
(2009) 10 GAU CK 0038

In the Gauhati High Court

Case No : Writ Petition (C) No. 269 (SH) of 2008

Nelson Kharnabi and Another

APPELLANT

Vs

State of Meghalaya and Others

RESPONDENT

Date of Decision : 28-10-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Meghalaya Police Service Rules, 1996 — Rule 41, 7, 7(2), 8(3)

Citation : (2010) 1 GLR 508 : (2010) 3 GLT 483

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Advocate : M.Z. Ahmed and B. Dutta, for the Appellant; N.D. Chullai, for the Respondent

Final Decision : Dismissed

Judgement

T. Vaiphei, J.—In this writ petition, the two petitioners are challenging the decision of the State-respondents in not appointing them to the posts of the Meghalaya Police Service (MPS) even though they were included in the select list prepared by the Meghalaya Public Service Commission (MPSC) in 2003.

2. The respondent No. 4 (MPSC) issued an advertisement on 15.5.2001 for recruitment of fourteen posts of MPS by direct recruitment. The petitioners appeared in the written tests conducted by the respondent No. 4, and were declared successful in the test. They were called for the interview held from 3.12.2003 to 16.12.2003 in which they participated and were found eligible for the posts of Deputy Superintendent of Police where after the select list was published on 22.12.2003 in order of merit. The petitioners were placed at serial No. 24 and 30 in the select list of 32 candidates so published. According to the petitioners, out of the said select list, the respondent No. 4 by the notification dated 19.1.2004 brought out a list of 25 candidates to be appointed in the MPS on probation with effect from the date of taking over the charge leaving out six candidates waiting for appointment. The names of the petitioners did not find a

place among those 25 candidates short-listed for the appointment though the respondent No. 4 and three others, who were placed much below them in the merit list prepared by the respondent No. 4, were eventually appointed to MPS on the basis of such short listing. It is stated by the petitioners that there was no mention of quota in the advertisement dated 15.5.2001. The validity of the select list was for a period of one year, which was to expire on 22.12.2004. When the representations made by them to the respondent authorities became pointless, they were compelled to file WP(C) No. 402(SH) of 2004 and WP(C) No. 400(SH) of 2004 before this Court, which was well before the expiry of the validity period of the select list dated 22.12.2003. This Court on 10.12.2004 passed an interim order observing that the pendency of the writ petition would not be a bar against the State-respondents from considering the case of the petitioners for the appointment. The petitioners accordingly approached the State-respondents for considering their case for the appointment as two posts were lying vacant following the promotion of one S. Nongenger to the post of Additional Superintendent of Police in August, 2004 and the retirement on superannuation of one M. War, MPS in the year 2006, but to no avail.

3. It is also the case of the petitioners that during the pendency of the writ petition, much to their surprise, the MPSC issued the advertisement dated 22.11.2006 for recruitment to the posts of Meghalaya Civil Service and MPS. According to them, on the basis of the statements made by the learned Senior government Advocate in the open court that the State-respondents were considering their prayer for appointment, they sought for, and were granted permission by this Court on 1.3.2007 and 5.3.2007 to withdraw the writ petition with a liberty to file fresh cases if their prayers were not considered favourably. It is pleaded by the petitioners that the respondent No. 2 gave them verbal assurance that they would be considered for appointment. However, no appointment orders were issued by the State-respondents. Subsequently, they came to know from the Principal Information Officer, Home (Police) Department, Government of Meghalaya under the Right to Information Act, 2005 that there were 52 sanctioned posts in the Junior Duty Posts of MPS, out of which twenty-six were to be filled up by direct recruitment and another twenty-six posts were to be filled up by promotion and that as on 17.6.2003 when written examination was held for direct recruitment, there were only 25 vacancies as one post was still being held by one S. Nongtynger, MPS, direct recruit of the previous batch and further that as on 4.3.2006, there was one vacancy for direct recruit following the promotion of the said S. Nongtynger on 3.8.2004 to the Senior Scale. The petitioners also found from the note dated 30.8.2004 signed by the Deputy Secretary, Home (Police) Department that as per Rule 7 of the Meghalaya Police Service Rules, 1996, the proportion of vacancies to be filled up is 50:50 respectively. The note further revealed that "besides, 26 promotees, another promotes Shri S. Dkhar has been promoted as DSP(CWS) under MPS thereby bringing the number of MPS promotees to 27. Hence at present the ratio is 27:25". This, according to the petitioners, exhibits gross irregularity against the

extant Rules. Moreover, the state-respondents have not clarified as to why the vacancy arising out of the promotion of S. Nongtynger on 3.8.2004 was not filled up by the next candidate on the merit list prepared by the respondent No. 4 on 22.12.2003, which was still valid at that time.

4. It is also stated by the petitioners that the promotion orders of two Inspectors, namely, Shri Hanwell War and Shri Mohan Shankar to the posts of Junior Scale of the MPS were issued on 29.10.2004, while Shri Hanwell War retired on 1.3.2003 and Shri Mohan Shankar expired on 17.10.2003, which shows that the said promotion orders were issued more than a year after the retirement and expiry of the said Hanwell War and Mohan Shankar respectively: this is grossly irregular. It is further pleaded that even if the said promotion orders were done retrospectively by the State-respondents also, and the name of the said Hanwell War deleted from the list of promotees on his retirement, the presence of Shri Harendra Nath Das and Shri Mohan Shankar among the promotees still made the total number of promotees to 28 (excluding Shri S.D. Dkhar, D.S.P., Central Motor Workshop) as on 17.6.2003, when competitive examination was held, which is in total violation of Rule 7(2) of the Meghalaya Police Service Rules, 1996. It is also contended by the petitioner that the extension of the probation period of Shri C.R. Sharma beyond four years should be declared illegal and the post held by him also be declared vacant. According to the petitioners, this Court by the judgment and order dated 9.10.2001, in a similar case, directed that if vacancies were available in the posts of Junior Grade in the Meghalaya Civil Service and the candidates from the merit list prepared by the MPSC were not absorbed, such candidates had the legitimate right to the post in terms of the select list so prepared. Finally, the Deputy Secretary in the Home (Police) Department, Government of Meghalaya, by his letter dated 19.10.2008 informed the petitioners that the validity period of the select list dated 22.12.2003 prepared by the MPSC had already expired in December, 2004 and as the new selection process had already started, the case of the petitioners was treated as closed. It is contended by the petitioners that the decision taken in the letter dated 19.10.2008 is arbitrary and illegal and suffers from the vice of non-application of mind. It is also the case of the petitioners that it was the duty of the respondent authorities to make appointment of the candidates out of the select list prepared by the respondent No. 4 who obtained the highest marks up to the number of vacancies to be filled up, and had this principle been followed, the petitioners would have been appointed to one of the vacancies in the posts, but they have been deprived of their appointment to the Junior Duty Posts under the MPS due to sheer discrimination and mala fides. Other pleadings are also made by the petitioners, but they do not make out any sense due obviously to bad drafting and the same are not reproduced.

5. The writ petition is resisted by the State-respondents, who filed their affidavit-in-opposition. The case of the answering respondents is that out of the thirty-two candidates recommended by the MPSC, twenty-five candidates were appointed as there were twenty-five vacancies available at that time. According to the

respondents, the appointment of twenty-five candidates is based on the reservation policy laid down by the Government, which is as follows:

(a) 15% General category - 3.75, which is rounded up to 4 posts, and are filled up by candidates at Serial number 1 to 4 of the select list.

(b) 40% Khasi and Jaintia category - 10 posts filled by candidates at Serial No. 5-7,9-11,13,15-17.

(c) 40% Garo community -10 posts filled up by Serial No. 8, 12, 14, 23, 25-27, 29 and 31.

(d), 5% other Scheduled Tribes - One post. As there is no other ST candidate, it is filled up by a candidate belonging to Khasi and Jaintia community, i.e., Serial No. 18.

6. It is thus pointed out by the respondents that 10 candidates belonging to Khasi and Jaintia category have been appointed thereby fulfilling the 40% reserved for this community. It is denied that candidates at Sl. No. 25, 27, 28 and 31, who were below the petitioner in the select list were appointed, more so, when 10 candidates belonging to Garo community were appointed to fill up 40% of the quota reserved for them. It is asserted by the respondents that the advertisement clearly mentioned that reservation of posts would be as per the Government policy. It is also pointed out by the respondents that the select list prepared by the MPSC was for a period of one year, and the same expired on 22.12.2004 by efflux of time and contended by them that once the select list got expired, the petitioners do not have any right to seek appointment on the basis of such expired select list. It is not obligatory for the respondents to fill up all vacant posts, but even if they decide to fill up the vacancies which arose subsequently, there are still other candidates above the petitioners in the select list such as the candidates at serial No. 21 and 22, who have better claim than the petitioners. The MPSC has issued a fresh advertisement on 22.11.2006 for recruitment to the posts of MCS and MPS. It is vehemently denied by the answering respondents that no assurance was ever made by the senior Government Advocate before this Court for considering the appointment of the petitioners as can be verified from the order dated 5.3.2007 passed by this Court: they simply sought for and were granted permission by this Court to withdraw their writ petition with a liberty to file a fresh case and nothing more. It is claimed by the respondents that the note that Shri S. Dkhar was promoted as Deputy Superintendent of Police, CMW thereby raising the number of promotees from 26 to 27 was misleading and has been clarified that the post of Deputy Superintendent of Police, CMW is a separate technical post sanctioned in the year 1986, and it does not form a part of the 52 posts sanctioned for MPS cadre. It is denied that the sanctioned strength of promotion quota has been exceeded. They also deny that the promotion orders of two Inspectors, namely, Shri H. War and Shri Mohan Shankar to the Junior Scale of MPS were issued on 29.10.2004 after Shri H. War retired and Mr. Mohan Shankar expired on 1.3.2003 and 17.10.2003

respectively: the orders of promotion were issued on 20.12.2002. It is the prerogative of the Government to extend the probation period of the said C.R. Sangma, DSP, and even if the same is not extended also, it would make no difference to the case of the petitioners since the select list has already expired. As the process of fresh recruitment for the posts of MPS has already started, the earlier select list cannot be acted upon any more. These are the sum and substance of the case of the respondents.

7. After hearing Mr. M.Z. Ahmed, the Learned Senior Counsel for the petitioners, and Mr. N.D. Chulai, the learned Senior Government advocate appearing for the State-respondents, and upon perusing the material available on record, I am of the view that there is no merit in this writ petition. In the first place, the select list dated 22.12.2003 prepared by the MPSC upon which the petitioners based their claim for appointment, already got expired after the lapse of one year. This is also admitted by the petitioners in their pleadings, Moreover, for the vacancies beyond the 25 posts already filled up, a fresh advertisement has already been issued by the MPSC. To decide This issue, suffice it to reproduce below the observations of the Apex Court in Madan Lal and Others Vs. State of Jammu and Kashmir and Others, which are found at paragraphs 23 and 24:

23. It is no doubt true that even if requisition is made by the government for 11 posts the Public Service Commission may send merit list of suitable candidates which may exceed 11. That by itself may not be bad but at the time of giving actual appointments the merit list has to be operated. That only 11 vacancies are to be filled up, because the requisition being for 11 vacancies, the consequent advertisement and recruitment could also be for 11 vacancies and no more. It is easy to visualize that if requisition is for 11 vacancies and that results in the initiation of recruitment process by way of advertisement, whether the advertisement mentions filling up of 11 office of the Commission that the requisition for the proposed recruitment is for filling up 11 vacancies. In such a case a given candidate may not like to compete for diverse reasons but if requisition for larger number of vacancies for which recruitment is initiated, he may like to compete. Consequently, the actual appointments to the posts have to be confined to the posts for recruitment to which requisition is sent by the Government. In such an eventuality, candidates who are in excess of 11 who are lower in the merit list of candidates can only be treated as wait-listed candidates in order of merit to fill only the 11 vacancies for which recruitment has been made, in the event of any higher candidate not being available to fill the 11 vacancies, for any reason. Once the 11 vacancies are filled by candidates taken in order of merit from the select list that list will get exhausted, having served its purpose.

24. It is now time to refer to Rule 41 as pointed out by the Learned Counsel for the petitioners. The said rule reads as under:

Security of the list. - The list and the waiting list of the selected candidates shall remain in operation for a period of one year from the date of its publication in

the Government Gazette or till it is exhausted by the appointment of the candidates whichever is earlier, provided that nothing in this rule shall apply to the list and the waiting list prepared as a result of the examination held in 1981 which will remain in operation till the list or waiting list is exhausted.

A mere look at the rule shows that pursuant to the requisition to be forwarded by the Government to the Commission for initiating the recruitment process, if the Commission has prepared the merit list and the waiting list of selected candidates such list will have a life of one year from the date of publication in the Government Gazette or till it is exhausted by the appointment of candidates, whichever is earlier. This means that if requisition is for filling up of 11 vacancies and it does not include any anticipated vacancies, the recruitment to be initiated by the Commission could be for selecting 11 suitable candidates. The Commission may by abundant caution prepare a merit list of 20 or even 30 candidates as per their inter se ranking on merit. But such a merit list will have a maximum life of one year from the date of publication or till all the required appointments are made whichever event happened earlier. It means that if recruitment is for 11 vacancies and the merit list prepared is for 20 candidates, the moment 11 vacancies are filled in from the merit list the list gets exhausted, or if during the span of one year from the date of publication of such list all the 11 vacancies are not filled in, the moment the year is over the list gets exhausted. In either event, thereafter, if further vacancies are to be filled in or remaining vacancies are to be filled in, after one year, a fresh process of recruitment is to be initiated giving a fresh opportunity to all the open market candidates to compete. This is the thrust of Rule 41. It is in consonance with the settled legal position as we will presently see. We cannot agree with the Learned Counsel for respondents that during the period of one year even if all the vacancies are filled in for which recruitment is initiated by the State in the present case and if some more vacancies arise during one year, the present list can still be operated upon because the Commission has sent the list of 20 selected candidates. As discussed above, the candidates standing at serial Nos. 12 to 20 in the list can be considered only in case within one year of its publication, all the 11 vacancies do not get filled up for any reason. In such a case only this additional list of selected candidates would serve as a reservoir from which meritorious suitable candidates can be drawn in order of merit to fill up the remaining requisitioned and advertised vacancies, out of the total 11 vacancies. If that cannot be done any reason within one year of the publication of the list, even this reservoir will dry up and the entire list will get exhausted. We asked Learned Counsel for respondent-State to point out whether after the letter at page 87, there was any further communication by the State to the commission to initiate the process for recruitment to additional anticipated vacancies. He fairly stated that no further request was sent. That letter at page 87 is the only material for this purpose since that is the basis for the recruitment made by the Commission in the present case. In this connection we may usefully refer to a decision of this Court in the case of *State of Bihar v. Madan Mohan*

Singh. In that case appointment to the posts of additional District and Sessions Judges were being questioned. The question was whether appointments could be made to more than 32 posts when the selected process was initiated for filling up 32 vacancies and whether the merit list of larger number of candidate would remain in operation after 32 vacancies were filled in. Negating the contention that such merit list for larger number of candidates could remain in operation after 32 advertised vacancies were filled in, K. Jayachandra Reddy, J. made the following pertinent observations: (AIR headnote)

Where the particular advertisement and the consequent selection process were meant only to fill up 32 vacancies and not to fill up the other vacancies, the merit list of 129 candidates prepared in the ratio of 1:4 on the basis of the written test as well as viva voce will hold good only for the purpose of filling up those 32 vacancies and no further because said process of selection for those 32 vacancies got exhausted and came to an end. If the same list has to be kept subsisting for the purpose of filling up other vacancies also that would naturally amount to deprivation of rights of other candidates who have becomes eligible subsequent to the said advertisement and selection process.

8. I have extensively reproduced herein above the relevant observations of the Apex Court in the afore-cited decision as they do have a direct bearing on this case. The select list dated 22.12.2003 prepared by the MPSC was admittedly for a period of one year. Once this one year was over by December, 2004, in the absence of extension of the life span of the select list by the competent authority, it is as dead as dodo. It cannot be revived by this Court in exercise of its power under Article 226 of the Constitution. It is, however, contended by the Learned Senior Counsel for the petitioners, that the claims of the petitioners for their appointments on the basis of the select list dated 22.12.2003 cannot be defeated because the currency of select list expired during the pendency of WP(C) Nos. 400(SH) and 402(SH) of 2004 filed by them. His submission is that as the withdrawal of the writ petitions was done with the permission of this Court to file a fresh case on the assurance of the learned State Counsel for considering their appointment, the select list in question is deemed to have continued or survived after the filing of this writ petition. This contention, in my judgment, cannot be accepted. In the case of State of U.P. Vs. Ram Sawrup Saroj, which is relied on by the Learned Senior Counsel, what the Apex Court said was that if a writ petition is filed during the currency of the panel list, the claim of the candidate on the basis of such panel list could not be defeated even though the same was not extended by the competent authority. In the instant case, once the two writ petitions separately filed by the petitioners before this Court came to be withdrawn by them, irrespective of whether it was done with the liberty to file a fresh case or not, the principle laid down in Ram Swarup Saroj case (supra) cannot be extended to this case. It will amount to unnatural and illogical extension of such principle. The filing of the subsequent writ petition like the one herein cannot have the effect of prolonging the validity of or reviving the select list which was no longer operative after December, 2004. On merit also, the

petitioners, who found their names in serial Nos. 24 and 30 in the said select list, could not be accommodated inasmuch as the State Reservation Policy came in their way. Rule 8(3) of the extant rules, namely, the Meghalaya Police Service Rules, 1996, reads, thus:

(3) Of the number of vacancies to be filled up on the result of each examination there shall be reservation for candidates belonging to the Scheduled Caste and Scheduled Tribes in accordance with such orders as the Government may, from time to time, make in this regard.

Then, Clause 5 of the advertisement, which is at page 30 of the writ petition, stipulates that reservation of vacancies should be as per Government policy. This refutes the contention of the petitioners that there was no mention of quota in this advertisement. True, the details of quota reserved for each category are not indicated therein. But the question is whether this omission will have the effect of vitiating the selection process altogether, is the moot point. In my opinion, it will not. This is the implied condition of the advertisement. A case of this nature came up for consideration before the Apex Court in *Indian Institute of Technology v. Paras Nath Tiwari* (2006) 9 SCC 670. In that case, the respondent therein was appointed to the post of Maintenance Engineer (Aircraft) in IIT, Kanpur for maintaining the aircraft owned by the Institute. Aircraft Act r/w Aircraft Rules required that even the privately owned aircrafts be maintained by qualified engineers holding license issued by the Director General, Civil Aviation (DGCA). Accordingly, appointment letter given to the respondent stipulating that subject to the provisions of the rules and statutes, appointment should be for one year and till the necessary certificates for maintenance of the Institute aircraft are obtained from the date of joining". The respondent undertook to abide by the terms and conditions contained in the appointment letter. As the requisite license could not be obtained and produced by the respondent within the probation period of one year, the period was further extended for one year and lastly for another six months on the same terms and conditions with the stipulation that no further extension would be granted. The respondent filed a writ petition making substantive prayer and seeking relief of quashing of the last office order by which six months' extension of probation was granted. The High Court allowed the writ petition and further directed that the respondent was entitled to consideration of permanent appointment on the post, even though he had failed to obtain the license. The Apex Court held that the respondent, having failed to produce the license, as required under the statute as well as under the appointment letter, despite grant of extension of probation period on his own request and having undertaken to abide by the terms and conditions of his appointment, the High Court erred in interfering with the impugned order. It was further held therein that even if the advertisement did not contain the requirement of the license, such requirement contained under the Act and Rules should be read into it. The Apex Court observed: (SCC, p. 647, para 12)

12. Learned Counsel for the respondent took up the stand that there was no

obligation on the part of first respondent to produce such a license. He repeatedly contended that there was no such requirement indicated in the advertisement of the vacancy and, therefore, the respondent was not obliged to produce any such license. We are unable to accept this contention. In the first place, as rightly contended by Mr. Ganguly, what is required by law must be read overridingly into every contract of employment. That the Rules requires a license for a person to be employed as Maintenance Engineer of an aircraft is clear, irrespective of whether the advertisement prescribed it or not. Such a requirement must be read into the advertisement and to the contract of employment. Apart therefrom, the letter of appointment in clear term states (vide Clause 4) that the first respondent was required to produce an AME license for the requisite type of aircraft owned by the institute. This was clearly understood by the first respondent, as seen from his correspondence wherein he did not deny such a requirement, but kept asking for time and extension of probation. The contention of the Learned Counsel for the first respondent is, therefore, without merit and cannot be accepted.

9. Even though the aforesaid decision was rendered in the context of Aircraft Act and Rules, I have no doubt in my mind that the underlying principles therein are squarely applicable to this case. In this case also, Rule 8(3) the Meghalaya Police Service Rules, 1996 stipulates that the reservation policy of the State in respect of Scheduled Tribes and Scheduled Caste will be followed for recruitment to the posts of MPS. The advertisement, though not so in many words, prescribed that reservation of vacancies should be as per the Government policy. The manner in which this policy was implemented by the State-respondents has been explained in their affidavit-in-opposition as reproduced earlier. The petitioners have, therefore, miserably failed to point out any infirmity in the impugned actions of the State-respondents calling for the interference of this Court. In the view that I have taken, I do not think it necessary to refer to or discuss the various decisions cited by the Learned Senior Counsel for the petitioners.

10. The result of the foregoing discussion is that there is no merit in this writ petition, which is hereby dismissed. However, on the facts and in the circumstances of the case, I direct the parties to bear their respective costs.