural Development Department, even, he was holding the post of HDO in the Horticulture Department, is not a feeder cadre for such promotion and the said post of Joint Director should be considered for

promotion as per Recruitment Rules, 1995. The promotion of private respondent No. 4 as Joint Director (Agri & Allied) in the Rural Development Department on the basis of placement on deputation against the aforementioned Recruitment Rules.

5. It is submitted by the learned counsel for the petitioner that the private respondent No. 4, who was holding the post of Horticulture Development Officer in the parental Department shows that his serial No. 76 in the final seniority list of the Department of Horticulture and the next immediate promotional of Horticulture Development Officer is Sub-Divisional Horticulture Officer and thereafter, next higher grade is District Horticulture Officer, which is equivalent to the post of Deputy Director of Horticulture and then only he would be eligible for promotion to the post of Joint Director. But, the private respondent has been given promotion to the post of Joint Director (Agri & Allied) in the Rural Development Department, on deputation by placing the service from the Horticulture Department, without following the Recruitment Rules framed under Article 309 of the Constitution, which affects the legitimate prospective promotion to the petitioner.

6. An affidavit-in-opposition, on behalf of the State respondent Nos. 1 & 2, i.e. Department of Rural Development, has been filed, wherein, it was categorically stated that the petitioner is holding the post of ex-officio capacity at his own grade pay as Block Development Officer (BDO), promotion/regularization of his post is not yet done. The promotion/appointment to the post of Joint Director will be filled up as per the standing Recruitment Rules for the post as and when the post of Joint Director falls vacant. The post of Joint Director is likely to be fell vacant in the year 2015 only after retirement of the incumbent holding the post of Joint Director and the Government has to decide for filling up the post of Joint Director as and when the particular post is vacant and has to be considered by the DPC on the basis of the existing Recruitment Rules for the same.

7. The private respondent No. 4 has contended in his affidavit-in-opposition, that the writ petition is not maintainable as per law as neither the legal right nor the constitutional rights of the petition has been violated and infringed while attaching the respondent No. 4 as Joint Director (Agri & Allied) in the Rural Development for 3 years. So, the petitioner has no locus-standi to file the instant writ petition. He further contended that the petitioner is concealing the fact about existing of two posts of Joint Directors in the Rural Development Department viz. namely, one post is of Joint Director (Non-Tech.), which is to be filled up from amongst the eligible Deputy Directors of the Department, failing which through deputation/transfer from the analogous posts of the State/Central Government and another post of Joint Director is purely a temporary and a technical post, which was created vide order dated 28.01.1994 for implementation of the JRY Scheme for Rural Development Department, which is to be filled up through deputation/transfer from among the eligible and willing officers of the rank of Assistant Engineers of Technical Departments of the State Government of

Arunachal Pradesh having a degree in civil engineering from a recognized university with 5 years of regular service as Assistant Engineer.

8. The present post of Joint Director (Agri. & Allied), whereupon, the private respondent No. 4 has been attached is not a sanctioned post, he has been appointed/brought purely on exigency of service in the Department in public interest. Further, the Joint Director (RD) Group-A post (Recruitment) Rules, 1995 is to be filled up from their own channel of promotion as per the Recruitment Rules but the petitioner, who is mere Block Development Officer, who is not yet to be promoted as Deputy Director, is not even come under the zone of consideration for promotion to the post of Joint Director, without following the post of feeder cadre/grade, cannot claim such promotion.

9. The private respondent No. 4 was brought to the Department of the petitioner due to lack of person having technical knowledge to cope up with the necessity and implementation of different new Schemes in the field of Agriculture), the petitioner has no right to assail the appointment of the private respondent No. 4, which was attached to the post of Joint Director purely temporary in the Department of Rural Development of his own pay scale, which will be drawn from his own parent's Department i.e. Department of Horticulture.

10. Regarding his induction in the Department of the petitioner, it has been apprised that having learnt from the reliable sources that the Department of Rural Development was in search of an experienced officer for execution and monitoring of various Centrally sponsored agro based Works in the State, the private respondent No. 4 applied for the same through proper channel and ultimately, on approval of the concerned authority, he was finally attached to the Department of the petitioner without disturbing him and he was placed in the Department initially for a period of 3 years with a direction that his salary and allowances will be drawn from his parent's Department i.e. Horticulture Department. As such, there was no illegality in attaching the private respondent No. 4 in the Rural Development Department as Joint Director (Agri. & Allied) and neither it has encroached/blocked the channel of promotion of the petitioner.

11. It is also pointed out that the petitioner is not yet the senior most Block Development Officer in the Department so as to consider him for the post of Deputy Director and attachment of the private respondent No. 4 is no way prejudice him to the interest of the petitioner and only the fact that the private respondent No. 4 has been entrusted with different kind of activities under the Schemes of the State Government, which cannot be a ground for infringement of legal right to the petitioner so as to invoke the writ jurisdiction of this Court.

12. What we found on the submissions of the learned counsel for the petitioner is that his grievance is basically raised against the employment of private respondent No. 4 in their department as a superior officer above him and who was much junior in his original cadre in the parental post in the parent department. However, the contention of the learned counsel for the petitioner is

that there is no post as such as Joint Director (Agri & Allied) in the Rural Development Department and how one can be posted against any non-existing post, which is a very serious matter. That apart, the salary of the petitioner is higher than the private respondent No. 4, which is also, shows that the respondent No. 4 is lower in the category of the post of the petitioner.

13. Thus, it has been contended that one junior person cannot be brought to the Department, who is much junior to the petitioner. The conduct of the State respondents indicated mala fide and vested interest while employing the private respondent No. 4. That apart, no notice to the other departments was plotted to fulfil the post on deputation and the private respondent No. 4 is brought at the backdoor policy on the recommendation of Parliamentary Secretary and he must be reverted back to his parent's department.

14. The learned Standing Counsel, Mr. Bayor, has highlighted the fact that the nature of work in the Horticulture and Rural Development Departments are same and the private respondent No. 3 was employed in the department of the petitioner only as attachment, not by way of deputation. Basing upon the relevant file produced before this Court, the learned Standing Counsel has submitted that to carry out the various new schemes like EREGA etc, one technical person is required to carry out the time bound scheme and such person being not available in the department and due to non availability of such technical post, on the recommendation of the higher authority and even the Chief Minister, the private respondent No. 4 was attached to the department of the petitioner for a limited period of three years with the following order:-

"GOVERNMENT OF ARUNACHAL PRADESH DEPARTMENT OF RURAL DEVELOPMENT ITANAGAR

ORDER

Dated, Itanagar, the 22nd October, 2012.

No.CD-275/2012 (E):- Consequent upon placement of services of Shri T.T. Dagium, HDO, in this Directorate vide Govt. Order No. Hort/E-462/2012 dated 11.10.2012, approval is hereby accorded for utilization of the services of the incumbent as Joint Director (Agri & Allied) initially for a period of 3(three) years with effect from the date of his joining.

2. That pay and allowance of the officer will continually be drawn from the Department of Horticulture, Govt. of Arunachal Pradesh, as per the existing arrangement as stipulated in above said order.

3. All other terms and condition not stipulated herein shall be governed by the Govt. orders to be issued from time to time.

4. This issue with the approval of HCM and HM (RD) dated 22.10.2012.

Sd/- (B.R. Babu) Secretary (RD), Govt. of Arunachal Pradesh, Itanagar."

15. From the nature of above order, it is apparent that his services has been utilized and it was not a regular appointment against any such post and the Government being the authority can take such administrative decision for the better interest of the department but it does not necessarily implicated that the private respondent No. 4 has been permanently absorbed in the post. It is also assailed by the State respondents that the petitioner is not yet eligible for his promotion to the next higher grade i.e. to the post of Deputy Director. There are still six senior persons over the petitioner to be promoted to the next higher grade, the petitioner cannot even think for posting against the post of Joint Director (Agri & Allied). Moreover, the petitioner never made any demand before the authority prior to coming to this Court challenging the matter, which is not maintainable.

16. Mr. Jini, learned counsel for private respondent No. 4 has urged that with the approval of the Hon'ble Chief Minister and Hon'ble Minister (RD), he was inserted/brought into the department against the policy decision taken by the Government, which is not a peculiar phenomenon in view of the nature of work in a department; rather, private respondent No. 4 is no way related to any post of Joint Director under the rules of the department and nor he has any claim for such post. The petitioner, who is not any enforceable claim to the post of Joint Director, who is far below the rank of Deputy Director, then, how, the petitioner, challenged the attachment of the private respondent No. 4 while no promotional aspect of the petitioner has been blocked or any legal right has been infringed. To bolster his arguments, the private respondent No. 4 has relied upon the various decisions of the Apex Court as well as this Court.

17. Relying the decision, the learned counsel for the private respondent No. 4, has cited the case law reported in *Saraswati Industrial Syndicate Ltd. and Others Vs. Union of India (UOI)*, AIR 1975 SC 460 : AIR 1974 SC 460 : (1974) 2 SCC 630 : (1975) 1 SCR 956 , wherein in para 24 reads as follows:-

"24. As the appeals fail on merits we need not discuss the technical difficulty which an application for a writ of certiorari would encounter when no quasi-judicial proceedings was before the High Court. The powers of the High Court under Article 226 are not strictly confined to the limits to which proceedings for prerogative writs are subject in English practice. Nevertheless, the well recognised rule that no writ or order in the nature of a mandamus would issue when there is no failure to perform a mandatory duty applies in this country as well. Even in cases of alleged breaches of mandatory duties, the salutary general rule, which is subject to certain exceptions, applied by us, as it is in England, when a writ of mandamus is asked for, could be stated as we find it set out in Halsbury's Laws of England (3rd Edn.)..."

In the case of *Tin Plate Co. of India Ltd. Vs. State of Bihar and Others*, AIR 1999 SC 74 : (1998) 79 ECR 497 : (1998) 7 JT 442 : (1998) 6 SCALE 36 : (1998) 8 SCC 272 : (1998) 2 SCR 547 Supp : (1999) 112 STC 543 : (1998) AIRSCW 3398 : (1998) 8 Supreme 305 , the learned counsel for the private respondent

No. 4 has relied upon the para 4 & 5, which read as follows:-

"4. Learned counsel appearing for the appellant urged that the High Court has committed a grave error in making various observations touching upon the merits of the case while dismissing the Writ petition on the ground of alternative remedy and thereby prejudicing the case of the appellant to be taken up before the appellate authority who was bound to decide the case in terms of the observations made by the High Court. The argument is well substantiated. It is no doubt true that when an alternative and equally efficacious remedy is open to a person, he should be required to pursue that remedy and not to invoke extraordinary jurisdiction of the High Court under Article 226 of the Constitution and where such a remedy is available, it would be a sound exercise of discretion to refuse to entertain the writ petition under Article 226 of the Constitution, in the present case, admittedly, the appellant had an alternative and equally efficacious remedy by filing an appeal before the appellate authority against the order of assessment and in view of such a remedy being available to the appellant, the High court was right in dismissing the writ petition on the ground that the appellant has an alternative remedy available under the Bihar sales Tax Act, 1959. However, we do not subscribe to the view of the High court when it made a number of observations touching open the merits of the case while dismissing the writ petition on the ground of alternative remedy. If the writ petition under Article 226 is to be dismissed on the ground of alternative remedy, the High Court is not required to express any pinion on is true that in the present case, the appellant's counsel in his effort to get over the objection of existence of an alternative remedy, addressed the Court on the merits of the case and thereby invited the observations on the merits of the case by the High Court. But in such a situation, if the High Court is to dismiss the writ petition on the ground of alternative remedy, it would be a sound exercise of jurisdiction to refrain itself from expressing any opinion on the merits of the case which ultimately is to be taken up by a person before an alternative forum.

"5. In the present case, in view of the observations made by the High Court, the appellate authority has rejected the appellant's appeal at the threshold and the appellant has been left without any remedy under the law. In such circumstances, we are of the view that the observations made by the High court in its judgement on the merits of the case were totally uncalled for and deserve to be set aside. Consequently, we set aside the observations made by the High Court in the judgment under appeal to the extent they relate to the merits of the case which was the subject matter of appeal before Sales Tax Appellate Authority. Since the appellate authority under the Act observed that delay could have been condoned and also the fact that the appellant has deposited 20 % of the Tax, we set aside the order of the appellate authority dated 22-6-1996 and restore the appeal to the file of the Joint Commissioner of Commercial Taxes (Appeals), who shall decide the appeal expeditiously on its own merit without being influenced by any of he observations made by the High Court in the writ petition."

18. Learned counsel for the private respondent No. 4 has relied upon the para 9 and 11 of the judgment reported in Shri Saikat Debbarma Vs. The State of Tripura and Sri Bijan Roy, Superintendent of Press , which reads as under:-

"9. Before proceeding with the issue relating to reservation in a single post cadre, we will have to consider as to whether the petitioner at whose behest the said issue is required to be answered was a competent person to be considered for appointment/promotion to the post of manager. As already noted above, the writ petitioner was not eligible either for direct recruitment or for promotion to the post of Manager. That being the situation, he had no locus standi to make any grievance against the advertisement and the selection thereof consequent upon which the private respondent i.e. the appellant in WA No. 182 of 2006 was appointed.

"11. The appellant in WA No. 82 of 2006, who had offered his candidature in response to the advertisement, pursuant to which a selection was also conducted and thereafter upon selection, has been appointed. No one, eligible for direct recruitment or for promotion to the post of Manager challenged the advertisement and the selection. It was the writ petitioner, who had challenged the selection and appointment although he was not eligible to hold the post. Situated thus, there could not have been any challenge by the petitioner, he himself, being not eligible to offer candidature for the post It was never the case of the petitioner that, but for the reservation provided to the post in question he would have been entitled to offer his candidature. Nowhere in the writ petition, we find any such statement."

19. In the case law of Ayaubkhan Noorkhan Pathan Vs. The State of Maharashtra and Others, (2013) 1 ABR 454 : AIR 2013 SC 58 : (2013) 136 FLR 574 : (2012) 11 SCALE 39 : (2013) 4 SCC 465 , the learned counsel for the private respondent No. 4 has referred the Para 9, read as under:-

"9. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the authority/court, that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order, etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or (sic) when there is a complaint by the appellant that there has been a breach of statutory duty on the part of authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can, of course, enforce the performance of a statutory duty by a public body, using its writ petition at the behest of a person, provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that the relief prayed for must be one to enforce a legal right, In fact, the existence of such right, is the foundation of the exercise of the said jurisdiction by the Court. The

legal right that can be enforced must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the court for relief as regards the same."

In the similar line, the learned counsel for the private respondent No. 4 has referred para 10 of the judgment, reported in *Esrafil Ali Vs. State of Assam*, (2014) 2 GLT 802 , which reads as follows:-

"10. That apart, the pleaded case of the respondents is that the respondents No. 7 has been holding the charge of the post of Head-Master all these years, To compound the problems for the petitioner, no whisper of statement is ever made by him in his writ petition that he has actually been discharging the duty of Head-mudaris in in-charge basis since 25.08.2004. All that he said is that his discharge from the post was stayed by this Court. Now, this is different from saying that he has been functioning as In-Charge Head-mudaris all these years. The burden of proof that he has been continuing as in-charge Head-mudaris since 25.8.2004 is upon the petitioner, he is unable to produce adequate evidence to prove it Article 226 of the constitution can be invoked only to enforce an established right and cannot be invoked to establish a right Moreover, the petitioner does not challenge the selection of the respondent No. 7 or his consequential appointment to the post of Headmudaris of the Madrassa on regular basis as approved by the respondent No. 2 by the order dated 13.07.2011. Looking at the matter from all angles, I am, therefore, of the view that his existence of complicated disputed questions of fact"

Also in the case of *Smt. Naseem Bano Vs. State of U.P. and others*, AIR 1993 SC 2592 : (1993) 4 JT 553 : (1994) 1 LLJ 84 : (1993) 3 SCALE 431 : (1993) 4 SCC 46 Supp : (1993) 3 SLJ 89 , the learned counsel for the private respondent No. 4 has referred the Para 9, which read as under:-

"9. The aforesaid reply would show that on behalf of respondents 1 to 4, it was not disputed that 40 percent posts which have to be filled up by promotion had not been filled up and the denial of promotion to the appellant was justified on the sole ground that she was not qualified to be promoted to L.T. grade. This shows that in the pleadings before the High Court, there was no contest on the question that the post of L.T. grade which was sanctioned on August 29, 1977 was required to be filled up by promotion for the reason that 40 percent posts had not been so filled. Even though there was no contest on this question the High court has gone into it and has held that the appellant has failed to establish her case that at the time of the appointment of respondent 6 by direct recruitment 40 percent of the total number of posts in the College were not filled up by promotion as described by Regulation 5(2)(a) of the Regulations. Since no dispute no dispute was raised on behalf of respondents 1 to 4 in their reply to the averments made by the appellant in the writ petition that 40 percent of the total number of the posts had not been filled by promotion, in as much as the said averments had not been controverted, the High Court should have proceeded on the basis that the averments had been admitted by respondents."

20. In view of the above legal pronouncements, there appears much substance in the submission of the learned counsel for the respondent No. 4. There is nothing to hold that the petitioner was firstly eligible to the post of Joint Director that he has the legal right to claim the same post and his legal right has been infringed by way of attachment of the private respondent No. 4 in the said post. He has no way preferred any appeal before the authorities concerned to challenge the attachment of the private respondent No. 4 in his department and it is the mandate of law as has been pronounced by the several judgments of the Apex Court that a person can claim redressal of his already established right but he cannot invoke the writ jurisdiction under Article 226 to establish his right. However, what is legal right and how it can be enforced, has been discussed in the catena of cases, over and above, already discussed.

21. From the very assertion of the petitioner in his petition, it is also apparent that he has filed the case only on apprehension that the private respondent No. 4 may be absorbed in the post in the event of vacancy of Joint Director in the year 2015, which may affect the legitimate prospect of promotion of the petitioner, vide para 13 and 14 of the petition, it has been mentioned that it is predictable that the private respondent No. 4 would be absorbed against the post of Joint Director likely to be vacant in 2015. From which, it is apparent that no legal right has yet been accrued to the petitioner to invoke the writ jurisdiction under Article 226 of the Constitution. The very nature of order of attachment indicates that he was not even brought on deputation and his salary is allowed to be drawn from his parent Department and his service has been utilized for benefit of the Rural Development Department, a similar concern, to carry out implementation of various special schemes of the Government.

22. It is an admitted position that the post of Joint Director can be filled up by the Rural Development Department by way of promotion from the Deputy Directors only as per the existing Recruitment Rules. So, in that view also, there is no expectation that the private respondent No. 4 can be appointed against the said post of Joint Director by violating the prescribed rules, only on the apprehension of the petitioner the attachment of private respondent No. 4, which is otherwise found not mala fide and it is going to terminate after few months, there arose no occasion to invoke the extra-ordinary jurisdiction under Article 226 of the Constitution, in absence of violation of a legal right of the petitioner. The petitioner, however, can come forward, whenever it effects his legal right by any unfair means of the respondents. This writ petition stands disposed of in view of the above observations.