
(2011) 01 GAU CK 0046

In the Gauhati High Court

Case No : Writ Petition (Civil) No.324(AP) of 2009

Mechi Gao

APPELLANT

Vs

State of Arunachal Pradesh and Ors.

RESPONDENT

Date of Decision : 19-01-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 14, 16, 16, 226

Citation : (2011) 5 GLR 44

Hon'ble Judges : I.A.Ansari, J and P.K.Musahary, J

Bench : Division Bench

Advocate : Mr.M.Pertin for the petitioner., Mr.R.H.Nabam and Mr.K.Ete for the respondents, Advocates appearing for Parties

Judgement

I.A. Ansari, J.—Should a High Court, while exercising its extraordinary jurisdiction under article 226 of the Constitution of India, direct the Government as to what shall be the rules of recruitment or of promotion in a given case or should High Court's exercise of power, under article 226, remain confined to the testing of the relevant recruitment rules in the light of the relevant provisions of the Constitution for the purpose of determining if the rules, in any manner, violate or defeat the constitutional provisions? When there are more than one sources of recruitment to a given post, will it be invariable irrational, on the part of the State Government, if it opts to make recruitment on the basis of total length of service of a person irrespective of the fact as to which cadre he belongs to or will it depend on the facts of a given case, whether or not the Government shall fix the percentage, ratio or quota of recruitment for each of such sources of recruitment to the given integrated next cadre? These are some of the important questions, which the present writ petition, made under article 226, has raised.

2. The petitioner was appointed as Extension Officer (WCS) in Rural Development Department, Government of Arunachal Pradesh, by order, dated 3.7.1989, and, in course of time, she was promoted as senior instructress, GroupB (nonGazetted) in the same department by order, dated 23.4.1992. Thereafter,

the petitioner was promoted, vide order, dated 25.3.1998, to the post of Principal (Training), Group B Gazetted, in the pay scale of Rs.6,500 per month plus other allowances as may be admissible. In terms of the recruitment rules for the post of Assistant Director (ICDS), which has been framed by the State Government in exercise of its power under article 309 of the Constitution of India, the post of assistant Director is to be filled up from the post of CDPO (ICDS)/Principal (Training) having five years of regular service in the grade for graduate and ten years regular service in the grade for undergraduate on the basis of senioritycumfitness.

3. The petitioner's grievances are, in brief, thus: The post of Principal (Training) and the post of CDPO form the feeder posts of equal grade for promotion to the post of Assistant Director, ICDS, which stands redesignated as Deputy Director, ICDS, from the year 1998, though the relevant recruitment rule still identifies the said post as Assistant Director, ICDS, and not as Deputy director, ICDS. The posts of Principal (Training) and CDPO are interchangeable posts and there are instances, where CDPOs have been posted, in the training institutes, as Principal and vice versa. However, the scale of CDPO was enhanced from Rs.6,500 to Rs. 10,500 per month to Rs.8,000.to Rs. 13,500, but the scale of Principal (Training), was not recommended by the Pay Anomaly Committee. Consequently, the pay scale of CDPO has remained stagnated at Rs.6,500 to Rs.10,500 per month. The recruitment rules for the promotional post of Deputy Director, ICDS, suffer from inherent defect inasmuch as the relevant recruitment rules do not prescribe any percentage, ratio or quota from the feeder post of CDPO and Principal. (Training), though the posts of CDPO and Principal (Training) form separate cadres. In the past, seven posts of the Deputy Director, ICDS, were filled up from CDPOs and, recently, seven more posts of Deputy Directors have been filled up from the posts of CDPO ignoring thereby the case of the present petitioner, who is the Principal (Training). The act of ignoring the case of the petitioner for promotion to the post of the Deputy Director, ICDS, and considering the case of CDPOs alone for promotion is highly illegal, unjust, arbitrary and discriminatory in nature. The relevant recruitment rules for the promotional post of CDPO too need correction by providing percentage, quota or ratio to the post of Deputy Director from the posts of CDPO and Principal (Training). Redesignation of the post of Assistant Director, as Deputy Director, has not been incorporated in the relevant recruitment rules and, hence, designation of the post as Deputy Director (ICDS) is also illegal.

4. In the backdrop of the above grievances, the petitioner has filed this writ petition seeking to get set aside and quashed the officiating promotion of private respondent Nos.4 to 9. By her writ petition, the petitioner has also sought to get set aside and quashed the recruitment rules aforementioned and to get issued to the State respondents directions to make necessary corrections in the said recruitment rules providing therein percentage, ratio or quota for promotion to the post of the Deputy Director, ICDS, from the feeder posts of CDPO and Principal (Training).

5. Resisting the writ petition, respondents have pointed out that as far as private respondent Nos.5 and 7 are Concerned, they were appointed as CDPOs as far back as on 2.5.1990 and so far as respondent Nos. 4, 6, 8 and 9 are concerned, they were appointed as CDPO on 26.4.1991; whereas the petitioner, who also falls in the same cadre, come to be appointed as Principal (Training) on 25.6.1998. Thus, though respondent Nos.4 to 9 may fall in separate cadre, the petitioner is far junior to the private respondents. Since the post of Assistant Director, which is redesignated as Deputy Director, is a nonselection post, based on senioritycumfitness, the State respondents have been considering the total length of service, rendered by an incumbent in the feeder grade of CDPO and/or in the feeder cadre of Principal (Training), as the criterion for promotion. Because of the fact that the total length of service, rendered by an incumbent in either of the said two cadres (which are of equal grade) or the total length of service rendered by an incumbent in both the said cadres combined together, is the criterion for consideration of promotion to the post of Assistant Director, the relevant recruitment rules do not specify the quota, ratio or percentage for the promotional post of Assistant Director redesignated as Deputy Director, ICDS.

6. We have heard Mr. M. Pertin, learned counsel, for the petitioner, and Mr. R.H. Nabam, learned Senior Government Advocate, for the State respondents. We have also heard Mr. K. Ete. Learned counsel, for the private respondents.

7. While considering the present writ petition, it needs to be noted that the posts of CDPO and the post of Principal (Training) are two different posts of equal grade. It is the case of the petitioner herself that the holders of these two posts are interchangeable. There is also no dispute that the post of Principal (Training) is the one post.

8. Coupled with the above, the relevant recruitment rules make the incumbent of both the posts, namely, CDPO and Principal (Training), eligible for promotion to the post of Assistant Director, ICDS, redesignated as Deputy Director, ICDS, the eligibility criterion being five years of regular service in either of the grades for a graduate and ten years of regular service in the grade of CDPO for an undergraduate. There is, admittedly, no quota, ratio or percentage of promotion to the promotional post of Assistant Director/Deputy Director from the posts of CDPO and Principal (Training). In a case of present nature, it is not wholly irrational, unreasonable or arbitrary, on the part of a State Government, not to fix any quota, ratio or percentage, for promotion from the lone post of Principal (Training), but to make the total length of service, in the posts of CDPO, (ICDS) and/or Principal (Training), as the sole basis for promotion if the incumbent is, otherwise, found to be fit to hold the post.

9. Situated, thus, we are clearly of the view that it is not always necessary that when there are more than one sources of recruitment for a grade, which results into an integrated cadre for promotees, there must be quota, ratio or percentage fixed for promotion from the feeder post.

10. It is well settled, in the light of the decision in *Kishori Mohanlal Bakshi v. Union of India*, AIR 1962 SC 1139, that article 16 and a fortiori also article 14 do not forbid creation of different cadres for Government service and if that be so, these two articles cannot stand in the way of the State integrating different cadres into one cadre. It is entirely for the State to decide whether to have several different cadres or one integrated cadre in its services. This is a matter of policy, which does not attract the applicability of equality clause.

11. Thus, in the present case, namely, the two posts of CDPO and Principal (Training), which are of equal grade, may be integrated into one at the level of Assistant Director (redesignated as Deputy Director). Creation of such an integrated cadre is not impermissible in law. For the purpose of recruitment of such an integrated cadre, as the one at hand, the total length of service in a cadre, may be made the basis of promotion, when both the cadres are of equal grade. It is entirely for the State to lay down its own rules, which it thinks proper for determining seniority in service and the court is not competent to strike down such a rule on the ground that in its opinion, any other rule would have better or more appropriate. The only enquiry, which the court can make, in such a case, is whether the rule framed by the State is arbitrary and irrational so that it does not result in inequality of opportunity amongst the employees belonging to the same class, [see *Reserve Bank of India v. N.C. Paliwal and Others*, (1976) 4 SCC 838].

12. Length of service as the sole criterion for recruitment to an integrated cadre has also been recognized in *Joginder Nath and Others v. Union of India and Others*, (1975) 3 SCC 459. In *Joginder Nath (supra)*, the Supreme Court has upheld the criterion of taking into consideration the entire length of service of the two classes of officers in the respective feeder cadres as the basis for recruitment. The Supreme Court has also clarified, in *Joginder Nath (supra)*, that the treating of two classes as one for the purpose of initial recruitment and fixation of seniority was a reasonable classification. In the case at hand too, both the posts, i.e., the posts of CDPO and Principal (Training), are posts of equal grade and, hence, it would have been, in the absence of any other cause, highly unjust to ignore an appointee of such an equivalent grade, i.e., CDPO, who had been appointed far before the present petitioner came to be appointed to the post of Principal (Training).

13. In *The General Manager, South Central Railway, Secunderabad and Another v. A.V.R. Siddhantti and Others*, (1974) 4 SCC 335, the Supreme Court has clarified that the fundamental right of equality means that persons in alike situation, like circumstances, are entitled to be treated alike. So long as employees, similarly circumstance, in the same class of service, are treated alike, the question of hostile discrimination does not arise.

14. In the light of the law as discussed above, when we revert to the facts of the case at hand, we notice from the fact that the petitioner herself claims that the posts of CDPO and Principal (Training) are interchangeable posts. Of equal grade

and, hence, it is not irrational for the State to take into account the total length of service of the incumbent of these two posts for promotion to the post of Assistant Director, ICDS, which stands redesignated as Deputy Director, ICDS, We do not find the recruitment rules suffering, in this regard, from the vice of arbitrariness, irrationality or unconstitutionality.

15. The petitioner's contention that the State shall be directed to prescribe, in the relevant rules, percentage, ratio or quota for promotion to the post of Assistant Director (redesignated as Deputy Director, (ICDS), from the posts of CDPO (ICDS) and Principal (Training), would, in the attending facts and circumstances, be wholly impermissible inasmuch as a High Court, while exercising power of judicial review of administrative action, does not sit as an appellate authority. The Constitution does permit the court to direct or advise the executive in the matter of policy or to sermonize qua any matter, which under the constitution lies within the domain of the Legislature or executive. When an action of a State is challenged, the function of the court, while exercising its extraordinary jurisdiction under article 226, remains confined to the examination of the impugned action and determine whether the Legislature or the executive, as the case may be, has acted within the powers and functions assigned to it under the Constitution and if not, the court must strike down the action. While doing so, the court must remain within its self imposed limits that it does not sit on the judgment of a coordinate branch of the Government as an appellate authority. The power to frame rules, under article 309, is with the State. The power under article 309 is a legislative power. This power, under the Constitution, has to be exercised by the President or the Governor of the State, as the case may be. The High Court cannot issue a mandate to the State Government as to what shall its legislation be nor can the High Court even indirectly require the executive to exercise its rule making power in any particular manner. The court cannot assume to itself a supervisory role over the rule making power of the executive under article 309. What the court does, and can do, while exercising its power under article 226, is merely to examine the legislative or executive action on the inbuilt provisions of the Constitution and if the action is found to be not in accord with the constitutional provisions, it becomes the duty of the High Court to strike down such an action, be it the action of framing of a given rule or any other legislative function. High Court cannot sit on the merit of the legislative or executive action. It is, in this regard, apposite to refer to the case of *Ashif Hameed v. State of Jammu and Kashmir*, (1989) Supp (2) SCC 364, wherein, having considered its previous decisions, in *Narinder Chand Hem Raj v. Lt. Governor, Administrator, Union Territory, Himachal Pradesh*, (1971) 2 SCC 747 and *State of Himachal Pradesh v. A Parent of a Student of Medical College, Simla*, (1985) 3 SCC 169, the Supreme Court observed and held as under:

"When a State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the Legislature or the executive has acted within the powers and functions assigned under the constitution and if not, the court must strike down the action. While doing so the

court must remain within its selfimposed limits. The court sits in judgment on the action of a coordinate branch of the government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matter of policy or to sermonize qua any matter which under the Constitution lies within sphere of Legislature of executive."

16. The above decision, in Ashif Hameed (supra), has been relied upon by the Supreme Court in its subsequent judgment in Mallikarjuna Rao v. State of Andhara Pradesh, (1990) 2 SCC 707.

17. In the backdrop of the position of law indicated above and also the light of the discussion of the relevant recruitment rules, when the facts of the present case are indicated above, that the private respondent transparent, as already indicated above, that the private respondent Nos.5 and 7 were appointed, as CDPOs, as far back as on 2.5.1990 and the private respondent Nos.4,6,8, and 9 were appointed as far back as on 26.4.1991; whereas the petitioner's appointment, as Principal (Training), which is in the same grade as CDPO, was as late as 25.3.1998. Considered in this light, the petitioner is far junior to the private respondents. It is, therefore, wholly unreasonable, on the part of the petitioner, to claim that the Government is favouring the CDPOs by promoting them to the post of Assistant Director, ICDS. As and when the turn of the petitioner comes, on the basis of her seniority, she too would become entitled to be considered for promotion to the post of Assistant Director, ICDS, redesignated as Deputy Director, ICDS. We, therefore, find no merit in the grievances raised by the petitioner nor do we find the relevant recruitment rules and, or the criteria for selection, adopted by the State respondents, suffering from irrationality, arbitrariness or unconstitutionality. This writ petition, therefore, fails and the same shall accordingly stand dismissed.

18. There shall, however, be no order as to costs.