
(2013) 07 GAU CK 0007

In the Gauhati High Court

Case No : Writ Petition (C) No. 157 (K) of 2011

Phyodemo Ezung and Others

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 11-07-2013

Acts Referred:

Citation : (2013) 4 GLT 782

Hon'ble Judges : N. Chaudhury, J

Bench : Single Bench

Advocate : A. Zho and Mr. Moa Jamir, for the Appellant; K. Sema, Addl. AG, for the Respondent

Final Decision : Dismissed

Judgement

N. Chaudhury, J.—Heard Mr. A. Zho, learned counsel for the petitioners and Mr. K. Sema, learned Addl. A.G., Nagaland on behalf of the respondents. By this application under Article 226 of the Constitution of India, the writ petitioners have prayed for a direction to the respondents for release of their salaries to them. As many as 18 petitioners have approached this Court stating that they have been working as Grade-IV staff in different capacities since 2007-08 on being appointed by the Chief Medical Officer, Wokha (respondent No. 4 herein). The appointment letter has been annexed as Annexure-1 (series) to the writ petition. Although at paragraph 3 of the writ petition the petitioners pleaded that the State respondents stopped paying their salaries, yet at the time of argument, learned counsel for the petitioners fairly submitted that they were never paid any salary at any point of time. It is the further case of the petitioners that at least 14 similarly situated persons named in paragraph 3 of the writ petition have been receiving salaries and as such, the purported objection of the respondents in not paying salaries on the ground that the petitioners have been working against non sanctioned post is not sustainable. The petitioner further stated in paragraph 5 of the writ petition that at least 3 more persons have been appointed as Grade-IV staff during the period 2009-2011 and as such it does not

fit in the mouth of the respondents to say that there was no sanctioned post to be filled up.

2. The respondents have filed affidavit-in-opposition. The affidavit is sworn by none other than the Commissioner & Secretary to the Government of Nagaland in the Department of Health & Family Welfare. In paragraph 3 of the affidavit-in-opposition, the respondents have categorically stated that the Department is not utilizing the services of the petitioners and that their joining was also not accepted by the Department at any point of time. Although an affidavit in reply has been filed by the writ petitioners against the affidavit-in-opposition submitted by the Government, yet no evidence could be placed on record to show that the writ petitioners really had been rendering service pursuant to their appointment by Annexure-1 (series). It is the specific case of the respondents that the then Chief Medical Officer issued the Annexure-1 (series) appointment letters without there being any selection process and more objectionably when there was no vacancy at all. In course of argument, the learned Addl. A.G. asserted that no right has accrued to the petitioners on the basis of appointment orders at Annexure-1 (series) of the writ petition in view of the fact that the said appointments are illegal and against non-existent vacancies. The learned Addl. A.G. has placed reliance on the following judgments:-

1. Sudhendu Mohan Talukdar Vs. State of Assam and Others,
2. Ashwani Kumar and Others Vs. State of Bihar and Others,
3. P. Thronhmusu Sangtam and Others Vs. State of Nagaland and Others,

3. In the case Sudhendu Mohan Talukdar Vs. State of Assam and Others, this Court considered the claim of salaries made by adhoc teachers who were appointed against non sanctioned post. They were not appointed following the rules. While discussing a large number of cases filed by the adhoc teachers, this Court considered the claims of such teachers who though really rendered service but were not appointed by following the procedures prescribed by rules and in some cases appointment were made without there being any sanctioned post. This Court held in paragraph 16 of the said judgment that a person appointed in an unauthorized manner against non-existent vacancies cannot claim that they are entitled to get salary on the basis of such appointment. It is also held in the said paragraph that such recruitments are null and void and would not give rise to any right to such recruitees to claim salary on the basis of such recruitment. This Court held that to be a valid recruitment, it must be made against sanctioned vacancies which are basically backed up by financial budget support of the State Government. Paragraph 16 of the judgment is quoted below:-

16. A person appointed in an unauthorized manner against the non-existent vacancies cannot claim that they are entitled to get salary on the basis of such appointment, whether recruitment made by an authority in a arbitrary manner or in violation of the statutory rules and norms and procedure for recruitment. Such recruitment are null and void and will not give rise to any right to such

recruitment. To be a valid recruitment it must be made against the sanctioned vacancy which is basically backed up by financial budget support of the State Government. Unless there is a vacancy, there is no question of filling up. An employee without a vacancy or post available on which he can work cannot be paid salary. No State Government can be burdened with such employees and the state exchequer cannot also be burdened for payment of salary to such employee, who were recruited illegally. Those persons are in the real sense not the employees under the State Government. Any recruitment made illegally cannot bind the State Government.

4. In the case of *Ashwani Kumar and Others Vs. State of Bihar and Others*, the Hon'ble Apex Court considered inter alia the question whether appointments of Class-III and IV employees on the Tuberculosis Eradication Scheme as a part of 20-point programme were legal and valid and whether cancellation of their appointments were made in violation of the principles of natural justice. Vide paragraph 12 of the judgment the Hon'ble Apex Court observed as follows:

It is axiomatic that unless there is vacancy there is no question of filling it up. There cannot be an employee without vacancy or post available on which he can work and can be paid as per the budgetary sanctions. It appears that Dr. Mallick suffering from wrong notions of power and authority under the said Government Resolution and without bothering to find out whether there were vacancies or not under the Scheme indulged in self-help to recruit as many Class III and Class IV employees as suited him and the result was that he loaded a dead weight of burden of these employees on the State Exchequer by resorting to a completely unauthorized exercise. The State authorities were justified in refusing to release salaries for paying this unauthorized army of staff which represented a host of unwelcome guest. They were all *persona non grata* and were not employees in the real sense of the term. It must, therefore, be held that the appointments of 6000 employees as made by Dr. Mallick in the Tuberculosis Eradication Scheme were *ex facie* illegal. As they were contrary to all recognized recruitment procedures and were highly arbitrary, they were not binding on the State of Bihar.

5. In the case of *P. Thronhmusu Sangtam and Others Vs. State of Nagaland and Others*, this Court considered the legality and validity of cancellation of appointment of as many as 22 constables under Nagaland Government. The petitioners in that writ petition received their salaries for some time since October-November 2005 till June 2006 but thereafter, their appointments were kept in abeyance and ultimately the appointments were cancelled. The petitioners challenged the said cancellation order and also claim salary for the period served by them. Vide paragraph 9 of the judgment, this Court held that the appointments having been made in violation of the Government policy and the excess of the strength were illegal and as such, there was neither any illegality in cancelling the said appointments nor had the writ petitioners any right to seek writ of *Mandamus* compelling the State respondents to pay their salaries on the basis of such illegal appointments. The said judgment was passed

after consideration of criteria of the judgment of the Supreme Court as well as this Court.

6. I have carefully gone through the judgments referred to above. It appears that it is the consistent stand of the Hon"ble Supreme Court as well as this Court to deprecate the propensity of the executive to make appointment at their sweet will without following due process of selection and also without there being any sanctioned vacancy. It is the settled law that once there is no vacancy appointment is illegal ab initio and is consequentially null and void and as such a beneficiary of such appointment cannot have any legally enforceable vested right to claim salary consequent upon such appointments irrespective of whether they rendered service or not. Once such a claim gets recognition by way of a direction to release their salaries or otherwise, it virtually amounts to indulging in arbitrary and unauthorized exercise of powers by the appointing authority and in the process the seekers of back door entry get encouragement. So even in the interest of rule of law it must be held that beneficiaries of illegal appointments are not entitled to any benefit not to speak of financial benefit by way of salary and as such the writ petition merits rejection.

7. The learned counsel for the petitioners also urged that the Government having made subsequent similar appointment against Grade-IV post is estopped from rising the plea of non-availability of sanctioned post by citing examples. The learned counsel wanted to persuade this Court that since similarly situated persons are not shunted out of service and they been paid salaries why should the petitioners be picked up for unequal treatment and as such respondents are liable to be directed to release the salaries of the petitioners to maintain parity.

8. Per contra the learned Addl. A.G. urged that even if some benefit is given to others by way of illegality no one can claim that such illegality be repeated under the cover of Article 14 of the Constitution of India. In this regard, the learned Addl. A.G. relied on the case of Chandigarh Administration and another Vs. Jagjit Singh and another, of the said judgment, the learned counsel submitted that order in favour of other person might be legal and valid or it might not be so which has to be investigated first before it can be directed to be followed in the case of the petitioner. Merely because the respondent authorities had passed one illegal/unwarranted order in one or other case, High Court cannot compel the authority to repeat that illegality over and over again.

9. I find force in the submissions of the learned Addl. A.G. While it is correct that the writ petitioners have to stand for fall on the basis of their own case and no right can be accrued to the petitioners merely because of the fact that someone else has been given benefit illegally.

10. The submissions of the learned counsel for the petitioners, therefore in this regard cannot be countenanced. However, it is true that if the respondent are indulging in payment of salaries to similarly situated illegal appointees, it shall be the duty of the respondents to make enquiry in this regard including the case

mentioned by the writ petitioners in paragraph 3 of the writ petition and thereafter to take appropriate action in those cases as well. It is undesirable that the Government shall pursue illegality in case of some blue eyed persons and speak of sanctity of selection procedure in case of the general appointees. I hope and trust that action shall be taken by the respondents to see that no illegally appointed persons are paid from the State exchequer. The respondents shall also consider steps for re-imbursement of the amount already paid to the illegal appointees from the concerned persons who had made these appointments.

11. In view of what has been stated above, it is to be held that although a show cause notice appears to have been issued by the respondent at some point of time asking some of the petitioners to give reply as to why their appointments should not be cancelled, yet the petitioners cannot claim any right of getting salaries on the basis of appointment letters issued to them without there being any sanctioned vacancies.

12. The writ petition, therefore, is devoid of any merit and the same is dismissed. However, no order as to cost.