

(1990) 08 GAU CK 0027

In the Gauhati High Court

Case No : Civil Rule Nos. 751 to 762 and 832 of 1989

Nengtipla Laleng; Ch.Bilashini Devi; Th.Ibecha Devi; L.Kesho Singh; Basi Haokip; M.Kiranbala Devi; Neikhokin; Th.Brajagopal Singh; T.Henia Phozne

APPELLANT

Vs

State of Manipur

RESPONDENT

Date of Decision : 20-08-1990

Acts Referred:

Fundamental Rules — Rule 9(19), 9(19)

Citation : (1990) 2 GLJ 303 : (1991) 1 GLR 145

Hon'ble Judges : S.N.Phukan, J and Y.Ibotombi Singh, J

Bench : Division Bench

Advocate : L.Shyam kishore Singh, N.Surjamani Singh, Advocates appearing for Parties

Judgement

S. N. Phukan, J.

1. The thirteen (13) writpetitioners before us appeared before the Departmental Promotion Committee held on 21st, 28th, 29th and 30th July, 1983 and 2nd and 3rd August, 1983 in the office of the Secretary (Fisher Government of Manipur for the posts of Lower Division Clerk in the Fishery Department. They also appeared the written as well as typing test. Thereafter, on 17th August, 1983 offers of temporary appointment were given to all the petitioners which were accepted. But letter offering appointments is available at Annexure AI. On 8th September, 1983 on the recoramentation of the Departmental Promotion Committee, the writpetitioners were appointed on "officiating basis". They joined the pasts and they were allowed to draw annual increments and contribute to the General Provident Fund. As their salaries were not paid from 1.1.89, they approached this Court. During the pendency of these writpetitions, they were served with the order of the Government dated 20th July, 1989 and by the said order their services were terminated with effect from 21.7.89 and the petitions for amendment of the main writpetitions were filed and prayer was allowed, and

accordingly, writ petitions were amended. The order of the said termination is available at Annexure A/30 to the petitions for amendment. On perusal of the said order, we find the ground of termination and this was that the appointment was made against the so-called "short term" vacancy like "leave vacancy and training vacancy" but these vacancies never existed.

2. One affidavit has been filed on behalf of all the respondents and it was not disputed that names of the petitioners and others were recommended to fill up the resultant vacancies of 20 posts as it was reported by the Director of Fishery that such vacancies would occur. It has been urged that there was no any clear vacant posts and the petitioners were not appointed against clear vacant posts. According to respondents, petitioners were appointed against the resultant vacancies arising out of training, deputation or leave etc. The respondents have further urged that the Government by Memorandum dated 25th May, 1988 stopped all the ad hoc and other irregular appointments and, therefore, the then Director of Fisheries made a proposal for creation of 175 posts to accommodate the petitioners but no post could be created due to financial stringencies. Therefore, the respondents had no other option but to terminate the services of the petitioners and accordingly, the impugned order was issued. The respondents have further urged that as the then Director made many irregular and illegal appointments, he was placed under suspension.

3. We have heard Mr. Surjamani Singh, learned counsel for the petitioners and Mr. Shyamkiswor Singh, learned Government Advocate. The learned Government Advocate has also placed before us some records. The main thrust of the argument of the learned Government Advocate is that the appointments were made irregularly and illegally by the then Director and the Government can not be fasten with the liability and that apart, the Government was kept in the dark about these appointments. According to the learned Government Advocate, the Director made a wrong statement that there were clear vacancies. That apart, the Government Advocate has further urged that the present petitioners were appointed in subsisted vacancies i.e. in vacancies which occurred at that time due to leave, training etc. On the other hand, the learned counsel for the petitioners has taken us through the recommendations of the Departmental Promotion Committee and has also drawn on attention that the persons appearing below the names of the petitioners in the merit list were regularised and that the petitioners were left out. According to the learned counsel; the respondents adopted pick and choose policy.

4. From the records we find that the Secretariat Department put up along notes giving the history of the appointment and this note is dated 16. 5. 89. From this note, it appears that the Secretary wants to put the entire blame on the Director of Fisheries ignoring the fact that the then Secretary (Fishery Department) was present in the DPC and he was a party. In other words, the Secretary gave approval which amounts to approval of the Government. That apart, from the proceedings of the DPC at Annexure D/I to the counter of the respondents, we

find that proceeding of the DPC containing the recommendations was sent by the Government in the fishery Department i. e. the letter dated 16th August, 1983 issued by the Under Secretary to the Government. From the proceedings we find that the then Secretary of the department was the Chairman of the DPC and three lists were prepared. The first one recommending 21 persons for the 21 clear vacant posts, the second list contained the names of 20 persons including the present petitioners and this list was for 20 resultant vacancies and the third list containing the names of 89 persons was for immediate future vacancies. From the above note of the Secretary in the records it is stated that recommending names for future vacancies was against Government instructions. But as stated above, as the then Secretary of the Department was present and the lists were sent by the Government, we are unable to ignore these lists.

5. Mr. Surjamani Singh, learned counsel for the petitioners, has drawn our attention to the fact that from the list which was for filling up future vacancies, persons below the petitioners in the merit list were not only appointed but their services were regularised but the petitioners were removed from service. For example, the learned counsel has drawn our attention to the names at SI. Nos. 1,3,5, 6, ! 3, 17, 37, 43, 49, 64 and 77 of the third list viz reserved list. This is, in our opinion, a clear case of pick and choose and on this ground alone the impugned order is liable to be set aside.

6. Mr. Shyamkiswor Singh, learned Government Advocate has drawn our attention to the proforma at Annexure D/2 to show that the petitioners were appointed against posts which were vacant due to leave, deputation etc. According to the learned counsel, as the petitioners were appointed against the above posts, their services were liable to be terminated. We are unable to accept this contention of the learned counsel inasmuch as the offers of appointment at Annexure A/1 to the petitions and the orders of appointment at Annexure A/2 did not indicate that the petitioners were appointed against such vacancies. In fact, from reading Annexure A/1, we have no other alternative but to hold that the petitioners were appointed against regular vacancies. We find support for the above conclusion in view of the fact that the persons below the petitioners whose names appeared in the .waiting list for future vacancies who were not only given regular appointment but their services were also regularised. No material have been produced before us to show that when this proforma, Annexure D/2 was prepared. It has also not been explained as to why the petitioners, who were holding the higher posts in the merit list, were not appointed against the regular vacancies, though the person below them were given regular appointment.

7. It has been urged by the learned Government Advocate that the State Government did not know about this appointment. In fact, it has also been recorded in the above note of the Secretary dated 16.5.89 but we find that copies of the appointment letter! were sent to the P. S. to the Deputy Chief Minister, P. S. to the M. O. S. (FY) of the Government. In addition, it was also sent to the Secretary of the Department, Accountant General, Treasury Officer

and all District Fisheries Officers etc. Even, if the Secretariat records did not show the receipt of the appointment letters, the matter could have been ascertained from the office of the Deputy Chief Minister and M. O. S. (FY). But this is not relevant for the relevant purpose as that the then Secretary of the Department was the Chairman of the DPC and the DPC proceeding was sent from the Secretariat (Fisheries) Department by the letter signed by the Under Secretary as stated above.

8. For the reasons stated above, we are of the firm opinion that the impugned termination order is illegal and invalid as it was passed arbitrarily by adopting "pick and choose policy" and there also "discrimination as stated above.

9. Before we part, we want to make some observation as this Court is flooded with writ petitions from the Government servants. The Government adopted the policy of adhoc appointments and ultimately effort was made to stop but now appointments were made in "officiating capacity". We quote below clause (19) of the Fundamental Rule 9 .

" (19) Officiating A Government servant officiates in a post when he performs the duties of a post on which another person holds a lien. The Central Government may, if it thinks fit, appoint a Government servant to officiate in a vacant post on which no other Government servant holds a lien." This rule came up for consideration by a Division Bench of this Court in which one of us (Hon"ble Y.I.Singh) was a party, in Civil Rule Nos. 12,8 to 30, 35 to 71 of 1989 wherein it was held that under this rule the officer to officiate must be one who has already been in the service and not be a fresh recruit. This term has contained in Railway Establishment Manual came up for consideration before the Apex Court in Arun Kumar vs. S.E. Railway, AIR 1985 SC 482. Considering the Circular issued by Railway Board and also Rule 312 of the Railway Establishment Manual, it was held :

"According to its ordinary connotation, the word "officiating is generally used when a servant having held one post permanently or substantively is appointed to a post in a higher rank, but not permanently or substantively, while still retaining his lien on his substantive post i.e. officiating in that post till his confirmation. Such officiating appointment may be made when there is a temporary vacancy in a higher post due the death or retirement of the incumbent or otherwise. In contrast, the word "temporary" usually denotes a person appointed in the civil service for the first time and the appointment is not permanent but temporary i.e. for the time being, with right to the post."

10. We hope and trust that the Government shall take appropriate steps in future in appointing a person in officiating capacity in the light of the above decisions.

11. Though in the case of the petitioners, they have not been given officiating appointments, in fact these are temporary appointments. We also like to say that when a person is appointed in temporary capacity following the recruitment rules i.e. through DPC or Public Service Commission as the case may be for further

regularisation, the person needs not again to appear before the DPC/ Public Service Commission. As soon as a permanent post is available, the person so appointed may be placed on probation if it is so provided in the rules and, thereafter, confirmation may be made in the post. In fact, in some cases, if a person selected according to the recruitment rules continues for a long period in the post, he may be confirmed against the permanent post even without putting him under probation if he is otherwise found suitable. Of course, a temporary Government servant has also got right to be declared quasi permanent under the relevant rules. We may also add that in the event the temporary posts are abolished while removing persons holding such posts, the principle of "first come last go" shall be applicable.

12. In the result, all the writpetitions are allowed by setting aside the impugned order of termination bearing No. 14/4/88FY (T) dated 20th July, 1989 issued by the Government in the Fishery Department and the petitioners shall be taken back in service. They shall also be entitled to arrear pay and allowances which they were drawing before 1.1.89. As the petitioners are poorly paid Government servant, each petitioner is allowed costs of Rs.1,000/.