
(1997) 04 GAU CK 0005
In the Gauhati High Court
Case No : Writ Appeal No. 6 of 1994

M.Toshimeren Aier

APPELLANT

Vs

State of Nagaland

RESPONDENT

Date of Decision : 10-04-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 14, 16, 16, 309

Citation : (1997) 2 GLJ 277 : (1997) 3 GLT 479

Hon'ble Judges : A.K.Patnaik, J and M.Sharma, J

Bench : Division Bench

Advocate : A.K.Das, P.Bora, C.T.Jamir, A.K.Bhattacharyya, G.N.Sahewalla,
Advocates appearing for Parties

Judgement

A. K. Patnaik, J.—This is an appeal against the judgment dated 9.9.94 of the learned Single Judge in Civil Rule No. 82 (K) of 1992 of the Kohima Bench of this Court.

2. The facts briefly are that the appellant joined the service as Lower Division Assistant in the office of the Deputy Commissioner, Mokokchung in the State of Nagaland on 16.11.65 and was confirmed as Lower Division Assistant on 3.11.73. Thereafter the appellant was allowed to act as Upper Division Assistant with effect from 23.2.74 and his service as Upper Division Assistant was regularised with effect from 5.11.74. On being selected for training course of Accountancy, he was sent by the Govt of Nagaland for such training course in the year 1978. On 5.2.79, the appellant was confirmed as Upper Division Assistant. Thereafter, on 26.6.85, the appellant was allowed to take over charge in the post of Accountant in the office of the Deputy Commissioner. Mokokchung where a post of Accountant had fallen vacant on retirement of the earlier incumbent. The appellant tookover charge of Accountant on 30.6.85 and thereafter, he was promoted and appointed as Accountant in scale of pay of Rs.6701160 pm, but in the said order it was stipulated that the appointment of the appellant to the post of Accountant will not affect the existing inter se seniority with regard to

promotion to Head Assistant, etc. On 20.3.89 a seniority list of Upper Division Assistants was published wherein the respondent No. 3 was shown against serial No. 3 and the name of the appellant was not included in the said seniority list. On 22.2.91, the appellant was confirmed and declared as permanent in the post of Accountant with effect from 1.12.90. The appellant then made a representation dated 29.7.91 to the Deputy Commissioner, Mokokchung to consider his case for promotion to the post of Superintendent. But the Deputy Commissioner, Mokokchung, in his letter dated 18.9.91 after stating the cases of both the appellant and the respondent No. 3 for promotion to the post of Upper Division Assistant (sic Superintendent) recommended the case of the respondent No. 3 who was then the seniormost Upper Division Assistant for promotion to the post of Superintendent. In the circumstances, the appellant submitted a representation dated 29.9.91 before the Commissioner, Nagaland and the said representation of the appellant was forwarded by the Home Commissioner, Nagaland. The Deputy Secretary, Home "Department, General Administration Branch, sought for a clarification from the Deputy Commissioner, Mokokchung and the Deputy Commissioner, Mokokchung by his letter dated 11.11.91 gave the said clarification. Thereafter a notification dated 30.3.92 was issued by the Home Commissioner, Nagaland, promoting the respondent No. 3 to Class II Gazetted post of Superintendent in the scale of pay of Rs.7751675 pm. Aggrieved, the appellant filed a writ petition under Article 226 of the Constitution which was numbered as Civil Rule No.82(K)92 in the Kohima Bench of this Court and the learned Single Judge after hearing the learned counsel for the parties, dismissed the civil rule by the impugned judgment.

3. Mr. AK Bhattacharyya, learned counsel for the appellant, contended that the learned Single judge has held in the impugned judgment that the post of Head Assistant which was the promotional post for Upper Division Assistants was the same post as Superintendent Class II post. He relied on the Nagaland Services (Revision of Pay) Rules, 1993 to show that the aforesaid two posts carried different scale of pay and were distinct from each other. He further argued that after the appellant was promoted and appointed as Accountant, he was drawing scale of pay of Rs.6701160 pm which was higher than the scale of pay of Rs.220330 pm of an Upper Division Assistant and hence the appellant was superior in rank than the respondent No.3 who was only an Upper Division Assistant and not an Accountant. The appellant was thus entitled to be considered for promotion to the rank of Superintendent in preference to the respondent No.3. Mr. Bhattacharyya pointed out that the Deputy Commissioner, Mokokchung in his letter dated 18.9.91 to the Commissioner, Nagaland has stated that the appellant once promoted to the post of Accountant ought to have been placed above the respondent No.3 as seniormost Upper Division Assistant but it was stipulated in the promotion and appointment order of the appellant as Accountant that his promotion will not affect the interse seniority amongst the Upper Division Assistants with regard to promotion to Head Assistant, etc. He urged that what appears to have been weighed with the authorities for not

considering the case of the appellant for promotion to the post of Superintendent is the condition in the promotion order dated 26.7.85 of the appellant as Accountant that the promotion was made on the condition that his appointment will not affect his inter se seniority with regard to the promotion to the post of Head Assistant, etc. But the authorities have failed to realise that in the order dated 22.2.91 by which the appellant was confirmed in the post of Accountant no such condition was stipulated. Mr. Bhattacharyya vehemently argued that in case it is held that the promotion to the post of Superintendent is to be made from amongst the Upper Division Assistants and not from amongst the Accountants then as the appellant has ceased to be an Upper Division Assistant since 1985 after his appointment as Accountant would be deprived of an opportunity to be considered for promotion to the post of Superintendent. In this context Mr. Bhattacharyya referred to the seniority list of Upper Division Assistants published on 20.3.89 and 17.3.92 after the appointment of the appellant as Accountant and stated that in the said seniority list of Upper Division Assistants, the appellant's name did not find place presumably because he was no longer an Upper Division Assistant. This has given rise, according to Mr. Bhattacharyya, an anomalous situation in which the appellant has absolutely no further prospect of promotion after he was appointed as Accountant. In these peculiar facts of the case, the Court should hold that the fundamental rights of the petitioner for equality and equal opportunity in the matters of public employment has been violated and this Court should quash the impugned notification promoting the respondent No.3 to the post of Superintendent or in the alternative direct the respondents to consider and promote the appellant to the post of Superintendent with retrospective effect and give consequential service benefits.

4. Mr. CT Zamir, learned GA, Nagaland, produced before us a copy of the order dated 19.9.88 of the Govt of Nagaland, Home Department, General Administration Branch, by which seven existing posts of Head Assistant in the establishment of Deputy Commissioners of seven districts including Mokokchung District had been upgraded and redesignated as Superintendent (Gazetted Class II) in the scale of pay of Rs. 7751675 pm with effect from 8.9.88 and submitted that thus the contention of Mr. Bhattacharyya that the post of Superintendent was different from the post of Head Assistant is not correct. He further argued that there are no rules framed under Article 309 of the Constitution with regard to appointment to the post of Head Assistant or Superintendent but the consistent practice that is prevailing in different establishments of the Deputy Commissioners including the establishment of Deputy Commissioner. Mokokchung is to consider and promote the Upper Division Assistants to the post of Head Assistant/Superintendent. In support of this submission. Mr. Zamir produced before us copies of various orders passed by the Deputy Commissioner. Mokokchung which indicate that the seniormost Upper Division Assistants was allowed to officiate as Head Assistant from time to time. He also produced before us a copy of the notification dated 19.9.88 issued by the Govt of Nagaland, Home Department, General Administration Branch, under which five existing Head

Assistants in the establishment of five Deputy Commissioners were appointed as Superintendent upon upgradation and redesignation of the post of Head Assistant. Mr. Zamir further contended that admittedly the respondent No. 3 was senior to the appellant as Upper Division Assistant and was promoted as Superintendent under the impugned notification and this promotion cannot be held to be arbitrary and violative of rights of the appellant under Articles 14 and 16 of the Constitution. Regarding the contention of Mr. Bhattacharyya that the appellant was working in the post of Accountant which carried higher scale of pay than that of an Upper Division Assistant. Mr. Zamir submitted that in the order of promotion and appointment of appellant as Accountant it was clearly stipulated that the inter se seniority with regard to promotion to the post of Head Assistant, etc. would not be affected by his promotion to the post of Accountant. Mr. Zamir also pointed out that the next promotional posts for an Accountant are Senior Accountant and District Treasury Accountant and, therefore, it is not true as has been contended by Mr. Bhattacharyya that there is absolutely no prospect for promotion of the appellant after he ceased to be an Upper Division Assistant. He produced before us copies of various orders to show that Accountants working in the establishments of Deputy Commissioners have been released to work in the Secretariat and in the District Treasury. According to Mr. Zamir, therefore, the appellant has absolutely no case and the learned Single Judge has rightly dismissed the writ petition of the appellant.

5. Mr. GN Sahewalla, learned counsel for the respondent No.3, submitted a written argument stating therein that the respondent No.3 was appointed by way of direct recruitment in the post of Upper Division Assistant on 27.10.66, but the appellant was promoted from the post of Lower Division Assistant to the post of Upper Division Assistant on 23.4.74 and, therefore, the appellant was junior to the respondent No.3 by several years. He has further submitted in his written argument that the Deputy Commissioner, Mokokchung in his letter dated 18.9.91 to the Commissioner, Nagaland, has recommended the case of the respondent No.3 not only because he was senior to the appellant as Upper Division Assistant but also because the performance of the respondent No. 3 was better than that of the appellant. He further mentioned in his written argument that when the appellant was appointed as Accountant by order dated 16.7.85, it was clearly stipulated therein that his appointment will not affect the inter se seniority with regard to promotion to Head Assistant, etc. Hence the appellant cannot now claim that he was entitled to be considered and promoted to the post of Head Assistant/Superintendent before the respondent No.3 who was senior to the appellant as Upper Division Assistant.

6. Mr. Bhattacharyya, learned counsel for the appellant may be right in his submission that the post of Head Assistant is different from the post of Superintendent in the sense that they carry different scale of pay under the Nagaland Service (Revision of Pay) Rules, 1993 but so far as the post of Head Assistant in the establishment of Deputy Commissioners are concerned, it is clear from the copy of the order dated 19.9.88 of the Govt of Nagaland, Home

Department, General Administration Branch, produced before us by Mr. Zamir that the posts of Head Assistant have been upgraded and redesignated as Superintendent (Gazetted Class II) in the scale of pay of Rs. 7751675 pm with effect from 8.9.88. We have, therefore, no hesitation in coming to the conclusion on the basis of the materials produced before us that the post of Superintendent to which the respondent No.3 has been promoted under the impugned notification was earlier a post of Head Assistant. We also find from the xerox copies of several documents produced before us that in the establishment of Deputy Commissioner. Mokokchung. promotion to the post of Head Assistant were being made from amongst the Upper Division Assistants. By our order dated 28.6.96. we had given opportunity to the appellant to file affidavit and to produce documents to show that the Accountants had earlier been promoted to the post of Superintendent. But no such affidavit or document was filed or produced before us. Therefore, on the basis of all the materials produced before us by the respondents, we hold that promotion to the post of erstwhile Head Assistant now redesignated as Superintendent in the establishments of Deputy Commissioner are being filled up on promotion from amongst the Upper Division Assistants. Admittedly no statutory rules or rules under Article 309 of the Constitution have been framed providing for appointment or promotion to the post of Head Assistant or Superintendent. In the absence of such statutory rule or rules framed under Article 309 of the Constitution, the executive is fully empowered to follow on procedure for appointment or promotion to the post of Head Assistant or Superintendent so long as the procedure does not violate the rights of equality in the matters of public employment under Articles 14 and 16 of the Constitution. In our considered opinion, the procedure followed in the present case for promoting the seniormost Upper Division Assistant with merit to the post of Superintendent cannot be held to be violative of the rights of the appellant under Articles 14 and 16 of the Constitution. Moreover, the appellant was given clear notice in the order dated 26.7.85 appointing him as Accountant that his appointment and promotion as Accountant will not affect the existing inter se seniority of Upper Division Assistants with regard to promotion to Head Assistant, etc. The fact that in the order dated 22.2.91 confirming the appellant in the post of Accountant no mention was made that his appointment as Accountant would not affect the existing inter se seniority of Upper Division Assistant with regard to promotion to Head Assistant, etc. will not alter the position in any manner in favour of the appellant because in any case the appellant had clear notice by the earlier order dated 26.7.85 that his appointment was not to affect the claims of Upper Division Assistants senior to him such as the respondent No.3 for promotion to the post of Head Assistant, etc.

7. We, however, find a lot of error in the submission of Mr. Bhattacharyya, learned counsel for the appellant, that the appellant after being appointed as Accountant in the scale of pay Rs.6701160 pm which was higher than that of Upper Division Assistant cannot be deprived of further prospect of promotion in service. After the appellant undertook the special training in Accountancy in the year 1978. he

became proficient in Accounts and he was appointed as Accountant in the scale of pay higher than that of an Upper Division Assistant. The appellant has not only had experience as Upper Division Assistant but also has knowledge and experience as an Accountant. It will, therefore, be unfair and arbitrary if the appellant is altogether left out of consideration for appointment to a higher post. In the seniority lists dated 29.3.89 and 17.3.92 of Upper Division Assistants in the establishment of Deputy Commissioner. Mokokchung, the appellant does not find place presumably because he has ceased to be an Upper Division Assistant after his appointment as an Accountant by order dated 26.7.85. Thus, it is not clear as to whether the appellant will at all be considered for promotion to the post of Superintendent having ceased to become an Upper Division Assistant. Mr. Zamir has made a submission that the appellant will in due turn be considered for promotion to the higher post of Senior Accountant. A copy of the letter dated 7.4.92 of the Deputy Commissioner. Mokokchung, to the Commissioner, Nagaland, recommending creation of a post of Senior Accountant has been placed before us which is quoted hereinbelow. (not quoted : Editor)

By the aforesaid letter dated 7.4.92. the Deputy Commissioner. Mokokchung, has sent a proposal to the Commissioner. Nagaland, for creation of a post of Senior Accountant in his establishment. But he has stated that such creation of post of Senior Accountant in the scale of pay of Rs. 8501590 pm would fulfil the desire of ministerial staffs the same "would open an avenue for further promotion of eligible Assistants/" In our opinion, the post of Senior Accountant is one which should be manned by a person having proficiency in Accounts and Upper Division Assistants who have no proficiency in Accounts can not possibly man the said post. The post of Senior Accountant, therefore, should be filled up by an Accountant only in which event the Accountant such as the appellant working in the establishment of the Deputy Commissioner, Mokokchung will have a prospect for promotion. We, therefore, direct that the Govt of Nagaland in the home Department, General Administration Branch, would pass appropriate orders within two months from today clearly stipulating that the post of Senior Accountant under the establishment of the Deputy Commissioner. Mokokchung, as and when created, if not already created, would be filled up only by an Accountant so that the appellant would have prospect of promotion to the said post.

8. With the aforesaid directions, this writ appeal is disposed of. But considering the entire facts and circumstances of the case the parties shall bear their own costs.