
(2008) 01 GAU CK 0006
In the Gauhati High Court

Nitoli and Others

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 08-01-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 226, 309

Citation : (2009) 3 GLT 297 : (2008) 1 GLT 769

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Judgement

I.A. Ansari, J.—The moot question, raised in the present writ petition, is this: In the absence of any provision, in the relevant recruitment rules, for absorption of contractual or ad-hoc employee in a given cadre and/or in the absence of any provision, in the relevant recruitment rules, for relaxation of the conditions of recruitment, is it possible to absorb and/or regularize the service of an ad-hoc or contractual employee, particularly, when the conditions of recruitment are governed, in the given case, by the recruitment rules framed under the proviso to Article 309 of the Constitution of India? Yet another question of immense importance, raised in the present writ petition, is this: whether an employee, who has been absorbed in a cadre contrary to the relevant recruitment rules, can be allowed to become senior to a regularly recruited person in the same cadre?

2. Before I endeavour to answer the questions posed above, the undisputed material facts, which have given rise to the present writ petition, may be set out as under:

(i) The recruitment to the various cadres in the Nagaland Taxation Service is governed by the Nagaland Taxation Service Rules, 1976, framed by the Government of Nagaland in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India. The members of the Nagaland Taxation Service, Class-III (Non-Gazetted), who are called Inspector of Taxes, constitute a separate cadre under the Nagaland Taxation Service Rules, 1976 (in short, "the Service Rules, 1976"). Rule 5 of the Service Rules, 1976, prescribes two distinct

and separate modes of recruitment to the said cadre, namely, (a) by promotion in accordance with Rule 7 and (b) by competitive examination in accordance with Rule 8. Rule 6 lays down that 25% of the vacancies in the cadre of Inspector of Taxes shall remain reserved for departmental promotion and the remaining 75% shall be filled up through direct recruitment. Thus, under the Service Rules, 1976, one can be appointed as Inspector of Taxes either by way of departmental promotion or by direct recruitment through a selection process to be conducted by the Nagaland Public Service Commission.

(ii) By order, dated 30.01.1996, issued by the Commissioner of Taxes, Government of Nagaland, while respondent No. 3 herein was appointed, on ad-hoc basis, as an Inspector of Taxes, respondent No. 4 herein was appointed as an Inspector of Taxes, on contract basis, by order, dated 23.07.2001, issued by the Commissioner of Taxes, Government of Nagaland. As far as the petitioner Nos. 1 to 8 herein are concerned, they were appointed, following a due process of recruitment as contemplated under the Service Rules, 1976, as Inspector of Taxes on regular basis, by order, dated 27.11.2002, issued by the Commissioner of Taxes, Government of Nagaland. So far as the petitioner No. 9 to 11 herein are concerned, they came to be appointed as Inspector of Taxes, on the basis of the regular recruitment, in terms of the order, dated 18.02.2004, issued by the Commissioner of Taxes, Government of Nagaland. On 09.02.2004, a tentative Seniority List, showing the seniority of the Inspectors of Taxes, as on 31.12.2004, was published by the Government of Nagaland. However, in the aforesaid Seniority List, the names of the private respondents did not figure at all. By two separate orders, both, dated 08.07.2004, issued by the Commissioner of Taxes, Government of Nagaland, while the service of respondent No. 3 was regularized in the cadre of Inspector of Taxes with effect from 01.02.1996, the service of respondent No. 4 was regularized with effect from 24.07.2001. Both these regularization were, however, subject to the passing of a departmental examination by the respondent Nos. 3 and 4 within a period of two years from the date of the issue of the orders, dated 08.07.2004, aforementioned. Though none of these two private respondents appeared in any selection process for direct recruitment as contemplated in the Service Rules, 1976, yet, in the tentative Seniority List of the Inspector of Taxes, as on 31.12.2004, published on 28.02.2005, while the names of the petitioners appeared at Serial Nos. 6 to 16, respondent No. 3 was placed at Serial No. 18 and respondent No. 4 at Serial No. 17 thereof. In this Seniority List, however, the dates of joining in the service by the respondent Nos. 3 and 4 were shown as 01.02.1996 and 24.07.2001 respectively. By making a representation, dated 28.03.2005, the petitioners sought for clarification from the Government as regards the date of counting of seniority of contractual ad-hoc appointees in the cadre of Inspector of Taxes. By a letter, dated 04.05.2005, Deputy Commissioner of Taxes, Government of Nagaland, informed the petitioners that in terms of the Government's standing order, seniority of the contractual/ad-hoc employees would be counted from the date of absorption of such employees. Notwithstanding, however, the

communication, dated 04.05.2005, aforementioned, when the final Seniority List of the Inspector of Taxes, as on 31.12.2004, was published on 05.05.2005, respondent Nos. 3 and 4 were placed at Serial Nos. 6 and 7 respectively and the petitioners were pushed down in the Seniority List and their names accordingly appeared at Serial Nos. 8 to 18. In the Seniority List, the dates, for the purpose of counting of seniority in respect of respondent Nos. 3 and 4, were shown as 15.01.2001 and 24.07.2001 respectively. In these circumstances the present petitioners have come to this Court seeking, with the help of this writ application made under Article 226 of the Constitution of India, issuance of appropriate Writ (s) setting aside and quashing the orders, dated 18.07.2004, aforementioned, whereby the services of respondent Nos. 3 and 4 had been regularized. By making this writ application, the petitioners have also sought for quashing and setting aside the final Seniority List, dated 05.05.2005, aforementioned and also to direct the State respondents to restore the seniority of the petitioners over respondent Nos. 3 and 4.

3. I have heard Mr. A. Zhemomi, learned Counsel for the petitioners, and Ms. Y. Longkumar, learned Government Advocate, appearing on behalf of State respondent Nos. 1 and 2.1 have also heard Mr. R. N. Lotha, learned Counsel for the private respondent Nos. 3 and 4.

4. Before proceeding further, it may be pointed out that though, in the writ petition, the petitioners have sought for, as already indicated above, setting aside and quashing the orders issued by the respondent No. 2 regularizing the services of the respondent Nos. 3 and 4 in the cadre of Inspector of Taxes, Mr. A. Zhemomi, learned Counsel for the petitioners, has candidly submitted, at the time of hearing of this writ petition, that the petitioners are more concerned with their seniority and, hence, the writ petitioners' grievances would be met if, while allowing the respondent Nos. 3 and 4 to remain in service, the seniority positions of the petitioners are suitably corrected in accordance with law.

5. Bearing in mind the facts, as indicated above, and the submissions made on behalf of the petitioners, let me, now, determine as to what relief (s), if any, the parties are entitled. In this regard, what needs to be pointed out, if I may repeat, is that there is no dispute that the cadre of Inspector of Taxes is a separate cadre under the Service Rules, 1976. There is also no dispute that Section 2 (e) of the Service Rules, 1976, defines "service" to mean "the Nagaland Taxation Service". Nor is there any dispute that all the recruitments and appointments to this service, including that of the Inspector of Taxes, are governed by the Service Rules, 1976. In fact, and as already indicated above, the Service Rules, 1976, conceives only two modes of recruitment to the cadre of Inspector of Taxes, namely, (a) by way of promotion in accordance with Rule 7 and (b) through competitive examination in terms of Rule 8. Rule 6 of the Service Rules, 1976, however, clarifies that 25% of the vacancies in the said cadre shall be filled up by promotion and the remaining 75% of the vacancies shall be filled up by direct recruitment through competitive examination. As far as the respondent Nos. 3

and 4 are concerned, they have, admittedly, not been appointed to the cadre of Inspector of Taxes by way of promotion; rather, their cases were treated by the Government as the cases of direct recruitment. In the face of clear and cogent provisions for appointment of Inspector of Taxes contained in the Service Rules, 1976, it could not, in fact, be contended, at the time of hearing of this writ petition, on behalf of the respondents, that apart from recruitment through competitive examination, as envisaged by Rule 8, there can be any other mode of direct recruitment to the cadre of Inspector of Taxes.

6. Thus, the facts narrated above clearly show that while the petitioners were directly recruited in terms of the provisions of Rule 8, respondent No. 3 came to be appointed, on 30.01.1996, as Inspector of Taxes, on ad-hoc basis, and respondent No. 4 was appointed as Inspector of Taxes, on 23.07.2001, on contractual basis. Their services were, however, regularized, as already indicated above, by way of absorption. The Service Rules, 1976, it needs to be pointed out, make no provision for absorption in the cadre of Inspector of Taxes from any source whatsoever. In fact, there is no provision also in the Service Rules, 1976, for relaxing the conditions of service, far less the conditions of recruitment. Thus, it is manifestly clear that the appointments of respondent Nos. 3 and 4 to the posts of Inspector of taxes were de hors the Service Rules, 1976, for, while regularizing or absorbing the services of the two private respondents, the Government, it appears, acted as if the Service Rules, 1976, had not been in force.

7. What follows from the above discussion is that when the initial appointment of respondent Nos. 3 and 4 as well as their absorption/regularization are de hors the relevant rules, the respondent Nos. 3 and 4 cannot be, strictly speaking, regarded as members of the Nagaland Taxation Service. Their appointments as Inspector of Taxes are, therefore, not only completely illegal, but untenable too. In fact, in the present case, the initial appointment and the subsequent absorption and/or regularization of the services of the private respondents reflects as if the Government of Nagaland has, while doing so, treated the Service Rules, 1976, as non-existent.

8. It maybe also be pointed out that in Dr. M. Laiphlang and Ors. v. State of Meghalaya and Ors. reported in 2004 (1) GLT 308 : 2004 (2) GLR 546, a Division Bench of this Court has clarified that the concept of appointment, absorption and promotion in service, in relaxation of the recruitment Rules, has undergone a prominent development. The present view is that there can be no relaxation of the basic and fundamental rules of recruitment. Thus, the service jurisprudence, now, makes a distinction between conditions of recruitment and conditions of service. While condition of service may be relaxed, condition of recruitment cannot be relaxed. Subject, however, to the condition that if the recruitment rules, in themselves, provide for relaxation of the conditions of recruitment, the conditions of recruitment may be relaxed provided that such relaxation does not render the conditions of recruitment, as a whole, nugatory and/or non est in its

entirety.

9. A Constitution Bench, in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, , has, while dealing with the matter of arbitrary recruitment, clearly held that the recruitment of a person in contravention of the recruitment rules does not vest, in such a person, a right to seek regularization. This apart, such regularization is also not permissible, because of the reason that the regularization would be nothing, but an arbitrary mode of recruitment by the State inasmuch as such an order of regularization would be tantamount to the State's denial of equal opportunity to its citizens in the field of public employment. The relevant observations made in Umadevi's case (supra), read as under:

When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Article 14 and 16 of the Constitution.

10. In view of the Constitution Bench decision in Umadevi (supra), it is, now, abundantly clear that the appointment of respondent Nos. 3 and 4, being wholly against the law, cannot be sustained.

11. However, when I examine, in the light of the Constitution Bench decision in Umadevi (supra), the legality of the regularization and/ or absorption of the services of the respondent Nos. 3 and 4, I find it difficult to ignore the fact that the present petitioners have not pressed for setting aside the impugned order (s) regularizing and/or absorbing the services of the respondent Nos. 3 and 4. This situation has given rise to a very pertinent question; and the question is this : If the absorption and/or regularization of the private respondents, in the Nagaland Taxation Service, is not interfered with, will it be still open to this Court to issue an appropriate Writ commanding the State respondents to treat the present petitioners as senior to the private respondents? To put it a little differently, when the absorption of the respondent Nos. 3 and 4 have been held to be illegal and they are not, at the same time, removed from the service, will it be possible for this Court to direct, in exercise of its powers under Article 226 of the Constitution of India, that the State respondents shall treat the present writ petitioners as senior to respondent No. 3 and 4?

12. The answer to the above question is fully covered by the Apex Court's decision in *State of U.P. Vs. Rafiquddin and Others*, . In this case, the Apex Court was confronted with a situation in which while, on the one hand, a Batch of persons was appointed in the judicial service of the State in violation of the relevant Rules of recruitment, another batch of persons was, on the other hand, appointed, in the same service, in accordance with the Rules, the irregular appointees having, however, been accorded seniority over the regular appointees

on the ground that the irregular appointees were selected from the selection test held in the year 1970, whereas the regular appointees were selected from the selection test held in the year 1972. Dealing with such a situation, the Apex Court observed and held as follows:

13. The appointment of unplaced candidates made in pursuance of the decision taken by the high level committee is not countenanced by the Rules. There is no escape from the conclusion that the unplaced candidates were not appointed to the service on the basis of the result of the competitive examination of 1970. Their appointment was made in breach of the Rules, in pursuance to the decision of the High level committee. It is well settled that where recruitment to service is regulated by the statutory rules, recruitment must be made in accordance with those Rules, any appointment made in breach of rules would be illegal. The appointment of 21 "unplaced candidates" made out of the third list was illegal as it was made in violation of the provisions of the Rules. The high level committee, which took decision for recruitment of candidates to the service on the basis of the 40 per cent aggregate marks disregarding the minimum marks fixed by the Commission for viva voce test, had no authority in law, as the Rules do not contemplate any such committee and any decision taken by it could not be implemented.

14. We are surprised that the Chief Justice, Chief Minister or as well as the Chairman of the Commission agreed to adopt this procedure which was contrary to the Rules. The high level committee, even though constituted by highly placed persons, had no authority in law to disregard the Rules and to direct the Commission to make recommendation in favour of unsuccessful candidates disregarding the minimum marks prescribed for the viva voce test. The high level committee's view that after the amendment of R. 19, the minimum qualifying marks fixed for viva voce could be ignored was wholly wrong. Rule 19 was amended in January, 1972, but before that 1970 examination had already been held. Since the amendment was not retrospective, the result of any examination held before January, 1972 could not be determined on the basis of amended Rules. The Public Service Commission is a constitutional and independent authority. It plays a pivotal role in the selection and appointment of persons to public services. It secures efficiency in the public administration by selecting suitable and efficient persons for appointment to the services. The Commission has to perform its functions and duties in an independent and objective manner uninfluenced by the dictates of any other authority. It is not subservient to the directions of the Government unless such directions are permissible by law. Rules vest power in the Commission to hold the competitive examination and to select suitable candidates on the criteria fixed by it. The State Government or the high level committee could not issue any directions to the Commission for making recommendation in favour of those candidates, who failed to achieve the minimum prescribed standards as the Rules did not confer any such power on the State Government. In this view, even if the Commission had made recommendation in favour of the unplaced candidates under the directions of the

Government, the appointment of the unplaced candidates was illegal as the same was made in violation of the Rules.

15...But even if the Commission had agreed to the Government's suggestion, their appointments continued to be illegal, as the same were made in breach of Rules. There was no justification for the appointment of the unsuccessful candidates in 1975, because by that time result of 1972 examination had been announced and duly selected candidates were available for appointment.

16...If selected candidates are available for appointment on the basis of the competitive examination of subsequent years, it would be unreasonable and unjust to revive the list of earlier examination by changing norms to fill up the vacancies as that would adversely affect the right of those selected at the subsequent examination in matters relating to their seniority under Rule 22. The 1970 examination could not be utilized as a perennial source or inexhaustible reservoir for making appointments indefinitely.

*** ** 19. The unplaced candidates were appointed to the service in breach of the Rules and they form a separate class. They cannot be equated with those who were appointed to the service from the first and second list of 1970 examination as their appointment was made on the recommendation of the Public Service Commission. They remain unchallenged. Similarly, candidates appointed to the service on the basis of the result of the competitive examination of 1972 before the unplaced candidates were appointed, formed separate class as they were also appointed in accordance with the Rules. The "unplaced candidates" of 1970 examination cannot claim seniority over them on the basis of R. 22 as their appointment was not made on the basis of the list approved by the Commission under Rule 19. In *Shitla Prasad Shukla Vs. State of U.P. and Others*, this Court held that an employee must belong to the same stream before he can claim seniority vis-a-vis others. Those appointed irregularly belong to a different stream and they cannot claim seniority vis-a-vis those who may have been regularly and properly appointed.

20...But we are also of the view that having regard to the period of 12 years that have elapsed, we do not propose to strike down their appointments.

21. Now the question arises as to when seniority should be assigned to the unplaced candidates. Their claim for assigning them seniority on the basis of the competitive examination of 1970 is not sustainable in law as discussed above. They were appointed to service after five years of the examination and before their appointment, competitive examination of 1972 had taken place and candidates selected under that examination had been appointed to service prior to their appointment. The directions issued by the High Court for rearranging the merit list of 1970 examination seriously affect the seniority of those who were regularly selected in accordance with the norms prescribed by the Commission. Having regard to these facts and circumstances of the case we are of the opinion that the view taken on by the High Court on its administrative side and the State

Government that the unplaced candidates of 1970 examination should be assigned seniority below the last candidate of 1972 examination appointed to the service is just and reasonable. In our opinion it would be just and proper to assign seniority to the unplaced candidates of 1970 examination at the bottom of the line of 1972 candidates. There were 37 unplaced candidates of 1970 examination who were included in the third list, of them 16 candidates appeared in the 1972 examination and they were successful and their names were approved by the Commission in the list prepared under Rule 19. The State Government appointed them in service. Under R. 22 they are entitled to seniority of 1972 examination but in view of the judgment of the High Court in Rafiquddin's case their seniority has been determined on the basis of their recruitment to service under the 1970 examination. We have already recorded findings that unplaced candidates of 1970 examination (as included in the third list) have not been recruited in service according to the Rules and their recruitment to service cannot be treated under 1970 examination for purposes of determining their seniority under Rule 22. We have further directed that 21 unplaced candidates of 1970 examination should be placed below the candidates of 1972 examination. But so far as 16 remaining candidates are concerned, they were appointed to the service on the result of 1972 examination and their appointment does not suffer from any legal infirmity. They are therefore entitled to seniority of 1972 examination on the basis of their position in the merit list of that examination. They are however not entitled to the seniority of 1970 on the basis of the examination of that year as held by the High Court.

13. In essence, the facts of the present case are akin to the case of Rafiquddin (supra), wherein the unplaced candidates were selected by a consultative process in the meeting of the Chief Minister, Chief Justice and the Chairman of the Public Service Commission of the State concerned. Though all the three organs, which were required for the purpose of selection, were involved in the process of selection, the Apex Court still did not consider it fit to put its seal of approval to the selection made following a procedure, which was contrary to the relevant recruitment Rules.

14. From the case of Rafiquddin (supra), it is clear that even when the High Level Committee consisted of persons, who had occupied highest of offices in the State, the action taken by such a High Level Committee was, being in breach of the rules, not upheld by the Apex Court reminding all of us of the principle, "however high you may be, the law is above you".

15. In the present case too, the entire process of recruitment, though in breach of the relevant rules, appears to have the approval of the State's Public Service Commission. However, merely because the fact that the Nagaland Public Service Commission was involved in the selection process, it can be no reason for giving a clean chit to the process of selection of the private respondents, particularly, when the same clearly suffers from illegality, arbitrariness, mala fide and in colourable exercise of powers.

16. The second underlying principle of the decision, in Rafiquddin (supra), is that even when, on account of lapse of a long period, appointment made to a service, in breach of the relevant recruitment rules, is not set aside and quashed, such irregular appointees shall not be allowed to steal a march over the regular appointees, for, as reiterated in Rafiquddin (supra), "an employee must belong to the same stream before he can claim seniority vis-a-vis others. Those appointed irregularly belong to a different stream and they cannot claim seniority vis-a-vis those, who may have been regularly and properly appointed."

17. Following the principle of law as indicated hereinabove, it is possible that without setting aside and quashing the appointment of an irregular appointee the court or Tribunal may direct the appointing authority to treat a regular appointee in service, though appointed later in point of time than the irregular appointee, as senior to the irregular appointee. In other words, an irregular appointee, particularly, if his appointment suffers from arbitrariness, mala fide and in colourable exercise of powers, cannot be allowed to gain seniority over the regular appointee, for, they cannot be said to belong to the same stream even if the appointment of the irregular appointee is prior in point of time and is not disturbed on account of long period of service, which the irregular appointee might have put in.

18. It may be pointed out that the principles governing seniority between a regular appointee and an irregular appointee, as enunciated in Rafiquddin (supra), have also been followed in State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, . In Sukanti Mahapatra (supra), the Tribunal on review of its earlier order, reversed its earlier finding and directed that the appointees, whose entry into the service was irregular being de hors the Rules, would rank junior to the regular appointees. In Sukanti Mahapatra (supra) too, I may emphasise, the Tribunal, having regard to the long period of service put in by the irregular appointees, did not set aside the appointment of the irregular appointees. While not setting aside the appointment of irregular appointees, the Tribunal, however, moulded the relief as regards seniority between the irregular appointees vis-a-vis the regular appointees by directing that the irregular appointees shall rank junior to the regular appointees. Aggrieved by the Tribunal's direction as regards their seniority, the irregular appointees, as appellants, came before the Supreme Court in Sukanti Mahapatra (supra). Dealing with the case, the Supreme Court, while upholding the Tribunal's order, observed and held as follows:

10. Now, even though the Tribunal came to the conclusion that Rule 14 did not permit regularization made under the impugned orders of January 3, 1985, and February 14, 1985, it, having regard to the long service put in by the employees named in the same two orders and on compassionate considerations, has supported the regularization under Article 162 of the Constitution. It has moulded the relief on such considerations. Since that part of the order has not been assailed and since the appellants cannot be worse off by appealing, we

cannot interfere with that part of the order. It will, therefore, be worked out as directed by the Tribunal but we may clarify that it will not have the effect of disturbing the seniority of regular appointees who will rank senior to the irregular appointees.

19. From the principle of law as discussed hereinabove and reflected from the cases of Rafiquddin (supra) and Sukanti Mahapatra (supra), it clearly follows that in a given facts and circumstances, when the appointment of a Government employee is found to be irregular and the Court, having regard to the long period of service, which the irregular appointee might have put in, may not set aside the appointment, yet it shall make him rank junior to the regular appointee.

20. It is, now, imperative to point out that though, ordinarily, seniority depends on the date of appointment and/or date of joining, the fact remains that the date of appointment and/or date of joining becomes important only when the appointee is a regular appointee. Sine an illegal appointee cannot be said to have become member of the service/cadre to which he is appointed, such an illegal appointee cannot be placed at par with a regular appointee and they, thus, cannot be treated as equal to regular appointees. Ordinarily, when the appointments of two members of the same cadre are regular, the person, who is appointed earlier, is ranked senior, but, when the appointment, as in the case at hand, has already been held to be de hors the recruitment rules, the illegal appointees cannot be said to have become members of the cadre on the date of their appointment. In such a situation, merely on the basis of the date (s) of absorption the private respondents cannot be allowed to be treated as senior to the petitioners, for, the private respondents' services, until regularized by a judicial order or otherwise, do not really exist in law.

21. In a situation, such as the present one, this Court, even if, keeping in view the considerable period of time that has already elapsed, chooses not to interfere with the appointments of the private respondents, they cannot be allowed to reap the benefit of the arbitrary, mala fide and wholly illegal way of appointment/regularization/absorption. Viewed from this angle, this Court is of the firm view that the petitioners must be given, at least, seniority over the private respondents.

22. In the backdrop of the above discussion, what crystallizes is that even if the very appointments, regularization and/or absorption of the private respondents are not interfered with and set aside, it is still within the powers of this Court to direct that the petitioners be treated as a class separate and different from the private respondents and that the petitioners, as a class, be treated as senior to the private respondents.

23. In the result and for the reasons discussed above, while the impugned orders, dated 08.07.2004, are not interfered with, the impugned seniority list, dated 05.05.2005, is hereby set aside and the State respondents are directed to treat the private respondent No. 3 and 4 as junior to the writ petitioner in the

cadre of Income Tax Inspector. With the above observations and directions, this writ petition shall stand disposed of. No order as to cost.