
(2014) 06 GAU CK 0007
In the Gauhati High Court
Case No : WP (C) No. 53 (K) of 2013

N. Joory and Others

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 30-06-2014

Acts Referred:

Constitution of India, 1950 — Article 14 166 166(1) 2 226
Equal Remuneration Act, 1976 — Section 1(3) 2 2(h) 6

Citation : (2015) 3 GLT 533

Hon'ble Judges : Prasanta Kumar Saikia, J

Bench : Single Bench

Advocate : C.T. Jamir, Sr. Advocate, N. Longkumer, Akum Jamir, Imkong Jamir and Amen Anichar, Advocate for the Appellant; K. Sema, Addl. A.G., A. Zhimomi, Imti Longjem, S.M. Ozukum and Joshua, Advocate for the Respondent;

Final Decision : Dismissed

Judgement

Prasanta Kumar Saikia, J.

1. This proceeding under Article 226 of the Constitution of India has been initiated seeking following relief's:-

"In the premises aforesaid it is most respectfully prayed that your Lordship may be pleased to admit this petition, call for the records, issue Rule calling upon the respondents to show cause as to why a writ as prayed for should not be issued calling upon the respondent to show causes as to why-

1. The Cabinet decision dated 18.12.12, in respect of Agenda No. 13, approving for absorption of the deputation service of the respondent No. 7.

2. The impugned Notification dated 25.3.2013 (Annexure-I to the writ petition) should not be set aside and quashed and upon cause or causes being shown, and after perusing the records and hearing the parties, your Lordship may be pleased to set aside and quashed.

And further direct the respondent authorities to fill up the post of OSD (Skill Development) strictly in accordance with the Rules by way of promotion.

And/or be further pleased to pass such other order or orders as your Lordship may deem fit and proper."

The facts necessary for disposal of the present proceeding, in brief, are that the petitioners herein are the officers under the Planning and Coordination Department in short "the department". They were directly recruited to the post(s) of Planning Officer/Assistant Planning Officer/Planning Assistant and they were so recruited through the Nagaland Public Service Commission, for short, the NPSC. The service conditions of the officers/employees are governed by the Draft Service Rules, known as the Nagaland Planning Machinery Service Rules, 2010 (in short, "the Rules of 2010"), copy of which is attached at Annexure-B to the affidavit-in-reply.

2. Heard Mr. C.T. Jamir, learned Senior Counsel for the petitioner. Also heard Mr. K. Sema, learned Addl. Advocate General for the State respondents as well as Mr. A. Zhimomi, learned counsel appearing for the private respondent No. 7.

3. As per the said Rules, the posts of Assistant Development Commissioner (in short, the ADC) or equivalent posts are to be filled up by promotion alone, and that too, from the feeder posts specified in the Rules of 2010. Under the Rules aforementioned, there is no provision for appointment to the post of ADC on deputation basis. Any attempt to fill up those posts by way of deputation, therefore, would result in violation of the Recruitment Rules aforesaid and consequently, same would be liable to be declared illegal.

4. In 2011, an ex-cadre post of Officer on Special Duty (Skill Development), (in short, the OSD), equivalent in rank and status to the post of ADC under the Planning and Coordination Department was created. Said post was created on getting approval from P&AR and Finance Department and the Post Creation and Up-gradation Committee, vide Annexure-A and Annexure-B to the writ petition. Vide order dated 16.11.2011 of Annexure-C to the writ petition, respondent No. 7 was appointed to the post of OSD (Skill Development) Class-1 Gazetted purely on deputation basis for a period of two years.

5. In the meantime, the Department had prepared a Cabinet Memo dated 18.12.2012 at Annexure-D to the writ petition requesting the Cabinet to take following decisions:-

(i) The post of OSD (Skill Development) ex-cadre under the Planning and Coordination Department to be made permanent subject to post facto approval of P&AR Department, Finance Department and the Post Creation and Up-gradation Committee,

and

(ii) To allow the present incumbent Smti I. Sino Phom (respondent No. 7) to

continue on deputation for another period of two years.

6. The Cabinet considered the Memo aforementioned writs meeting held on 18.12.2012. The suggestion of the department to make the post of OSD permanent was accepted by the Cabinet. However, the suggestion that respondent No. 7 be allowed to work as OSD for another 2 years on deputation basis was not fully accepted. Rather, the respondent No. 7 was absorbed permanently against the post of OSD (Skill Development) Ex-cadre without obtaining concurrence from the concerned departments and the NPSC. The minutes of the said meeting was communicated by O.M. dated 19.12.2012 at Annexure-E to the writ petition.

7. For ready reference, the OM dated 19.12.2012 at Annexure-E to the writ petition is reproduced below:-

"Government of Nagaland Cabinet Secretariat (Cabinet Cell)

No. CAB-2/2008(Pt)

Dated, Kohima, the 19th December, 2012

Office Memorandum

Sub:- Minutes of the Cabinet meeting held on 18th December, 2012.

The Undersigned is directed to forward herewith an extract of the minutes (Agenda No. 13) of the Cabinet Meeting held on 18th December, 2012 for kind necessary follow up action. Quote:

The action taken on the matter may kindly be intimated to the Cabinet Cell."

8. Thereafter, by order dated 25.03.2013 (Annexure-1 to the writ petition), the Ex-cadre post of OSD (Skill Development), which was made equivalent to ADC in rank, status and pay, was converted into a regular cadre with effect from 19.12.2012 and by the same Notification, the service of respondent No. 7 was absorbed permanently against the post which stood regular in view of Notification dated 25.03.2013.

9. It has, now, been contended that absorption of respondent No. 7 against the post of the OSD (Skill Development) which was made permanent with effect from 19.12.2012 on the strength of Notification dated 25.03.2013 was entirely illegal since such absorption was made in total violation of the cardinal principles of service jurisprudence. In that connection, it has been pointed out that the Cabinet Memo never suggested the Cabinet to absorb the respondent No. 7 on permanent basis against the post of OSD which was so made permanent on the strength of Office Memo dated 25.03.2013.

10. According to the learned counsel for the petitioners, the absorption of respondent No. 7 was also illegal since it was done in complete violation of O.M. dated 21.07.2004 which deal with the matters pertaining to filling up of post by way of deputation/absorption, more particularly, Clause-2 and Clause-9 thereof.

For ready reference the relevant part of the Notification is reproduced below:-

"Government of Nagaland Personnel and Administrative Reforms Department
(Administrative Reforms Branch)

Office Memorandum

No. AR-7/8/86

Dated Kohima, the 21st July, 2004

Sub:- Procedure for filling up of vacancies on deputation regular absorption of deputationists.

The undersigned is directed to refer to the subject cited above and to state that inspite of laid down rules on deputation, many departments appoints person on deputation without following the existing Government orders and later absorb them. The Government after examining this issue has decided to issue the following instructions to be followed while filling up any vacancies on deputation.

1. Before deciding to fill up the post on deputation, prior consultation with NPSC (in case the post comes within the purview of the NPSC) shall be necessary before appointing a person on deputation basis.
2. Normally, a Department should fill up vacancy on deputation only if there is provision for this in the relevant Service Rules or if the Department requires a specialized job or personnel with required qualification and seniority within the Department are not available for specific reasons.
3. Such vacancy will be invariably circulated through Newspapers and official orders indicating qualification, experience, other eligibility conditions, last date of receipt of application, etc.
4. The candidates will be selected by a Screening Board which will be chaired by the Secretary of the Department with representative of the P&AR Department and representative of the concerned Directorate or expert in the relevant discipline.
5. A person should be eligible to apply for a deputation post only if he is in the same or equivalent grade or if the candidate is in the next lower grade and has fulfilled the qualifying years and other criteria for promotion to the next higher grade. Department must also certify that no suitable candidate from the feeder service is available or going to be available in the future promotion.
6. The period of deputation shall be subject to maximum of 2 (two) years in all cases for those where a longer period of tenure is prescribed in the Service Rules. If the post falls within the direct recruitment quota as per the recruitment rules, such deputation shall not exceed a period of 2 years or the recruitment by the NPSC, whichever is earlier. The extension beyond the period laid down may be granted with the prior approval of the lending Department and P&AR Department and the NPSC (for the post under their purview).

7. An officer on deputation will not be normally granted promotion while on deputation. The officer will revert to the parent cadre to avail promotion and another officer will be deputed to that post if the seniority continues to exist. In exceptional situation, an officer can be promoted by the borrowing Department after obtaining the approval of the cadre controlling authority NPSC and the P&AR Department.

8. On completion of the deputation period, an officer shall get reverted automatically to their parent Department even if no release order has been issued unless an order extending his/her deputation has been issued before the expiry of the deputation period.

9. Any proposal to absorb a candidate must have the prior clearance of the NPSC and P&AR and the Cabinet stating that no suitable candidate are available from the feeding cadre for promotion to that post. The consent of the person concerned and the lending Department will be mandatory before considering for permanent absorption.

10. The seniority of a person so absorbed in the deputation post, shall be counted from the date of such absorption only (i.e. from the date of Cabinet approval)".

11. It is alleged that none of the conditions, so specified in Office Memo dated 21.07.2004, was followed while respondent No. 7 was absorbed in the Department against the post of OSD (Skill Development) aforesaid.

12. It is also the case of the petitioners that the post of OSD (Skill Development) is equivalent in rank, status and pay to the post of ADC and was made a cadre post of the Department. This clearly signifies that the incumbents in the post of the ADC and the incumbent in the post of OSD are inter-transferable. Since the post of the ADC is a 100% promotional post in terms of Service Rules, 2010 and since the incumbents in the post of the ADC and the incumbent in the post of OSD are inter-transferable, the filling up such a post by the respondent No. 7 by way of absorption is violative of the Service Rules, 2010.

13. Referring to the letter dated 27.02.2013 from the Cabinet Secretary to the Government of Nagaland, it has again been contended that having written such a letter, the Cabinet Secretary tries to improve the case of the respondent No. 7. In that context, it has been stated that while recommending the absorption of the respondent No. 7 against the post of OSD, nothing has been stated in the Cabinet Memo dated 18.12.2012 about her status amongst the tribes. However, the Cabinet Secretary by his letter aforesaid requested authority concerned to take into account her backward tribe status while considering her case for absorption against the post of OSD.

14. Such a letter undoubtedly shows that the State respondents tried to supply something to the Cabinet Memo which was found conspicuously lacking in such Memo. More importantly, State respondents had done so to justify the absorption

of the respondent No. 7 against the post in question. However, same is not permissible in law. In support of such a contention, my attention has been drawn to the decision of the Apex Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, . The relevant part of the judgment is reproduced below:-

"Para 8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reason in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Commissioner of Police, Bombay Vs. Gordhandas Bhanji, .

"Public "orders publicity made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

"Orders are not like old wine becoming better as they grow older. A caveat."

15. According to the petitioners, since the Service Rules do not allow the post of ADC/OSD (Skill Development) to be filled up by the way of deputation, filling up of such a post on the strength Cabinet Memo is highly illegal since what cannot be done straight way, cannot be done by any other indirect method. On this count too, the petitioners want the Court to set aside the impugned recommendation/Notification. They, therefore approach this Court seeking relief"s aforementioned.

16. Notice of the proceeding was served on the respondents. Respondent No. 1 to 6 entered appearance and having filed common counter-affidavit have contested the proceeding. On the other hand, respondent No. 7 entered appearance and contested the case filing her own affidavit. In their counter-affidavit, the State respondents have strenuously contended that there is no regular Service Rules to govern the conditions of service including the recruitment procedures.

17. Since there is no regular Service Rules, put in place, it cannot be said that the post of the OSD (Skill Development) Ex-cadre when converted to a regular post, it becomes a cadre post in the Department in the rank of the ADC. Since the petitioners could not establish that the OSD (Skill Development) is cadre post and since the petitioners also fail to show that incumbents in the post of ADC and OSD are inter-transferable, on this count alone, the present proceeding is liable to be dismissed.

18. It is also the case of the State respondents that since the Department in question did not have the regular Recruitment Rules, enacted under Article 309 of the Constitution of India, the Nagaland Planning Machinery Service Rules, 2007 as well as the Nagaland Planning Machinery Service Rules, 2010 hold the field governing the conditions of service including the recruitment procedures. But then, said Rules had never been adhered to strictly in the past. The relevant part of the counter-affidavit is reproduced below:-

"5. That the statements made in paragraph 3 and 4 of the writ petition is denied. The Nagaland Machinery Service Rule 2010 is yet to be enacted and has no application for regulating recruitment and the service conditions of the employees in the department. The said rule was drafted only in the year 2010 and is not adhered to as of date. In short neither the Draft Service Rules, 2010 nor 2007 has been enforced and followed in the department."

19. It may be stated that with the formulation of National Policy of Skill Development and with the launching of coordinated action for skill development and setting up of Prime Minister National Council of Skill Development and National Skill Development Coordination Board, the State Government was required to appoint someone as Nodal Officer to implement the course of action and schemes incorporated in the aforementioned policy. Since implementation of the policies aforementioned called for experience, expertise and competence of unprecedented degree, since such works involve coordinated action amongst the different Departments of the State respondents, State respondents were forced to create a post of OSD (Skill Development) in the aforementioned Department.

20. Since the Department did not have qualified and competent officer to man such a post to tackle the situations, arising out of the requirement of implementation of policies, referred to above, after making necessary look out, the State respondents zeroed upon the respondent No. 7 so as to give her the responsibility of serving the Department operating from the aforesaid post who was then working as the Assistant Professor in the Department of Mass Communication under Nagaland University. Accordingly, she was brought on deputation to serve the Department in the aforesaid capacity for a period of two years.

21. However, the Cabinet found her service to be too essential and too indispensable and as such, the Cabinet while making the post of the OSD permanent in terms of Cabinet Memo dated 18.12.2012, also absorbed the respondent No. 7 against the post of the OSD (Skill Development) which was made permanent with effect from 19.12.2012. Therefore, one cannot find fault with the Cabinet in filling up the post of the OSD by absorbing the respondent No. 7 against such post.

22. In regard to the allegation that the post of the OSD (Skill Development) was made permanent without the occurrence of the P&AR Department, Finance Department and Up-gradation and Coordination Committee, it has been stated

that the Cabinet is the supreme collective decision making body in the State and as such, the Cabinet is not bound by suggestion, made in Cabinet Memo by any Department provided the decision taken by Cabinet in deviation of suggestion, made, is done in exigency of service and without any ulterior motive.

23. In support of such contention, the State respondents has referred me to the decision in the case of *Gulabrao Keshvrao Patil Vs. State of Gujarat* reported in (1996) 2 SCC 16. The relevant part is reproduced below:-

"Para 16. In *Kedar Nath Bahl Vs. State of Punjab* a Bench of three Judges held that expression of the order in the name of the Governor as required by Article 166 of the Constitution and communicated thereof to the party affected thereby are conditions precedent for the order to bind the Government. In that case the order though initially was made by the Minister, the order of confirmation was cancelled by the Chief Minister before it was communicated. This Court upheld the order to be legal."

"Para 17. The same view was reiterated in *State of Kerala Vs. A. Lakshmikutty*. It would thus be clear that before an order or action can bind the Government, it must be drawn in the name of the Governor as envisaged in Article 166(1) and (2) read with the Business Rules and must be communicated to the affected person. Until then, the action of the Government is not final. Before it is duly done. Chief Minister has power to call for any file and would have it re-examined and decision taken."

"Para 18. It would thus be seen that the decision of the Revenue Minister on 06.07.1973 is not final because the Urban Development Department did not accept or agree to the decision taken by the Minister for Revenue. As stated earlier, when the matter was brought by the Ministry of Urban Development and Housing Department to the notice of the Chief Minister, who holds ultimate responsibility and duty to report to the Governor and accountable to the people, the Chief Minister, in light of instruction 10, should place the decision necessarily before the council or the Cabinet, as the case may be, and then may be decided by the Chief Minister. It is seen that no decision has been taken by the Chief Minister under Instruction 10. Therefore, under Section 5A(2), no decision was taken to proceed further under Section 6 or to drop the acquisition proceedings. The High Court, therefore, was right in rejecting the writ petition as being not proper for interference."

24. As stated above, it has been contended that in view of initiation of some policies of extra ordinary importance by the Government of India, the State respondents were forced to create the post of OSD in the Department and had to secure the Service of the private respondent. More importantly, the service, rendered by her, was found to be enormously satisfactory for which the State respondents were forced to fill up the post, held by her on deputation, by way of absorption.

25. Further case of the State respondents was that the Department did not have

qualified and competent officers to man the new post of the OSD which is why the State respondents were forced to search for someone working in the Department beyond the Department in question. The fact that none in the Department, raised any objection when the private respondent was brought on deputation to serve the Department from the post of OSD is a clear proof of the fact that the Department did not have officer/officers competent enough to man the post of OSD (Skill Development).

26. In regard to the contention that the post of OSD (Skill Development) is a cadre post in the Department in the rank of ADC which needs to be filled up exclusively by promotion, it has been stated that such a contention is without any substance. In support of such claim, it has been stated that though the rank, pay and status of the ADC and the OSD (Skill Development) are similar, yet, those factors alone do not determine if two posts belong to the same cadre.

27. According to the State respondents, duties, responsibilities and functions, assigned to a post, are some factors which are to be considered alongside since such factors could play a decisive role in showing if two posts are of same cadre. According to State respondents, the duties, responsibilities and functions, assigned to OSD (Skill Development) and to ADC are fundamentally different and as such, on this count alone, this proceeding needs to be rejected holding that the OSD (Skill Development) and the ADC are not the posts of same cadre.

28. In support of such contention they have referred me to the decision reported in case of Union of India (UOI) Vs. Tarit Ranjan Das, . The relevant part of the judgment is reproduced below:-

"7. Yet, in another decisions in State Bank of India Vs. M.R. Ganesh Babu a bench of three learned Judges of this Court, while dealing with the same principle, in para-16 has expressed that(SCC p. 563)

"16. The principle of equal pay for equal work has been considered and applied in many reported decisions of this Court. The principles has been adequately explained and crystallized and sufficiently reiterated in catena of decisions of this Court. It is well settled that equal pay must depend upon the nature of work done. It cannot be judged by the mere volume of work, there may be qualitative difference as regards reliability and responsibilities. Functions may be the same but the responsibilities made a difference.

10....."This Court in the case of Delhi Veterinary Association Vs. Union of India (UOI) and Others, said that in addition to the principle of equal pay for equal work", the pay structure of the employees of the Government should reflect many other social values. It was said:

"The degree of skill, strain of work, experience involved, training required responsibility undertaken, mental and physical requirements, disagreeableness of the task, hazard attendant on work and fatigue involved are, according to the Third Pay Commission, some of the relevant factors, which should be taken into

consideration in fixing pay scales. The method of recruitment, the level of which the initial recruitment is made in the hierarchy of service or cadre, minimum educational and technical qualifications prescribed for the post the nature of dealings with the public, avenues of promotion available and horizontal and vertical relatively with other jobs in the same service or outside are also relevant factors".

11. In the case of State of UP Vs. J.P. Chaurasia it was pointed out that whether two posts are equal or should carry equal pay, depends on several factors. It does not depend just upon either the nature of work or the volume of work done. Primarily, it requires among others, evaluation of duties and responsibilities of the respective posts by the competent authorities constituted for the purpose and Courts cannot coordinately substitute themselves in the place of those authorities. The quantity of work may be the same but the quality be different. That cannot be determined by relying upon averments in affidavits of interested parties. It must be determined by expert bodies like Pay Commission and the Government, who would be the best Judges, to evaluate the nature of duty, responsibility and all relevant factors. The same view was reiterated in the case of State of MP Vs. Pramod Bhartiya by a three-Judge Bench of this Court. In the case of Shyam Babu Verma Vs. Union of India a claim for equal pay by a group of pharmacists was rejected saying that the classification made by a body of experts after full study and analysis of the work, should not be disturbed except for strong reasons which indicate that the classification made was unreasonable."

29. In the case of State of Madhya Pradesh and Another Vs. Pramod Bhartiya and Others, . The relevant part is reproduced below:-

"Para 12. The material above-mentioned goes to show that (a) the qualifications prescribed for the lecturers in the Higher Secondary School and the non technical lecturers in Technical Schools are the same (b) service conditions of both the categories of lecturers are same and (c) that the status of the schools is also the same. There is however a conspicuous absence of any clear allegation and/or material suggesting that functions and responsibilities of both the categories of lecturers are similar. Much less is there any allegation or proof that qualitatively speaking, they perform similar functions. It is not enough to say that the qualifications are same nor is it enough to say that the schools are of the same status. It is also not sufficient to say that the service conditions are similar. What is more important and crucial is whether they discharge similar duties, functions and responsibilities. On this score there is a noticeable absence of material. Whether we look at the averments in, and the material produced along with, the original petition or to the averments in the counter affidavit or even to the averments in the counter affidavit filed by the Government in M.P. No. 2277 of 1985 (upon which the counsel for the respondents has placed strong reliance), we do not find any clear material to show that the duties, functions and responsibilities of both the categories of lecturers are identical or similar. In this context it would be appropriate to refer to the definition of the expression "same

work or work of similar nature" contained in clause (h) of Section 2 of the Equal Remuneration Act 1976. The said Act was enacted by Parliament (as pointed out by this Court in *Mackinnon Mackenzie Vs. Audrey D' Costa*) to implement Article 39(d) of the Constitution and the obligation created by The Convention concerning Equal Remuneration for Men and Women Workers" for work of equal value (generally) referred to as "Equal Remuneration Convention, 1951), adopted on June 29, 1951, to which India is a signatory. Article 2 of the Constitution obliged the signatory States to effectuate the said rule by all means including the machinery of law. The said Act is applicable to such establishments and employments as may be notified by the Central Government under Section 1(3) of the Act. Though the said Act is mainly directed against discrimination against women and is also not applicable to the employments or establishments to which the respondents herein belong, yet the relevance of the said definition cannot be denied, occurs as it does in an enactment made to give statutory shape to the rule or equal pay for equal work both for men and women." The definition in Section 2(h) reads:

"2 (h) "same work or work of a similar nature" means work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or a woman and the difference, if any, between the skill, effort and responsibility required, of a man and those required of a woman are not of practical importance in relation to the terms and conditions of employment."

"Para 13. It would be evident from this definition that the stress is upon the similarity of skill, effort and responsibility when performed under similar conditions. Further, as pointed out by Mukharji, J (as he then was) in *Federation of All India Customs and Excise Stenographers*" the quality of work may vary from post to post. It may vary from institution to institution. We cannot ignore or overlook this reality. It is not a matter of assumption but one of proof. The respondents (original petitioners) have failed to establish that their duties, responsibilities and functions are similar to those of the non technical lecturers in Technical Colleges. They have also failed to establish that the distinction between their scale of pay and that of non technical lecturers working in Technical Schools is either irrational and that it has no basis, or that it is vitiated by mala fides, either in law or in fact (see the approach adopted in *Federation* case). It must be remembered that since the plea of equal pay for equal work has to be examined with reference to Article 14, the burden is upon the petitioners to establish their right to equal pay, or the plea of discrimination, as the case may be. This burden the original petitioners (respondents herein) have failed to discharge".

30. The inter-transferability of the incumbents in different posts is yet another factor which could play significant role in determining if two posts are very similar in all respects. But there is nothing on record to show that the incumbent in those two posts are inter-transferable. Rather, all materials available show that the post of ADC and the post of OSD (Skill Development) are not inter-

transferable since the functions assigned to those two posts are constitutionally different which strongly demonstrates that the aforesaid two posts are not identical.

31. Since the petitioners could not make out that OSD (Skill Development) and ADC are similar post in the same cadre of the Department, aforesaid, it cannot be said that the OSD (Skill Development) is a 100% promotional post, more so, when there is nothing in the Draft Service Rules to show that aforesaid posts has ever been incorporated in the cadre in the rank of ADC and when there is nothing in the Draft Service Rules regarding method of recruitment, promotion and other conditions of service applicable to such post.

32. According to the State respondents, since there is no Service Rules enacted under Article 309 of the Constitution of India, the Department has the authority and privilege to issue executive order to implement some decision in the exigency of service, more so, when Draft Service Rules has no answer to the problems, faced by the Department with the initiation of some policy of extraordinary importance. In that connection, the State respondents have relied on the decisions of the Apex Court in the case of Vimal Kumari Vs. The State of Haryana and Others, . The relevant part is reproduced below:-

"Para 6.....Draft Rules cannot be treated to be Rules made under Article 309 of the Constitution and cannot legally, exclude the operation of any existing executive or administrative instruction on the subjects covered by the Draft Rules not can such Draft Rules exclude the jurisdiction of the Government, or for that matter, any other authority including the appointing authority, from issuing the executive instructions for regulating the conditions of service of the employees working under them."

"Para 7. In the instant case, as pointed out above, the Draft Rules were prepared in 1983. They have been lying in a nascent state since then. In the meantime, many promotions, including that of the appellant were made on the basis of "seniority" which, in the absence of any Rule made under Article 309, could be legally adopted as the reasonable basis for promotion. Seniority having thus been adopted as the criteria for making promotion of the post of Superintendent could not have been displaced by the Draft Rules and the High Court could not have invoked any provision of those Draft Rules which have been lying frozen at their embryonic stage for more than ten years."

33. In so far as the violation of the policy of 2004 is concerned, it has been contended that such allegation has no basis whatsoever. In the present case, the policy of 2004 has no application since the deputation in question was not made to a regular post in the Department. Rather such deputation was made to an ex-cadre post created for a limited period. Being so, the prohibition in the policy of 2004 cannot come in way of appointment of deputationist (respondent No. 7) by way of absorption.

34. Even one assumes for the sake of argument for a moment that the policy of

2004 needs to be followed before filling up a post by way of absorption on deputationist, yet, there are indisputable evidence to show that the department did not have any officer qualified enough to hold the post of OSD forcing the former to make a search for a competent officer capable enough to attend the duties entrusted to the incumbent in the post of OSD. This is one more testimony of the policy of 2004 having no application to the case in hand.

35. The creation/abolition/modification of a cadre of service are exclusively in the domain of executive since they relate to policy matter and a writ Court cannot interfere on the policy matters unless it is shown that the decision on policy matter suffers from serious infirmity. However, the petitioners could not show any infirmity in the orders which are questioned in the present proceeding. It has also been held again and again, even if decision on policy matters suffers from some infirmity, writ Court would not ordinarily interfere with such decision. In support of such contention, the State respondents have relied on the decision rendered in the case of P.U. Joshi and Others Vs. The Accountant General, Ahmedabad and Others, . For ready reference relevant part is reproduced below:-

"10. We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadre, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotion and criteria to be fulfilled for such promotions pertain to the field of policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the statutory tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its view for that of the State. Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/subtraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadre by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restrictive the pattern and cadres/categories of service, as may be required from time to time by abolishing the existing cadre/post and creating new cadres/posts. There is no right in an employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, and bring into force new rules relating to even an existing service."

36. Similar decision had been rendered in the case of State of Orissa and Others Vs. Gopinath Dash and Others, . The relevant parts of the judgment is

reproduced below:-

"Para 5. While exercising the power of judicial review of administrative action, the Court is not the Appellate Authority and the Constitution does not permit the Court to direct or advise the executive in the matter of policy or to sermonise quo any matter which under the Constitution lies within the sphere of the legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power (see Asif Hameed Vs. State of J & K and Shri Sitaram Sugar Co. Ltd. Vs. Union of India). The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or it violates the fundamental rights of the citizen or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court, is cannot interfere."

"Para 6. The correctness of the reasons which prompted the Government in decision making taking one course of action instead of another is not the matter of concern in judicial review and the Court is not the appropriate forum for such investigations."

"Para 8. The Court should constantly remind itself of what the Supreme Court of the United States said in Metropolis Theater Co. Vs. City of Chicago.

"The problems of Government are practical ones and may justify, if they do not require, rough accommodations, illogical it may be, and unscientific. But even such criticism should not be hastily expressed. What is the best is not always discernible, the wisdom of any choice may be disputed or condemned. Mere errors of Government."

37. The decisions rendered in the aforementioned cases has been reiterated in the case of State of U.P. and Others Vs. Chaudhari Ran Beer Singh and Another, . The relevant part of the judgment is reproduced below:-

"The policy decision must be left to the Government as it alone can decide which policy should be adopted after considering all relevant aspects from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown. Courts will have to occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government."

38. Respondent No. 7 having filed separate counter-affidavit contested this proceeding. According to the respondent No. 7, the Draft Service Rules, 2007 and 2010 were never followed. In support of such contention, it has been stated that on previous many occasions, the State respondents have requisitioned the services of employees/officers from other Departments who were subsequently absorbed in the Department and who were subsequently given promotion on up-

gradation of post against which they are absorbed.

39. In that connection, (a) the case of one Nasorjul Charles, (b) the case of Kekhwewe Sekhemo, (c) the case of one Mhonseo and (d) file case of Avebfuse Kapo were cited to show that in the past, on many occasions, persons were recruited in the Department not in the terms of the Draft Services Rules and as such, in the past, the Draft Service Rules were not strictly adhered to.

40. The respondents have also claimed that the petitioners are not the aggrieved persons. It is a settled law that only the aggrieved person can approach the Court seeking relief's. In that connection, the decision of Hon''ble Supreme Court in the case of Ayaaubkhan Noorkhan Pathan Vs. The State of Maharashtra and Others, was relied on. The relevant of the judgment is reproduced.

"Para 10. A "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from an psychological or an imaginary injury; a person aggrieved must, therefore, necessarily be one whose right or interest has been adversely affected or jeopardised. (Vide Shanti Kumar R. Canji Vs. Home Insurance Co. of New York and State of State of Rajasthan Vs. Union of India)".

"Para 17. In view of the above, the law on the said point can be summarised to the effect that a person who raises a grievance, must show how he has suffered legal injury. Generally, a stranger having no right whatsoever to any post or property, cannot be permitted to intervene in the affairs of others."

41. Since the petitioners do not suffer any legal or fundamental right due to absorption of respondent No. 7 against the post of OSD (Skill Development) which was made permanent vide Notification dated 25.03.2013, the present proceeding is liable to be dismissed on this count also.

42. The petitioners having filed affidavit-in-reply to the counter affidavit, filed by the respondents, refuted the claims, made in their counter-affidavits and had reiterated the claims, they made in their petition The learned counsel for the petitioner further submits that though the scope of judicial review is extremely limited yet the writ Court must not shrink its constitutional obligation whenever State and its instrumentalities are found resorting to enormous illegality or where such decisions are marked by palpably perversity, the writ Court must not sit idle. Rather it needs to raise to the occasion to correct the decision which are clear product of perversity, illegality or colossal irregularity. Above being the claims and counter-claims, let us see whose claim stands to reason in view of the materials on records.

43. I have found that the parties are at loggerheads over the question if the post of OSD and he post of ADC are the posts of same cadre. Therefore, before one proceeds further, he needs to know what are the criteria which determine is two or more posts are of same cadre. In this context, I have perused the decisions

rendered in the case of Union of India Vs. Tarin Ranjan Das (Supra) and State of Madhya Pradesh & Anr. (Supra). The aforesaid decisions succinctly specify the criteria which determine if two posts belong to same cadre.

44. Criteria which determine if two posts are of same cadre having been found well documented, let us see if those conditions stood fulfilled in our instant proceeding. In my firm view, the factors which led to creation of the post of OSD (Skill Development) in the department may throw enough light on such matter it may be stated here that the Cabinet Memo dated 03.02.2011 and the Cabinet Memo dated 18.12.2012 discussed in detail the facts and circumstances which led to creation of post of OSD in the department aforesaid. The Cabinet Memo dated 18.12.2012 is, therefore, reproduced below:-

"Cabinet Memorandum

Sub:-Creation of one post of O.S.D. (Skill Development) under Planning Department.

Formulation of National Policy on Skill Development, and the launch of the Coordinated Action for Skill Development and setting up of the Prime Minister's National Council Skill Development and National Skill Development Coordination Board (NSDCB) have been important and mutually supporting initiatives. The Skill Development Policy provides an enabling environment and the Council and the NSDCB provide a mechanism for implementation at the highest level. National Policy on Skill Development also provides a national policy response to guide formulation of skill development strategies and coordinated action by all concerned by addressing the various challenges in skill development.

In the line with the "Coordinated Action on Skill Development" at the national level, the State Government has set up a State Skill Development Mission to address the specific problems of multiple interfaces required in securing approval for both Central and State schemes relating to Skill Development in the State. Besides, the State Mission is required to immediately activate the Mission in the State.

The implementation of Skill Development in the State will entail different activities which will have to be undertaken by different Line Departments. Universities. Colleges. Polytechnics and ITIs. In addition to the 11th Plan envisages the activities of the Skill Development to be undertaken in partnership with NGOs, Self Help Group and Private Sector. As such, it is felt that there is a need for Planning Department to coordinate and give impetus to this multi sectoral task of Skill Development. A little more than a year is left during the current 11th Plan for us to kick start the implementation of Skill Development Mission in the State.

Therefore a post of O.S.D. Ex-cadre (Skill Development) is proposed to be created in the rank and Status of Assistant Development Commissioner (ADC) in the Planning & Co-ordination Department in the Pay Band of Rs. 15,600-39,100/-

with Grade Pay of Rs. 6600/- p.m. for a period of two years.

On creation of the post of O.S.D. (Skill Development), the Department desires to appoint on deputation Ms. I. Sino Phom, presently serving as Assistant Professor, Department of Mass Communication and it is felt that her academic experience suits the responsibility. The O.S.D. (Skill Development) would separately function under the Monitoring Cell of the Planning Department.

The proposal Was moved by the Department and the P & AR Department have agreed to the proposal vide U.O. No. 807 dated 8.10.2010 as shown at Annexure-A. Finance Department has also concurred vide REC/ESTT/No. 27/37 dated 9.11.2010 as shown at Annexure-B. The post of O.S.D. (Skill Development) as shown as Annexure-C."

The matter is therefore, placed before the Cabinet for kind consideration and approval."

45. In that context, we may also consider the functions, duties and responsibilities which were assigned to the incumbent in the post of OSD. In order to understand the functions, duties and responsibilities, so entrusted to incumbent in the post of OSD, the order under which such duties and responsibilities were assigned to the OSD is also reproduced below:-

"Government of Nagaland Planning & Co-Ordination Department Nagaland: Kohima

Order

Dated Kohima, the 24th August, 2012 No. PLN/PF-401/11:: The following subject matters are hereby assigned to Smti. I. Sino Phom, OSD, Skill Development under Planning & Co-ordination Department with immediate effect.

1. All Skill Development Matters at the State including coordinating with the other Departments on the subject matter and shall be directly endorsed to the Commissioner & Secretary (Planning).
2. All matters and correspondences pertaining to State Innovation Council and coordinating with the National Innovation Council.
3. All matters of Right to Food and Right to Life including coordination with Government of India and other Departments of the State in these subjects.
4. All States Training Programmes and NEC training programmes.

The above subject matters at Sl. No. 2 to 4 shall be routed through the Joint Development Commissioner (Aolemla)".

46. A perusal of Cabinet Memo dated 3rd Feb 2011 (at Annexure-2 to the counter Affidavit of the State respondents) and the Cabinet Memo dated 18th Dec, 2012 (at Annexure-D to the petition) reveals that with the initiation of Formulation of National Policy on Skill Development, and the launching of the

Coordinated Action for Skill Development and setting up of the Prime Minister's National Council Skill Development and National Skill Development Coordination Board. (NSDCB), the departments in question has been saddled with task of implementing the policies and scheme with calls for expertise, experience, capability and skill of unprecedented degree and proportion.

47. The Department found that the duties, functions and responsibilities which were entrusted upon the Department with the initiation of the aforesaid policies and programme can be better addressed if a post of OSD (Skill Development) is created. Accordingly, the State respondents created the post of OSD (Skill Development) to address the works which demand special expertise, skill and experience of enormous proportion.

48. The Cabinet Memo dated 3rd Feb 2011 also gives a clear impression that since the department did not have officer to man such a post, the department had to make a vigorous search for person having necessary wherewithal to execute the works, assigned to the Department. It is also apparent from such a Cabinet Memo that after making necessary look out, the State respondents found the respondent No. 7 to be the person having necessary means and ability to man the aforesaid post and accordingly, she was brought on deputation to the department for a period of two years to serve the later from the aforesaid post.

49. When the Cabinet Memo dated 03.02.2011 and the Cabinet Memo dated 18.12.2012 is read together with the order dated 24.10.2012, it would appear more than clear that the functions, duties and responsibilities assigned to OSD (Skill Development) is completely different from the functions, duties and responsibilities, assigned to ADC, otherwise, with the initiation of aforesaid policies and programmes, the department would have gone for the creation of the post OSD (Skill Development) or it would not have made a search for someone to execute the functions, duties and responsibilities which stood entrusted to the Department under the aforesaid policies and programmes.

50. Inter-transferability between the posts is one important criterion to assertion if two posts are of the same cadre. We have already found that the functions, duties and responsibilities, assigned to the post of ADC and OSD, are fundamentally differently. This coupled with the fact that the department had to search for an officer to man the post of OSD (Skill Development) as well as the fact that there is no mention whatsoever in the Draft Service Rules about the post of OSD (Skill Development) clearly serve to show that the incumbent in the post of OSD (Skill Development) and incumbent in the post of ADC are not inter-transferable.

51. Once it is found that the functions, duties and responsibilities, assigned to the incumbent in the post of OSD and ADC are different and once it is found that the incumbents in the post of OSD and the post of the ADC are not inter-transferable, they being some very vital criteria which determine if two posts are of same cadre, there cannot be any escape from the conclusion that the post of

OSD (Skill Development) and the post of ADC are not the post of same cadre.

52. One may note here that there is no evidence whatsoever to show that when the post of OSD was created, any one from the Department had volunteered to be considered for appointment to the post aforesaid. Rather, all available materials reveal that the Department had to make vigorous search for an officer capable enough to man the post of OSD (Skill Development) effectively and efficiently. Why no one from the Department volunteered to work as OSD? Why did the Department have to make an all out search to find an officer to man the post aforesaid?

53. Reasons are not far to find. The only answer to the above queries is that the department did not have the officer with necessary resources to handle the post of OSD (Skill Development) effectively and efficiently. These are, in my firm opinion, more and more testimonies to the fact that the functions, duties and responsibilities, entrusted to the incumbent in the post of OSD and the functions, duties and responsibilities, commended to the incumbent in the post of ADC are different which again establishes that those two posts are not the posts of same cadre.

54. One may note here that the order under which the post of OSD stood created says that such a post was created in the rank and status of ADC with similar pay scale, yet, it did not speak anything about the mode of filling up of such post. Nor does it speak about the qualification experience etc necessary for vying for such a post. Such disclosure, in the fact and circumstances of the present case, only serves to show that the post of OSD (Skill Development) and the post of ADC are not the posts of same cadre.

55. The petitioners strenuously contend since that the post of ADC is 100% promotional post and since the post of OSD is also a post in the cadre of ADC, it cannot be filled up by deputation. The only mode of filling up of such post is by promotion from the feeder channel. Since the contention that the post of ADC and post of OSD are of same cadre has found to have fallen through, the claim that the post of ADC/OSD are to be filled up only by promotion is also found to be without any substance.

56. The petitioners further contend that deputation of the respondent No. 7 to the Department in question is illegal since such deputation was done in gross violation of various provisions incorporated in O.M. dated 21.07.2004 including Clause-2 & Clause-9. Clause-2 of OM dated 21.07.2004 states that deputation to a post in a particular Department is permissible only when concerned Service Rules of the Department permits such deputation. I have already found that the Department in question do not have regular Service Rules. But then, the petitioners contend that the Draft Services Rules have always been followed in all matters including matter pertaining to recruitment, promotion etc.

57. Such a contention was objected tooth and nail by the respondents stating that in the past, in matter of recruitment promotion etc, the Services Rules had

never been strictly followed. The above claim and counter claim require me to decide if the Draft Services Rules have always been followed strictly in all matters including appointment and promotion. In support of their contention, the petitioners have drawn my attention to the Advertisement dated 31.10.2007 to show that the post of Assistant Planning Officer, Class-II Gazetted had been recruited in accordance with the Notification of 1992.

58. However, disputing such contention, the respondents claim that there are several instances when some officers in the Department were appointed not in accordance with terms, specified in any of the Draft Service Rules aforesaid. Instances of the officers/employees who were appointed not in accordance with term and conditions have been given in the paragraph-3 of the counter-affidavit of respondent No. 7. The state respondents too supported such a contention stating that the Draft Services Rules were not strictly adhered to in the past, vide paragraph-5 to the counter affidavit, filed by the State respondents.

59. On considering the averments, made in paragraph-3(c) to 3(h) of the counter-affidavit of respondent No. 7 in the light of statements, made in paragraph-5 of the counter-affidavit of the State respondents, I have found that on many occasions in the past, the officers/employees in the Department were appointed not in accordance with procedure made in the Draft Service Rules. Being so, the claim that the Draft Service Rules has always been adhered to in making appointment etc. is found to be not wholly supported by materials on record.

60. Admitting that one cannot force the State respondents to follow the Draft Service Rules, the petitioners contend that where there is intention on the part of the State respondents to enforce the Draft Service Rules in the near future, in that event, the Draft Service Rules are to be followed. In that connection, my attention has been drawn to the decision of the Apex Court in the case of Chandigarh Administration Through the Director Public Instructions (Colleges), Chandigarh Administration through the Director Public Instructions (Colleges), Chandigarh Vs. Usha Kheterpal Waie and Others, . The relevant part of the judgment is reproduced below:-

"In Abraham Jacob and Others Vs. Union of India, , this Court held that where draft rules have been made, an administrative decision taken to make promotions in accordance with the draft rules which were to be finalised later on was valid, In Vimal Kumari Vs. The State of Haryana and Others, , this Court held that it is open to the Government to regulate the service conditions of the employees for whom the rules were made, even if they were in their draft stage, provided there is a clear intention on the part of the Government to enforce those rules to the near future. In this case, the High Court however rejected the advertisement on the ground that the regular rules were not notified by the President of India even after five years, when the High Court decided the matter. But what is relevant to test the validity of the advertisement, was the intention of the appellant when the advertisement was issued. At that time, the appellant

had the clear intention to enforce the Recruitment Rules in future as they had been made in consultation with UPSC, in accordance with the UGC guidelines and the Rules had been sent to the Central Government for being notified by the President and the matter was pending consideration for a few month when the advertisement was issued. The appellant at that time had no inkling that there would be inordinate delay or the Rules may not be notified by the President, Therefore, the advertisement in terms of the 2000 Recruitment rules was valid."

61. Referring to the same decision, it has also been contended that even in absence of regular Service Rules, it cannot be said that the Draft Service Rules should not be followed. The relevant part is reproduced below.-

"Even in the absence of valid rules, it cannot be said that the advertisement was invalid. In exercise of its executive power, the appellant could issue administrative instructions from time to time in regard to all matters which were not governed by any statute or rules made under the Constitution or a statute. In fact, it is the case of the respondents from UT Cadre should be promoted as principals. In fact, the administrator of appellant had issued a notification on 13.1.1992 adopting the corresponding Punjab Rules to govern the service conditions of its employees. If so, the administrator of appellant could issue fresh directions in regard to qualifications for recruitment. The Recruitment Rules made by the Administrator were duly notified. Though they were not rules under Article 309, they were nevertheless valid as administrative instructions issued in exercise of executive power, in the absence of any other Rules governing the matter. Once the recruitment rules, made by the Administrator, were notified, they became binding executive instructions which would hold good till the rules were made under Article 309. Therefore, the advertisements issued in terms of the said Recruitment Rules were valid."

62. I have already found that in the past, the Draft Services Rules were not strictly adhered to. On the other hand, there is no clear evidence to show that the State respondents have any intention to implement the Draft Services Rules in the near future too. Quite contrary to it, in the last couples of years, the State respondents have created posts and made appointments which are not in accordance with the terms and conditions specified in the Draft Services Rules.

63. These revelations only show that the claim that the State respondents have the intention to enforce the Draft Service Rules in the near future is a farfetched one. Since Clause-2 of the O.M. dated 21.07.2004 states that deputation will be governed by Service Rules of the particular Department, since in the instant case, there is no regular Service Rules and since the Draft Service Rules were not regularly followed, in my considered opinion, Clause-2 cannot come in the way of the appointment of the respondent No. 7 as OSD (Skill Development).

64. According to the petitioners, under the O.M. of 2004, before bringing someone on deputation, the Department needs to ascertain if the Department has any officer competent enough to fill up the post sought to be filled up by way

of deputation. Since it was not done, on this count too, the orders impugned are liable to be quashed. Such an argument too is found to be without any substance. It is found that the State respondents were compelled to create the post of OSD (Skill Development) since the Department did not have necessary resource in terms of the post as well as the officer with necessary expertise, experience and capability etc. to execute the works stood entrusted upon the Department with the initiation of the policies/programmers" aforementioned.

65. What is important is that the Department was compelled to make a search to locate an officer who could handle the new responsibility effectively and efficiently. On making necessary search, the Department could locate the respondent No. 7 who was then working as Assistant Professor, Department of Mass Communication in Nagaland University. Since the State respondents were under enormous compulsion of finding someone urgently to man the post of OSD and since the Department in question seemed to have no qualified officer to man such a post, in my considered view, Clause-9 of the O.M. dated 21.07.2004 too cannot come in the way of appointment respondent No. 7 as OSD (Skill Development).

66. Coming to the allegation that in not acting on the suggestion rendered by the Department through its Cabinet Memo dated 18.12.2012, the Cabinet has flouted the normal official procedures and it is alone requires the Court to overthrow the Orders/Notifications, under challenge, it may be stated that such allegation too has no valid foundation. It may be stated that the Cabinet is the highest decision making authority and is not bound by suggestion made by the Department. The Cabinet has the authority to reject/refuse/modify the suggestion(s) made by the Department provided such rejection/refusal/modification does not suffer from the arbitrariness, whimsicality and illegality.

67. Coming back to our case, I have already found that a situation has arisen which required the Cabinet to absorb respondent No. 7 in the Department permanently against the newly created post of OSD (Skill Development). The fact that the respondent No. 7 has rendered her job very efficiently as it is evident from the letter dated 05.12.2012 from the Chief Minister, Nagaland, coupled with other facts which necessitated the creation of the post of OSD in the Department (which I have narrated hereinbefore in detail) firmly show that by ordering absorption of the respondent No. 7 in the Department permanently, the Cabinet committed no wrong whatsoever. Being so, the refusal of the Cabinet to accept the entire Cabinet Memo dated 18.12.2012 cannot be said to be illegal.

68. Regarding Post Facto Approval, learned counsel for the respondents has submitted that mere was noticeable difference the previous approval or prior approval, special permission or general permission. Again, there is difference between permission and approval. While the term "approval" means that certain act or acts continue to be valid unless such act/acts are disapproved, the term "permission" means certain act/acts would be valid only when permission is accorded. In that connection, decision of the Apex Court of the country in the

case of Ashok Kumar Das and Others Vs. University of Burdwan and Others, has been relied on. For ready reference the relevant part of the judgment is reproduced below:

"Para 6. Life Insurance Corporation of India Vs. Escorts Ltd. and Others, , considering the distinction between "special permission" and "general permission", previous approval" or "prior approval" in para 63 held that:" We are conscious that the word" prior" or "previous" may be implied if the contextual situation or the object and design of the legislation demands it, we find no such compelling circumstances justifying reading any such implication into Section 29(1) of the Act." Ordinarily, the difference between approval and permission is that in the first case the action holds good until it is disapproved, while in the other case it does not become effective until permission is obtained. But permission subsequently granted may validate the previous Act, it was stated in Lord Krishna Textiles Mills Ltd. v. Workmen (AIR 1961 SC 8601), that the Management need not obtain the previous consent before taking any action. The requirement that the Management must obtain approval was distinguished from the requirement that it must obtain permission, of which mention is made in Section 33(1)."

69. Coming back to our case, we have found that the recommendation of the Cabinet against the item No. 13, adopted in its meeting held on 18.12.2012 was already approved by P&AR department. Since there is nothing on record to show that other departments had refused to approve the same, the validity of the recommendation aforesaid cannot be questioned, more so, when the post of OSD (Skill Development) was created on temporary basis with the concurrence of all those Departments.

70. The learned counsel for the petitioner submits that the State respondents try to justify the absorption of private respondent in the department stating that she belongs to backward community. In that connection, my attention has been drawn to the letter dated 27.02.2013 from Cabinet Secretary to the Addl. Chief Secretary & Development Commissioner Planning & Coordination Department. However, when the Cabinet recommended her absorption against the post of OSD (Skill Development), nothing has been stated about her status amongst the tribes.

71. According to learned counsel for the petitioners, such a ground was invented to remove the infirmity in the recommendation of the Cabinet adopted in its meeting held on 18.12.2012. I have considered the above submissions in the light of the decision, rendered in the case of Mohinder Singh Gill & Anr. (Supra) and found that it is true that the Cabinet Secretary by his letter dated 27.02.2013 requested the authority concerned to consider the backward tribe status of the respondent No. 7 in taking decision in absorbing her permanently in the Department aforesaid. But such a request in the letter dated 27.02.2013 from the Cabinet Secretary no way demolishes the merit and worth of the recommendation, made by the Cabinet on 18.12.2012.

72. In this context, it needs to be stated that there are authentic materials on record to show that respondent No. 7 had successfully managed a very daunting job, assigned to her which has enormous implications on the functioning of various departments. Therefore, when one reads the recommendation, made by the Cabinet on 18.12.2012, together with other documents, found on record, he would find that the respondent No. 7 deserves to be absorbed against the post of OSD on her own merit. These disclosures therefore, show that despite being a lady and inspite of hailing from a backward community, she excels in the job, assigned to her. Such achievements, in my opinion, are not to be denounced but to be rejoiced.

73. According to the learned counsel for the respondents, the present petition needs to be quashed since the matter in dispute in this proceeding being a matter pertains to policy of the State, Court cannot poke its nose in such matters unless it is shown that such decision suffers from arbitrariness of extraordinary proportion. However, such a case could not be made out by the petitioners in issuing the impugned order/notification. Such a proposition has been strongly disputed by the petitioners stating that in issuing the aforesaid order/notification the State respondents acted with profound illegality.

74. I have considered the rival submissions and have found that the allegation of the State respondents issuing impugned order/notification the State respondents had acted with huge illegality cannot be said to be based on solid foundation. Quite contrary to it, such order/notification was issued legally and in exigency of service. The discussion, indulge hereinbefore makes such position abundantly clear and same needs no further reiteration.

75. The learned counsel for the private respondent has argued that on the appointment of the respondent No. 7 of OSD (Skill Development), the petitioners did not suffer any legal injury. Since, they did not suffer any legal injury, in terms of law laid down in the case of Ayaubkhan Noorkhan Pathan (supra), the petitioner could not have filed the present proceeding. This contention was to by the petitioners contending that the illegal appointment of the respondent No. 7 requires the petitioners to suffer legal injury having far-reaching consequences on them.

76. I have considered the above submissions and found that there was no serious infirmity in either recommending the respondent No. 7 for appointment against the post of OSD (Skill Development) or appointing her against the post aforesaid. Being so, it cannot be said the petitioners had suffered legal injury arising out of impugned recommendation/Notification.

77. Since the recommendation requiring the State respondents to appoint the respondent No. 7 against the post of OSD (Skill Development) or the Notification appointing the respondent No. 7 against the post aforesaid pertain to Policy matters, since such policy matters fall in exclusive domain of the executive, since this Court could not notice any infirmity in the impugned recommendation or

Notification, this Court is of the opinion that there is no scope for judicial review, the scope of which over matters in question is otherwise very limited. In the result, it is held that the present proceeding lack merit and as such, same stands dismissed. No costs.