

(2009) 05 GAU CK 0009
In the Gauhati High Court

Neidilhou Angami and Others

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 28-05-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 309

Nagaland Economics and Statistics Service Rules, 1973 — Rule 13, 14, 14.1, 5, 6

Citation : (2010) 2 GLR 218 : (2009) 3 GLT 692

Hon'ble Judges : A. Potsangbam, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A. Potsangbam, J.—All the three writ petitions pertain to similar question of fact and law and as such, as agreed upon by the learned Counsel for the parties, the writ petitions are taken up together for hearing and disposal by this common judgment and order.

2. Heard Mr. N. Mozhui and Mr. C.T. Jamir, learned Counsel appearing for the petitioners, Mrs. Y; Longkumer, learned Government Advocate, appearing for the State Respondents Also heard Mr. R. Iralu, Mr. K. Sema learned Counsels appearing for the private respondents.

3. For the purpose of deciding this batch of writ petitions and for convenience, the facts associated with WP(C) 24(K)/2008 shall be discussed and referred to as hereunder.

3.1. The petitioners as well as the private respondents are presently working as Statistical Officer and District Statistical Officer in the Directorate of Economics and Statistics, Kohima, Nagaland. The recruitment and conditions of service for the post of Statistical Officer/District Statistical Officer ("SO/DSO") are governed by the Nagaland Economics and Statistics Service Rules, 1973 ("the Service Rules, 1973") as amended from-to-time. According to the Service Rules of 1973, the post of SO/DSO is classified as junior grade Class II Gazetted Officer. 50% of

the cadre strength of the post of SO/DSO is to be filled up by direct recruitment and the remaining 50% by promotion. Rule 5 of the Service Rules, 1973, provides the methods of recruitment, i.e., one by direct recruitment and another by promotion from lower grade and Rule 6 provides that direct recruitment to gazetted post and grade-I under Class III posts be made through competitive examination to be conducted by the Public Service Commission. Rule 7 provides for appointment and Rule 14 provides as to how seniority in the cadre is to be determined. The relevant portion of Rule 14.1 and Rule 14.1(b) and 14.1(c) is reproduced below:

14. SENIORITY:

1. Seniority in a cadre shall normally be determined with reference to the date of joining in that cadre provided that-

(a)*** ** (b) seniority of persons appointed through Selection or Competitive examination shall be determined in accordance with their position in the merit list, provided that if a person did not join the service within one month from the date of issue of the offer of appointment or within the period specified or within the period of extension of joining of time allowed, he will rank below those who joined before him.

(c) If in a calendar year, recruitment is done partially by departmental promotion and partly by direct recruitment, the departmental promotees will rank senior to the direct recruits.

3.2. According to the column 5 of Schedule II to the Service Rules, 1973, the qualification for appointment as SO/DSO against direct recruitment quota is as follows:

Master's degree in Statistics/Mathematics/Economics/Commerce or a graduate with any one of the above subject with 3(three) years experience as Inspector of Statistics.

3.3. The dispute in the instant case is not, between direct recruits and promotees as such the provisions relating to the promotion is not referred to and discussed in this judgment. The controversy involved in the instant case is between two groups of direct recruits. In order to be eligible for appointment as a direct recruit against the post of SO/DSO, one must possess Master Degree in Statistics/Mathematics/Economics or Commerce and the Inspector of Statistics, the next lower post, is also eligible for consideration for appointment against direct recruitment quota provided one is a graduate with any one of the subjects mentioned above with 3 years of experience as Inspector of Statistics. The above are the conditions for recruitment and there is no provision in the Service Rules of 1973 enabling the authority to relax any of the conditions of recruitment as mentioned above.

3.4. On the recommendation of Nagaland Public Service Commission, vide NPSC/C-6/2004 dated 4.1.2005, the petitioners, four in number, were appointed as

Statistical Officer vide order dated 1.3.20.05 under the establishment of Director of Economics and Statistics, Nagaland, with effect from the date of joining to the post. On completion of the probationary period, the service of the petitioners were confirmed as Statistical Officer (Class-II gazetted) in terms of Rule 13 of the Service Rules, 1973 by an order dated 30.8.2007 issued under order No. PLN/GEN/E&S/NL/2007 (Part-III). It is submitted that in view of the aforesaid appointment and confirmation referred to above, the petitioners have been expecting for consideration of promotion to the next higher post, if they come within the zone of consideration against any of the vacancies that may arise in the higher grade.

4. It is stated that the respondent No. 4, who is a graduate with Economics was appointed on contract basis on 14.8.1997 as Statistical Officer, the respondent No. 5, who has similar qualification was appointed on 20.12.1997, the respondent No. 6, who is an MA in English with Economics in BA was appointed w.e.f. 30.6.1998 and the respondent No. 7, who is a MA in Public Administration was appointed w.e.f. 10.7.1998. It is not in dispute that their appointments as Statistical Officer are without any notification and without facing any selection test as contemplated under the Service Rules, 1973. It appears that they have been appointed to the post on contract basis without following the procedure prescribed by the Rules framed for such appointment.

4.1. The contract service of private respondents were regularized as Statistical Officer in the Directorate of Economics and Statistics, Nagaland, by an order dated 17.5.2006 under No. PLA/BS.Estt/1/2003 (Annexure-C) wherein it is clearly stipulated that the period of service rendered on contract basis will count towards leave, pension, etc., as per rules other than the seniority w.e.f. from the dates given thereto. The notification dated 17.5.2006 is reproduced hereinbelow:

Notification

Dated Kohima, 17th May, 2006

No. PLN/E&S/ESTT-1/2003: The Governor of Nagaland is pleased to regularize the contract services of the following Statistical Officers in the Directorate of Economics & Statistics, Nagaland, Kohima in the scale of pay of Rs. 6500-200-10500 pm plus all other allowances as are admissible under Rules from time to time in Nagaland w.e.f. 23.2.2006 i.e. from the date of Cabinet approval.

1. Shri Remchigkangba Statistical Officer. 2. Shri Khrietoslie Whourie Statistical Officer. 3. Smt. Asangia Statistical Officer. 4. Smt. Vikeyielinuo Statistical Officer.

2. This is issued with the approval of the Cabinet in its meeting held on 23.2.2006 and conveyed vide CAB.2/2003 dated 24.2.2006.

3. The period of services rendered on contract basis will count towards Leave, Pension, etc., as per Rules other than seniority with effect from the date as given below:

Name w.e.f.

1. Shri Remchigkangba 14.8.1997. 2. Shri Khrietsolie Whourie 20.12.1997. 3. Smt. Asangla 30.6.1998. 4. Smt. Vikeyielinuo 10.07.1998.

Sd/- Laihuma IAS Chief Secretary & Development Commissioner, Nagaland.

4.2. It is stated that regularization of contract services of the private Respondents have been made by the Government in terms of the Memorandum No. AR-S/ASSO/98 dated 18.2.2004 (Regulation for contract/ad hoc appointments), an executive instruction issued apparently under Article 162 of the Constitution of India. Paragraph 3(b) of the aforesaid memorandum provides for consideration of regularization of those ad hoc/contract appointees who have completed 5 to 10 years of service and who fulfil the following criteria:

(i) There is sanctioned post;

(ii) the employee fulfils all the eligible criteria for the post including requisite educational qualification, and

(iii) the performance of the employee has been satisfactory in the service.

As per the aforesaid Memorandum dated 18.2.2004, the cases of those ad hoc/contract appointees who fulfil the aforesaid criteria were to be considered by a Screening Committee in terms of para 3(a) of the said Memorandum.

4.3. The Office Memorandum dated 18.2.2004 is completely silent as to how the seniority of the contract employees should be counted on their absorption/regularization to the posts held by them. However, in the instant case, the recommendation of the selection committee dated 11.10.2004 (Annexure-5 to the Government affidavit) would make it very clear that the seniority of the respondents should be counted from the date of joining.

5. It is stated that in the tentative seniority list of the SO/DSO published on 16.10.2006 by the Government, (Annexure-D to the writ petition) the seniority of the petitioners are placed at Sl. Nos. 18, 19, 20 and 21 whereas seniority of the private respondents are placed at Sl. Nos. 22, 23, 24 and 25.

5.1 After the publication of the tentative seniority list, as discussed above, the Government issued a notification under No. AR-5/ASSO/98 dated 16.11.2006 (Annexure-E) giving service benefit of one year for every three years of continuous service for counting seniority to the regularized contract employees, who were regularized pursuant to the Office Memorandum dated 18.2.2004 as referred to above. The notification which is impugned in this writ petition is reproduced herein below:

NOTIFICATION

Dated Kohima, the 16th November, 2006

No. AR-5/ASSO/98: In the interest of public service, the Governor of Nagaland is

pleased to grant service benefit of 3:1, i.e., 1(one) year service benefit for every 3 (three) years of continuous service for counting of seniority to the regularized contract employees who were regularized in pursuance of this Department Notification No. AR-5/ASSO/98 dated 18.2.2004.

This has the approval of the Cabinet, vide OM No. CAB-2/2003 dated 3.10.2006.

Sd/- C.J. Ponraj Principal Secretary to the Govt. of Nagaland.

5.2. Pursuant to the aforesaid notification, as extracted hereinabove, the Government issued another notification dated 19.4.2007 thereby giving 3 years service benefit towards seniority to the respondent No. 4, and 2 years seniority to each of the respondent Nos. 5, 6 and 7. The consequence of this order is that the respondents would now be placed above the petitioners despite having been regularized on a date later than the date of appointment of the petitioners to the grade. The notification dated 19.4.2007, which is impugned in this petition, is reproduced hereinbelow :

NOTIFICATION

Dated Kohima, the 19th April, 2007

No. PLG/STAT-1/SL/98: In pursuance of the notification No. AR-5/ASSO/98 dated 16th November, 2006 the Governor of Nagaland is pleased to grant service benefit in the ratio of 3:1, i.e., 1(one) year service benefit for every 3 (three) years of continuous service for counting seniority to the following Statistical Officers whose contract service have been regularized vide Notification No. PLN/E&S/ESTT-1/2003 dated 17th May, 2006 issued by the Government of Nagaland, Planning and Coordination Department (General Branch):

Name	Designa-	Date of	Date of	Total	Period	Date of	Entry	regulari-	period of
of counting	into zation	service on	service	seniority	service	16.11.2006	benefit in		
the rendered	admis-	grade of	by the	sible	Statistical	Officers	Officer		
-----	-----	-----	-----	-----	-----	-----	-----	1.	-----
Shri Statistical	14.8.97	23.2.2006	9 years	3	3 years	23.2.2003	Remchingkaba		
Officer								months	
-----	-----	-----	-----	-----	-----	-----	-----	2.	-----
Khrietsolie Statistical	20.12.97	23.2.2006	8 years	10	2 years	23.2.2004	Whourie		
Officer								months	
-----	-----	-----	-----	-----	-----	-----	-----	3.	-----
Smt. Statistical	30.6.98	23.2:2006	8 years	4	2 years	23.2.2004	Asangia		
months							Officer		
-----	-----	-----	-----	-----	-----	-----	-----	4.	-----
Smt. Statistical	10.7.98	23.2.2006	8 years	3	2 years	23.2.2004	Vikeyieklinuo		
Officer								months	
-----	-----	-----	-----	-----	-----	-----	-----		

Sd/- Lalthara IAS Addl. Chief Secretary and Development Commissioner

5.3 It is stated that due to various representations/complaints received against the impugned notification dated 16.11.2006, the Government reconsidered the matter and issued another notification under No. AR-5/ASSO/98 dated 7.3.2008 (Annexure-J) revoking the impugned notification dated 16.11.2006 and reintroduced the old practice of counting seniority from the date of regularization only. It is also stated that without assigning any reason, the notification dated 17.3.2008, referred to above, is again superseded by another notification under No. AR-5/ASSO/98 dated 20.5.2008 (Annexure-K) and revived the impugned notification dated 16.11.2006 and the notification dated 20.5.2009 is also challenged in the writ petitions under consideration.

6. The case of the petitioners is that they have been appointed on 1.3.2005, through regular selection process, on the recommendation of the Nagaland Public Service Commission and in terms of the provisions of the Service Rules, 1973, and confirmed to the service on 30.8.2007 and as such, their seniority should be counted in order of merit from the date of their joining in service. Thus, they have acquired legitimate and vested right to count their seniority from the date of appointment/joining and their seniority in the grade is to be determined only in terms of Rule 14 of the Service Rules, 1973. The gradation position obtained by them in the grade of SO/ASO cannot be disturbed. The further case of the petitioners is that the private respondents who did not fulfil even the qualification prescribed for appointment of SO/DSO, as a direct recruit, have been regularized only on 17.5.2006 on the recommendation of a Screening Committee constituted under Office Memorandum dated 18.2.2004, by condoning/relaxing the qualification prescribed for such appointment. In the proceeding of the Screening Committee held on 11.10.2004 (Annexure-I) it is clearly provided that the seniority of the private respondents should be from the date of their joining and, therefore, no other date of seniority could be assigned to the private respondents anterior to their date of regularization. Further, it is submitted that in absence of indicating the source of authority to issue the Office Memorandums/Notifications dated 16.11.2006, the same shall have to be treated as without jurisdiction and a nullity in law and, therefore, the impugned order dated 16.11.2006 (Annexure-E) and 19.4.2007 (Annexure-F) and 20.5.2008 (Annexure-K) are liable to be quashed.

7. Though the private respondents did not fulfil the criteria laid down in the Office Memorandum dated 18.2.2004, their services had been regularized with the condition that their contract appointment would be counted for increment, leave, pension, etc., except seniority. However, the State Government took a decision as it is evident from the order dated 16.11.2006 by which the contract service rendered by the ad hoc/contract employees, became possible to be counted towards seniority in the ratio of 3:1. It is also noticed that admission of the State respondents made in para-11 of the affidavit-in-opposition dated 8.12.2008 that the private respondents did not have the requisite qualification for appointment as direct recruits against the post of SO/DSO but the Screening Committee had condoned the educational qualification. Para-11 of the affidavit-in-

opposition is reproduced hereinbelow:

That the averments made in paragraphs 20 and 21 of the writ petition are admitted. However, the deponent respectfully states that the Selection Committee in its meeting on 11.10.2004 had observed that the respondents 4 to 7 had been appointed in relaxation of qualification prescribed by the Service Rules and, therefore, condoned the educational qualifications basing on the fact that at the respondents 4 to 7 had Economics as one of the subjects in their degree course. It is pertinent to state herein that the petitioners have not challenged the decision of the Selection Committee.

The Government has not stated any where in the affidavit in opposition on the very source of power of the Government to issue the aforesaid impugned orders, which are admittedly contrary and repugnant to the statutory rules framed under Article 309 of the Constitution of India. The affidavits of the private respondents are more or less on the same line adopted by the Government respondents in the affidavit in opposition dated 8.12.2008 and as such it may suffice, if the affidavit of the Government alone is considered in this judgment.

8. In the backdrop of the factual matrix, as discussed above, the following issues now emerge for consideration of the court:

(i) Whether the private respondents have been appointed in accordance with the provisions of the Service Rules framed under Article 309 of the Constitution of India and whether the Screening Committee; constituted under Office Memorandum dated 18.2.2004, is competent to relax and condone any of the conditions of recruitment, i.e., qualification prescribed?

(ii) Whether the Government has jurisdiction and authority to issue the Office Memorandum dated 16.11.2006 and 20.5.2008 which are admittedly contrary to and repugnant to the statutory rules framed under Article 309 of the Constitution?

(iii) Whether inter se seniority between the petitioners and the regularized contract employees is to be determined on the basis of the date of joining and as per Rule 14 of the Service Rules, 1973 or not and what would be seniority position between the disputing parties?

9. Through the regularization of the private respondents vide order dated 17.5.2006 is not under challenge, the Court will examine whether they have been appointed according to Rules occupying the field or not. Admittedly, the Service Rules, 1973 provides only two methods of recruitment - on by direct recruitment through open competition to be conducted by the Public Service Commission and another by way of promotion from the lower grade. It is not in dispute that the petitioners have been appointed on 1.3.2005 on the recommendation of Nagaland Public Service Commission, and as such, their appointment is in accordance with the Service Rules, 1973. In the Service Rules, 1973, there is no provision other than the two methods mentioned above for

recruitment/appointment to the post of SO/ASO and the appointment/regularization through the Executive Instruction is not contemplated in the extant Service Rules and, therefore, the logical conclusion is that the appointment of the private respondents as SO/DSO is outside the Service Rules, 1973.

10. In the constitutional scheme of public employment as laid down by the Apex Court in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, it is held that regularization is not a method of recruitment permissible in law and all appointments to public posts should be made after notifying the vacancies under Compulsory Notification of Vacancies Act, 1954 and through open competition. Only then, it can conform to the requirement of Articles 14 and 16 of the Constitution; In *A. Umarani Vs. Registrar, Cooperative Societies and Others*, it was held by the Apex Court that any appointment made in contravention of the mandatory provisions of the Statutory Rules and by ignoring the essence of qualification, such appointment would be illegal and cannot be regularized by the State by invoking the power under Article 162 of the Constitution. In *State of U.P. Vs. Neeraj Awasthi and Others*, the Apex Court held that there is no power of the State Government under Article 162 of the Constitution to make appointment and even if, there is any such power, appointment cannot be made in contravention of the statutory rules. It is further held that the High Court has no jurisdiction to frame any Scheme by itself or to direct the State for framing a Scheme for regularization and this view is reiterated in the case of *State of Kashmir v. Kashmir Employees Welfare Association* (2006) 1 SCC 62. In *Punjab Water Supply and Sewerage Board, Hoshiarpur Vs. Ranjodh Singh and Others*, it was held by the Apex Court that if the terms and conditions of service is to be governed by the rules framed under Article 309, any policy framed by invoking the power under Article 162 of the Constitution, if contrary to the rules, is illegal.

11. In the instant case, the Office Memorandum dated 18.2.2004 does not authorize the Screening Committee to condone the qualification prescribed for eligibility of the post by the rules framed under Article 309 and the duty of the Screening Committee is to ensure that incumbent fulfils the eligibility criteria for the post prescribed by the Rules. The fact of relaxing the qualification of the private respondents by the Screening Committee is also admitted by the State Government in paragraph 11 of their affidavit in opposition, as extracted hereinabove and as such the Screening Committee has exceeded its jurisdiction. Thus, it is the considered opinion of this Court that the appointment of the private respondents is fraught with illegality. However, as the appointment of the private respondents is not challenged by the petitioners in this writ petition, question of quashing the appointment of the private respondents is left untouched. In view of the above discussions, it will not be inappropriate to hold that the private respondents are irregular appointees and in the proceeding hereinafter, they shall be referred as irregular appointees. Thus, this issue is answered in the negative.

12. Now adverting to the second issue which is of immense importance, the court is to examine constitutionality and the legality of the impugned order dated 16.11.2006 and its revival order dated 20.5.2008. In Article 309 of the Constitution of India, it is provided that the Union or the State Government may make rules regulating the recruitment and conditional service of persons appointed to such services and the posts in connection with the affairs of Union or a State. Therefore, in exercise of the power given under Article 309 of the Constitution of India as discussed above, the extant Service Rules of 1973 is framed by the State Government. The service rules so framed under Article 309 of the Constitution of India may be amended/modified, or replaced either by amendment or by a new set of rules framed under Article 309 of the Constitution itself. Indisputably, the impugned order dated 16.11.2006 was issued by the State Government by invoking the jurisdiction of the Article 162 of the Constitution of India which provides the extent of executive power of State with its self-contained limitation. It is a settled position of law that the executive instruction issued under Article 162 of the Constitution of India cannot override or encroach upon any provision of the rules framed under Article 309 of the Constitution of India and, therefore, any executive instruction, if found contrary to the rules framed under Article 309 of the Constitution of India, is liable to be quashed as unsustainable in law.

The learned Counsel appearing for the respondents has been repeatedly asked by the court to show the source of power of the Government to issue the impugned Notification dated 16.11.2006 other than the provision of Article 162 of the Constitution of India and the learned Government counsel failed to demonstrate any other source of power of the Government. In such circumstances, this Court is to hold that the impugned notification dated 16.11.2006 is without jurisdiction and without mandate of law.

13. In *Union of India and Another Vs. Tulsiram Patel and Others*, the Constitution Bench of the Apex Court held in the following words:

There cannot be exercise of power unless such power exists in law. If such power does not exist in law, the purported exercise of it would be an exercise of non-existent power and would be void. The exercise of a power is, therefore, always referable to the source of such power and must be considered in conjunction with it. It is also well settled that where a source of power exists, the exercise of such power is referable only to that source and not to some other source under which were the power exercised, the exercises of such power should be in valid and without jurisdiction.

With regard to the source of power, the above proposition of law is relied and followed by a Division Bench of this High Court in the case of *Neman Behari Singh v. State of Manipur and Ors.* 2004 (1) GLT 1. This issue is also answered in the negative.

14. Now referring to issue No. 3, there is no dispute that both the petitioners and

the private respondents belong to the category of direct recruit. It is not the case of the respondents that they have been appointed as against the promotion quota, therefore, the dispute of seniority is between amongst the direct recruits. While discussing the Issue No. 1 above, this Court has already held that in view of the manner and fashion in which the respondents have been regularized to the post of SO/DSO, they shall be categorized and referred to as irregular appointees. The petitioners being direct regular appointees to the grade of SO/DSO, they shall be referred to as regular appointees. This issue of seniority between irregular and regular appointee is no longer res integra in view of the decision rendered by this Court in Nitoli and Others Vs. State of Nagaland and Others, relying on the principle laid down by the Apex Court in State of U.P. Vs. Rafiquddin and Others, In the aforesaid case, this Court relying on the principle laid down in Rafiquddin (supra) held that an irregular employee who has been absorbed retrospectively in the cadre contrary to the extant Service Rules, cannot be allowed to become senior to persons who are regularly appointed earlier. Further in Uttranchal Forest Ranger's (Direct Recruit) and Ors. v. State of U.P. and Ors. (2006) 10 SCC 346, the Apex Court held that retrospective seniority cannot be given from a date to an incumbent when the incumbent had not been borne in the cadre and more particularly, when it would affect others who are already borne in the cadre.

15. The petitioners, in the instant case, having been appointed on 1.3.2005 by following the procedure prescribed by the Service Rules, 1973 seniority position obtained by the petitioners on the strength of their regular appointment cannot be superseded/disturbed by invoking the impugned notification dated 16.11.2006 by which the private respondents who have been regularized in the cadre by order dated 17.5.2006 are sought to be given retrospective seniority. Further, in view of the findings recorded by this Court on the first and second issue, as above, the respondents, irregular appointees, cannot be given any seniority to a date anterior to the date of absorption/regularization, i.e., 17.5.2006.

16. For the reasons and the proposition of law discussed hereinabove, the court is of the opinion that the impugned notifications dated 16.11.2006 (Annexure E), 19.4.2007 (Annexure F) and 26.5.2008 (Annexure K) are liable to be set aside and quashed and accordingly the impugned notifications are set aside and quashed as illegal and unsustainable in law.

17. IN WP(C) No. 91(K)/2008

In the above case, it will not be necessary to deal elaborately the facts associated with the case, inasmuch as the challenge in this writ petition is against the notifications dated. 16.11.2006 (Annexure-F) and 20.5.2008 (Annexure-K), which have been set aside and quashed in WP(C) No. 24(K)/2008 after thorough discussions on the legality, validity or otherwise of the aforesaid impugned notifications.

The decision rendered in WP(C) No. 24(K)/2008 is squarely applicable in this

case also and accordingly, the impugned notifications dated 16.11.2006 (Annexure-5) and 20.5.2008 (Annexure K) are set aside and quashed.

18. IN WP(C) No. 70(K)/2007

In the above case it will not be necessary to deal elaborately the facts associated with the case, inasmuch as the challenge in this writ petition is against the notifications dated 16.11.2006 (Annexure K) and 19.3.2007 (Annexure L). The impugned order dated 16.11.2006 having been set aside and quashed in WP(C) 24(K)/2008, above, after thorough discussions on the legality, validity or otherwise of the same, the consequential order dated 19.3.2007 (Annexure L) is also liable to be set aside and quashed.

The decision rendered in WP(C) No. 24(E)/2008 is squarely applicable in this case also and accordingly, the impugned notification/order dated 16.11.2006 (Annexure K) and 19.3.2007 (Annexure L) are set aside and quashed.

19. All these writ petitions are accordingly allowed. No costs.