
(1996) 03 GAU CK 0009
In the Gauhati High Court
Case No : Civil Rule No. 202 of 1994

Prafulla Chandra Das

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 07-03-1996

Acts Referred:

Constitution of India, 1950 — Article 226, 226

Citation : (1996) 2 GLJ 350 : (1996) 3 GLR 141 : (1996) 2 GLT 171

Hon'ble Judges : N.Surjamani Singh, J

Bench : Single Bench

Advocate : A.Lodh, M.Dutta, A.Chakraborty, P.K.Paul, Advocates appearing for Parties

Judgement

1. By this writ petition, the 4 petitioners, approached this Court for issuing a writ in the nature of Certiorary or appropriate writ of the like nature or order or direction, for setting aside the impugned Memorandum dated 6th April, 1994 marked as Annexure 3 to the writ petition cancelling the earlier Prisons Directorate, Government of Tripura Memo No.F.II586/IGP/81/3151 dated 17.4.1990 declaring the result of the successful Warders and Head Warders in the departmental examination for the purpose of departmental promotion for " the post of Head Warders and Chief Head Warders.

2. The case of the petitioners is that they have been appointed as Warders and Head Warders under the Directorate of Prisons, Government of Tripura and they have been discharging their duties in different jails in Tripura. Their next post for promotion from the post of Head Warders and Warders are to the posts of Chief Head Warder and Head Warder. As per Memorandum No.F.II586/ IGP/81/28695 dated 17.1.1990 issued by the Inspector General of Prison, Tripura a departmental examination for promotion to the posts of Chief Head Warder and Head Warder would be held on 19th and 20th February, 1990 at Agartala Central Jail, as seen in the Annexure I to the writ petition. In the said memorandum dated 17.1.1990 it has been stated that as per Recruitment Rules for the post of

Chief Head Warder, all Head Warders and such Warders who have completed 5 years of service on the 1st day of January, 1990 are eligible for appearing in the said departmental examination. The petitioners along with others appeared in the said examination. The result of the said examination was declared on 17.4.1990 under office Memorandum No.F.II586/IGP/81/3151 issued by the Joint Secretary cum Inspector General of Prison, Government of Tripura, Agartala. The said Inspector General of Prison, Tripura, Agartala is the appointing authority. In the said memorandum of 17.4.1990, it is stated that all those Warders and Head Warders who have got 50% marks are declared to have passed the departmental examination and, as such, they would not require to appear in future at the departmental examination for the purpose of promotion, but it is clarified therein that, for promotion in future, ACRs and service records " will be taken into account. The petitioner Nos. 1 to 4 whose names appear in the said list of successful persons at SI No.41,54 and 17 in the column of "Warders" and SI No. 15 in the column of "Head Warders". The respondent No.2, Joint Secretary to the Government of Tripura issued a Memorandum dated 6.4.1994 i.e. the impugned order, cancelling the earlier order dated 17.04.1990 as Annexure 1 to the writ petition, by deciding that the result of the departmental examination held in March, 1990 of the Warders and Head Warders for promotion to the post of Head Warders and Chief Head Warders shall have no effect for the purpose of the aforesaid promotion and for such promotion, a fresh departmental examination will be held as and when required. Being aggrieved by the said memorandum dated 6th April, 1994, the petitioners have filed this writ petition.

3. Mr. A. Lodh, learned counsel for the petitioners submits that the impugned memorandum/order dated 6.4.1994 was passed/issued in complete violation of the principle .of natural justice. He further submits that no reason has been assigned in the impugned order for recalling or cancelling the earlier memorandum dated 17.4.1990. Mr. Lodh, submits that a discrimination has been meted out by the respondents towards the petitioners in the matter of < appointment on promotion to the post of Head Warders and Chief Head Warders inasmuch as 27 persons whose names appeared in the select list, and similarly situated with the petitioners have been given appointment or promotion on the basis of the said result/select list as in Annexure 2 to the writ petition. Shri Lodh, further contended that in the year 1993 one Shri Ananda Sharma Warder of Central Jail, Agartala has been given appointment on promotion to the post " of Head Warder on the basis of the same select list. In the said select list name of the said Shri Ananda Sharma appears at serial No. 10 of the "Warders" column. He further went to submit that by an order dated 20.4.1995, 5 female Warders have been promoted to the post of Head Warders only on seniority basis, although they did not appear at the departmental examination as seen in the document marked as Annexure 5 to the writ petition.

4. Shri Lodh, learned counsel for the petitioners drew my attention to a case between Asha Kaul & another vs. State of Jammu and Kashmir & others, reported in (1993) 2 SCC 573 wherein the Apex Court held that State

Government's action in rejecting a part of the list found to be unsustainable. But during the one year period of operation of the list no vacancy arose calling for appointment of the remaining candidates of the list. After lapse of the period of operation of the list, any direction to the Government to approve the remaining part of the list would be futile. The Apex Court further observed that the authority could not have approved the select list in part and reject in part; but if the Government wanted to disapprove or reject the list, it ought to have done so within reasonable time of the receipt of the select list and for reasons to be recorded.

I agree with the submission of the learned counsel Mr. A. Lodh on these principles of law. But in the instant case there is no rejection of the entire select list by the authority concerned. But by virtue of the impugned order dated 6.4.1994 as in Annexure 3 to the writ petition, the said result/select list has been virtually cancelled.

5. Mr. A. Chakraborty, learned Advocate General, Tripura, appearing for the respondents at the very outset contended that the memorandum dated 17.4.1990 relating to the declaration of the result of the departmental examination for the purpose of departmental promotion to the post of Chief Head Warders and Head Warder is illegal and it cannot continue further. Learned Advocate General further submits that the said memorandum dated 17.4.1990 in Annexure 2 to the writ petition appears to contain serious irregularities and is also out of procedure and is in contradiction to the actual facts i.e. merit list. He also submits that the result sheet was published by the Superintendent, Central Jail, Agartala under his signature without any official number and date. But the Joint Secretary cum Inspector General of Prison, Tripura circulated the said memorandum with the list on 17.4.1990 stating that who have got 50% of marks in the departmental examination would not be required to sit further for examination in future for promotion to the post of Chief Head Warder and Head Warder. Mr. Chakraborty, learned Advocate General give stress on a particular and a specific point that the promotion should be subjected to the availability of the vacant posts and the requirements of prescribed procedures for selection should be complied with. As there are certain serious irregularities, the authority concerned rectified the matter and issued the memorandum dated 6th April, 1994 and, as such, there is no illegality or irregularity or perversity in issuing the impugned memorandum dated 6th April, 1994 as in Annexure 3.

6. Mr. A. Chakraborty, learned Advocate General, drew my attention to a case between State of Uttar Pradesh & others vs. UP State Law Officers Association & others reported in (1994) 2 SCC 204 in which the Apex Court held that professional engagement of ad hoc counsel as Brief Holders in High Court by the State Government by empanelling them for handling surplus work when available; Government orders abolishing the system of engaging Brief Holders and empowering Legal Remembrancer to appoint special counsel for special matter is valid in the eye of law; consequent removal of the Brief Holders cannot

be challenged on the ground of violation of principles of natural justice. In the said case the Apex Court in paragraph 19 observed as follows :

"It would be evident from Chapter V of the said Manual that to appoint the Chief Standing Counsel, the Standing Counsel and the Government Advocate, Additional Government Advocate, Deputy Government Advocate and Assistant Government Advocate, the State Government is under no obligation to consult even its Advocate General much less the Chief Justice or any of the Judges of the High Court or to take into consideration, the view of any committee that "may" be constituted for the purpose. The State Government has a discretion. It may or may not ascertain the views of any of them while making the said appointments. Even where it chooses to consult them, their views are not binding on it. The appointments may, therefore, be made on considerations other than merit and there exists no provision to prevent such appointments. The method of appointment is indeed not calculated to ensure that the meritorious alone will always be appointed or that the appointments made will not be on considerations other than merit. In the absence of guidelines, the appointments may be made purely on personal or political considerations, and may be arbitrary. This being so those who come to be appointed by such arbitrary procedure can hardly complain if the termination of their appointment is equally arbitrary. Those who come by the back door have to go by the same door. This is more so when the order of appointment itself stipulates that the appointment is terminable at any time without assigning any reason. Such appointments are made, accepted and understood by both sides to be purely professional engagements till they last. The fact that they are made by public bodies cannot vest them with additional sanctity. Every appointment made to a public office, howsoever made, is not necessarily vested with public sanctity. There is, therefore, no public interest involved in saving all appointments irrespective of their mode. From the inception some engagements and contracts may be the product of the operation of the spoils system. There need be no legal anxiety to save them."

7. The accepted principle of law is that wholesome termination of the services of the employees of an institution or Government Department without notice or reasonable opportunity of being heard is arbitrary and violative of Article 14 of the Constitution. But the ratio of this law cannot be applied to the appointments of Law Officers in the High Court whose appointment is said arbitrary and was made in disregard of Article 14 of the Constitution. Facts of the present case in hand is quite different from the facts of the case reported in (1994) 2 SCC 204. Therefore, the said decision of the Apex Court does not help the respondents. "

8. By virtue of memorandum dated 17.4.1990 the petitioners and others have been declared to have passed the departmental examination and that they would not require to appear in future in that departmental examination for the purpose of promotion and such promotion in future their ACRs and service records will be taken into account. On the basis of this memorandum dated 17.4.1990 in Annexure 2 to the writ petition, I am of the view that the petitioners have certain

rights, namely :

- (1) that they are successful candidates in the said departmental examination;
- (2) they have got 50% marks;
- (3) they would not require to appear in future at the departmental examination for the purpose of promotion;
- (4) their promotion shall be considered on the basis of their ACRs and service records.

These rights of the petitioners have been taken away by another memorandum dated 6.4.1994 i.e. the impugned orders as in Annexure 3 to the writ petition by which the petitioners have to face a fresh departmental examinations and when required by the authority concerned in future. It is also ; revealed that no notice or reasonable opportunity of being heard was afforded/ given to the petitioners while passing/issuing the impugned memorandum/order dated 6.4.1994 as in Annexure 3 to the writ petition.

9. I refer these two decisions of the Apex Court, firstly, in a case between Charan Lal Sahu vs. Union of India reported in AIR 1990 SC 1480 wherein the Apex Court laid down the principles of natural justice. I hereby make a passage of the relevant portion of the said judgment and the same is reproduced as here under :

"This Court reiterated that audi alteram partem is a highly effective rule devised by the Courts to ensure that a statutory authority arrives at a just decision and it is calculated to act as a healthy check on the abuse or misuse of power. The rules of natural justice can operate only in areas not covered by any law validly made. The general principle as distinguished" from an absolute rule of uniform application seems to be that where a statute does not in terms exclude this rule or prior hearing but contemplates a post decisional hearing amounting to a full review of the original order on merits then such a statute would be construed as excluding the audi alteram, partem rule at the pre decisional stage. If the statute conferring the power is silent with regard to the giving of a predecisional hearing to the person affected the administrative decision after post decisional hearing was good."

In another case between SN Mukharjee vs. Union of India, reported in AIR 1990 SC 1984, the Apex Court held that "the administrative action must be supported by reasons and such reasons must be recorded, except in cases where requirement is dispensed with expressly or by necessary implication."

10. It is an elementary principle of natural justice that no person should be condemned without hearing. In the instant case also the petitioners were not given any notice or reasonable opportunity of being heard before passing the impugned memorandum dated 6.4.1994. Therefore, I am of the view that the impugned memorandum dated 6.4.1994 is violative of the principles of natural justice and, accordingly, the impugned memorandum dated 6.4.1994 in

Annexure 3 to the writ petition is hereby quashed.

11. Now, the question as to whether the relief sought for by the petitioners for their appointment on promotion to the post of Chief Head Warders and Head Warders on the basis of the said result/select list shall be granted or not, is to be examined.

12. Mr. A. Chakraborty, learned Advocate General submits that the penal drawn by the selecting authority or Departmental Promotional Committee would normally be valid for one year as contemplated under Rule 8A of Appendix 29 of the Civil Service Regulation. This is the accepted principle of law. It is also an accepted principles of law that generally, the life of the penal initially is for one year which can also be extended by specific order by the competent authority. But, in the instant case there is no such extension of the period of penal after the expiry of one year.

13. On the other hand, Mr. Lodh, learned counsel for the petitioners submits that even assuming but not admitting that the life of the penal expires, the respondents gave appointment as many as 27 candidates on promotion to the post of Chief Head Warders and Head Warders after expiry of the period of one year from the date of publication of the said result/select list. He also contended that even in the year 1994/95 some persons have also been given appointment on promotion on the basis of the selection list as seen in the document marked as Annexure 5 and; also without appearing in the departmental examination for the purpose of promotion.

The submission of Mr. Lodh, learned counsel for the petitioners has some force. But this Court's hands are tight by the law of the land that this Court cannot give direction to the authority concerned to give appointment or to issue appointment orders in favour of the petitioners on the basis of the select list. At this stage a reference may be made to a case between *Jatinder Kumar & others vs. State of Punjab & others* reported in AIR 1984 SC 1850 and also a case between *State of Kerala vs. Laxmikutty & others* reported in AIR 1987 SC 331. In both the cases, the Apex Court held that; (1) Persons selected by Public Service Commission has no right to be appointed and no Mandamus lies; (2) High Court issuing Mandamus to the State Government to appoint persons recommended by the High Court not warranted by Article 233 (1) of the Constitution. In that case the Supreme Court further held that in such a case, the High Court could have issued a writ in the nature of Mandamus requiring the State Government to refer back the matter to the High Court for reconsideration.

14. It is also established principles of law that when the authority has failed to exercise its discretion, power and jurisdiction conferred upon him by rule or by law or by a policy decision causing injustice to the interested person or person concerned then in that case the High Court can issue a writ in the nature of Mandamus directing the authority to perform its lawful duties in accordance with law. These legal aspects find place in a case between *Comptroller and Auditor*

General of India, Gain Prakash, New Delhi & another vs. KS Jagannathan & another reported in (1986) 2 SCC 679.1 also hereby make a passage of the relevant portion of the judgment of the Apex Court and the same is reproduced as hereunder :

"There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of Mandamus or a writ in the nature of Mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion malafide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and ;n any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of Mandamus or a writ in the nature of Mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

15. In the present case, this Court cannot compel the respondents to appoint the petitioners on promotion to the said post of Chief Head Warders and Head Warders on the basis of the said select list/result by issuing a writ of Mandamus. Therefore, the prayer of the writ petitioners for a direction to the respondents to appoint them on promotion to the post of Chief Head Warders and Head Warders on the basis of the result/select list as in Annexure 2 cannot be entertained.

However, in the existing facts and circumstances of the case, I hope and trust that the respondents shall consider the case of the petitioners and select persons/ candidates who are similarly situated with the petitioners for appointment on promotion to the post of Chief Head Warders and Head Warders on the basis of the said select list preferably within a period of 2 months from the date of receipt of this judgment and order; and pass necessary order in the matter, to meet the ends of justice.

16. The writ petition is partly allowed. The interim stay order passed earlier shall stand vacated.

17. Before I part with the case, I have come across a petition dated 12.7.1994 filed by the petitioners for addition of 15 persons as petitioners in the present case. The said petition become infructuous in view of the findings and observations made in the present case.