
(2016) 01 GAU CK 0033
In the Gauhati High Court
Case No : WA No. 06(AP) of 2013.

Onyok Tabing

APPELLANT

Vs

Secretary, Legislative Assembly, Secretariat and Others

RESPONDENT

Date of Decision : 27-01-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 3 GauLR 340

Hon'ble Judges : Manojit Bhuyan; Michael Zothankhuma, JJ.

Bench : Division Bench

Advocate : Mr. M. Pertin and Ms. Y. Kiri, Advocates, for the Appellant; Mr. T. Jamoh, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Michael Zothankhuma, J.- Heard Mr. M. Pertin, learned senior counsel assisted by Ms. Y. Kiri, counsel for the appellant/writ petitioner. Also heard Mr. T. Jamoh, counsel for the private respondent No.4. None appears on behalf of the respondent Nos. 1 to 3.

2. Office note indicates that AD cards in respect of private respondent Nos. 2 and 3 have been returned back. However, none appears for the said respondents.

3. Order dated 1.10.2013 indicates that the respondent No. was represented by a counsel. However, none appears for the respondent No.1 today.

4. The appellant/writ petitioner has filed this appeal against the judgment and order dated 8.3.2013 passed in WP(C) No. 195(AP) of 2011 with WP(C) No.408(AP) of 2011, wherein the writ petition was dismissed.

5. The petitioner's case, in brief, is that the Secretary, Legislative Assembly, Arunachal Pradesh had issued an advertisement dated 29.4.2010 inviting applications for filling up of 1 vacant post of LDC in the Arunachal Pradesh Legislative Assembly Secretariat. A selection Board was constituted and on the

basis of the results submitted by the Selection Board on 20.5.2010, one Ms. Choto Segia was selected" for filling up the said vacant post of LDC.

6. The minutes of the Selection. Board dated 20.5.2010 shows that the petitioner was placed at Serial No.2 in the panel/merit list while one Miss Yapi Dulom was placed at Serial No.1 in the panel/merit list. Thereafter, vacancies arose in the post of LDC due to promotion of incumbents and creation of new post.

7. On 4.4.2011, the State respondents approved the proposal for appointment of Ms. Yapi Dulom and private respondent Nos. 2 and 3 to the vacant post of LDCs. Subsequently, vide orders dated 30.5.2011, the respondent Nos. 2 and 3 along with Miss Yapi Dulom were appointed to the post of LDCs on officiating basis in the Legislative Assembly Secretariat, Arunachal Pradesh, Naharlagun. In respect of the respondent No.4, she was appointed to the post of LDC on officiating basis in the Arunachal Pradesh Legislative Assembly Secretariat vide order dated 22.9.2011.

8. The appellant's counsel Mr. M. Pertin, submits that the panel list made by the Selection Board on 20.5.2010 being valid for a period of one year, the petitioner should have been appointed to one of the vacancies to the post of LDC, in place of respondent Nos. 2 to 4. The appellant's counsel submits that as Ms. Yapi Dulom, who was placed at Serial No.1 of the panel list had been appointed from the panel list, the appellant who was at Serial No.2 in the panel list should also have been appointed.

9. The appellant's counsel submits that the failure of the State respondent to appoint the appellant as LDC in pursuance to the valid panel list made on 20.5.2010 is discriminatory and cannot be allowed. The appellant's counsel further submits that the appellant has not made a challenge to the appointment of Miss Yapi Dulom inasmuch as, the appellant being similarly situated as Miss. Yapi Dulom, the benefit of appointment given to Miss. Yapi Dulom should also be given to the appellant.

10. The second limb of argument advanced by the appellant's counsel is to the effect that the State respondents could not have appointed the respondent Nos. 2 to 4 to the posts of LDC de hors the relevant Recruitment Rules and without issuing an advertisement. The appellant's counsel submits that the manner in which the respondent Nos. 2 to 4 have been appointed is arbitrary as the appellant has been denied the opportunity to take part in the selection process as he could also have applied for the said post if it had been advertised.

11. The appellant's counsel submits that the State respondents are bound to appoint him to the post of LDC, not only on the basis of his position in the panel list, but he was also to be considered for appointment along with the private respondents if it was a fresh selection. The appellant's counsel, thus, prays for setting aside the appointment orders of the private respondents and for a direction to the State respondents to appoint the appellant/writ petitioner to the post of LDC on the basis of his position in the panel/merit list dated 20.5.2010.

12. Mr. T. Jamoh, counsel for the respondent No.4 submits that as per the relevant recruitment rules, i.e. "The Arunachal Pradesh Legislative Assembly Group "C" (Non-Gazetted) Recruitment Rules, 1986 for LDC" the post of LDC is to be filled up by way of, 10% by promotion and 90% by direct recruitment.

13. Counsel for the respondent No.4 submits that the respondent No.4 has been working as Peon on contingency basis for more than 10 years and that the respondent No.4 was not a direct recruit to the vacant post of LDC, but had been promoted on officiating basis to the said vacant post of LDC, in the quota reserved for promotes as per the relevant Recruitment Rules, her promotion order dated 22.9.2011 should not be disturbed.

14. In the case of Rakhi Ray and others v. High Court of Delhi and others, (2010) 2 SCC 637, it has been held that "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under article 14 read with article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. It has, thus, held that filling up the vacancies over the notified vacancies is neither permissible nor desirable.

15. In the present case, Miss. Yapi Dulom and the present appellant had applied for the lone vacant post of LDC which was notified by way of advertisement dated 29.4.2010. The said lone vacant post having been filled up by one Miss. Choto Sena, the present appellant and Miss Yapi Dulom do not have any right to be appointed to any subsequent vacancies that has occurred, without following the due process of law and by going through a fresh selection process.

16. In the case of Chandigarh Administration and Another v. Jagjit Singh and Another, (1995) 1 SCC 745, it has been held by the Supreme Court that "Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order."

17. In view of the law laid down by the Apex Court in Chandigarh, Administration and Another (supra), the petitioner's prayer for appointment to the post of LDC due to a wrong precedent cannot be granted.

18. However, the appellant having not made any challenge to the appointment of Miss. Yapi Dulom to the post of LDC on officiating basis vide order dated 30.5.2011, we are of the view that no interference is called for with the order dated 30.5.2011 appointing Miss. Yapi Dulom as LDC on officiating basis.

19. In the case of *State of Orissa and Another v. Mamata Mohanty*, (2011) 3 SCC 436, it has been held at paras 35 and 36 as follows :

"35. At one time this court had been of the view that calling the names from Employment Exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, came to the conclusion that some appropriate method consistent with the requirements of article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television as merely calling the names from the Employment Exchange does not meet the requirement of the said article of the Constitution - *Vide Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi and Ors.*, AIR 1992 SC 789; *State of Haryana and Ors. v. Piara Singh and Ors.*, AIR 1992 SC 2130; *Excise Superintendent Malkapatnam, Krishm District, A.P. v. K.B.N. Visweshwara Rao and Ors.*, (1996) 6 SCC 216; *Arun Tewnri and Ors. v. Zila Mansavi Shikshak Sanah and Ors.*, AIR 1998 SC 331; *Binod Kumar Gupta and Ors. v. Ram Ashrau Mahoto and Ors.*, AIR 2005 SC 2103; *National Fertilizers Ltd. and Ors. v. Somvir Sinah*, AIR 2006 SC 2319; *Telecom District Manager and Ors. v. Keshah Deb*, (2008) 8 SCC 402; *State of Bihar v. Upendra Narauan Sinah and Ors.*, (2009) 5 SCC 65; and *State of Madhya Pradesh and Anr. v. Mohd. Ibrahim*, (2009) 15 SCC 214.

36. "Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board, etc., that will not meet the requirement of articles 14 and 16 of the Constitution. Such a course violates the mandates of articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in article 16 requires that every such appointment; be made by an open advertisement as to enable all eligible persons to compete on merit."

20. In present case, as no advertisement, has been issued before appointing the respondent Nos. 2 to 4 to the posts of LDC and as the appellant also was not able to take part in the selection process due to want of advertisement, the petitioner's right to be considered for appointment has been violated. The documents in the record also do not indicate that the relevant recruitment rules have been applied while appointing the private respondent Nos. 2 to 4 as LDCs.

21. Thus, we are left with no other view except to hold that the appointments of

the private respondent Nos. 2 to 4 have been made without issuance of any advertisement and de hors the relevant recruitment rules.

22. The educational and other qualifications required for direct recruits to the post of Lower Division Clerk (LDC) as per "The Arunachal Pradesh Legislative Assembly Group ?C (Non-Gazetted) Recruitment Rules, 1986 for LDC", referred to hereinafter as the "1986 Rules", which are as follows :

Educational and other qualifications required for direct recruits.

Matriculate or equivalent examination of a recognised Board and specified speed test - in typing, i.e., 30 words p.m. relaxable to 20 w.p.m. in case of AP Tribal candidate for probationary appointment for 6 months. If the candidate fails to qualify in 30 w.p.m. on or before 6 months, services are to be terminated.

The recruitment shall be made on the basis of merit adjudged through a written test carrying 300 marks followed by viva-voce test carrying 100 marks. The written test shall consist of the following papers:

- (i) General Knowledge and elementary Mathematics - 75 marks.
- (ii) English Essay and letter writing - 75 marks.
- (iii) Typing speed test -150 marks.

80% of the direct recruitment would be reserved for ST candidate of AP."

23. The learned Single Judge while passing the impugned judgment and order dated 8.3.2013 passed in WP(C) No. 195(AP) of 2011 with WP(C) No.408(AP) of 2011, seems to have been overlooked the requirement of the 1986 Rules insofar as the appointment to the post of LDC is concerned.

24. The contention of the counsel for the respondent No.4 that the appointment order dated 22.9.2011 has to be construed to be a promotion order and not an appointment order cannot be accepted by us in view of the decision of the Apex Court in Commissioner of Police, Bombay v. Gordhandas Bhanji, AIR (39) 1952 SC 16, wherein it has been held in para 9, which is as follows :

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

25. In view of the reasons stated above, we are of the opinion that the promotion order of the respondent Nos. 2 to 4 being de hors the Recruitment Rules and without issuance of any advertisement, the same is not sustainable and accordingly, it is set aside.

26. The State respondents shall fill up the vacant posts of LDC by way of promotion and direct recruitment as per the 1986 Rules. In the event, some posts are going to be filled up as per the Recruitment Rules, the State respondents shall issue an Advertisement inviting candidates from the open market

27. Consequently, the judgment and order dated 8.3.2013 passed in WP(C) No.195(AP) of 2011 with WP(C) No.408(AP) of 2011, is hereby set aside. The appeal is accordingly allowed. No cost.