
(2013) 09 GAU CK 0059
In the Gauhati High Court
Case No : W.P. (C) No. 239 (K) of 2011

R. Atuba Jamir

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 18-09-2013

Acts Referred:

Citation : (2014) LabIC 844

Hon'ble Judges : Prasanta Kumar Saikia, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Prasanta Kumar Saikia, J.—In this proceeding, the letter dated 14/9/2011 at Annexure-VI issued by respondent No. 2, namely, General Manager, Nagaland State Transport, Dimapur, Nagaland, as well as letter dated 9/8/2011 by respondent No. 2 addressed to the respondent No. 1 requesting him to fill up 2 posts of Station Superintendent (Class-II Gazetted) by direct recruitment have been called in question. The petitioner having filed additional affidavit had also sought for the quashing of requisition dated 25/8/11 addressed to the Secretary NPSC to fill up 2 posts of Station Superintendents by way of direct recruitment.

2. I have heard Mr. Limawapang, learned counsel for the petitioner. Also heard Mr. T.B. Jamir, learned Addl. A.G. Nagaland for respondent Nos. 1 and 2 and Mr. Joshua, learned counsel appearing for respondent No. 3.

3. The brief facts necessary for disposal of the present proceeding as they emerge from the proceeding is that the petitioner was appointed as Assistant Station Superintendent on ad hoc basis vide order dated 12/10/98, subsequently the ad hoc basis service was regularized vide order dated 2/8/2000. Thereafter, the seniority list of Assistant Station Superintendent/Assistant Enforcement Officer was prepared and published by the department vide seniority list dated 14/9/2000.

4. In that seniority list at Annexure-III to the writ petition, the petitioner was

placed at SI. No. 3. It has been stated that the Officer at SI. Nos. 1 and 2 of the seniority list dated 14/9/2010 was promoted to the rank of Station Superintendent and thereafter, the petitioner becomes the senior most Officer in the rank of Assistant Station Superintendent/Assistant Enforcement Officer.

5. It has been stated that The Nagaland State Transport Service Rules, 2009, (for short, the Rules of 2009) was published in 2009 vide notification dated 20/11/09 and as per Clause 6(A) of the aforesaid Rules, the post of Station Superintendent/Enforcement Officer are to be filled up in the manner as stated in Clause 6(A) I (a) and 6(A) I (b).

6. For ready reference, the aforesaid provisions are reproduced below:--

(a) 50% of the vacant posts shall be filled up by direct recruitment through an open competitive examination conducted by the Commission. Reservation for backward tribe as prescribed by the Government from time to time shall be strictly followed.

(b) 50% of the vacant posts shall be filled up by promotion from amongst the members of the Nagaland State Transport Subordinate Service confirmed in the post of Assistant Station Superintendent/Assistant Enforcement Officer who have rendered not less than 5(five) years of service in that grade.

7. Rule 17(iii) further says that when an appointment to a particular grade is made through both promotion and direct recruitment during the same calendar year, relative seniority of direct recruits and promotees shall be determined according to the rotation of vacancies, reserved for direct recruitment and promotion in the term of the Recruitment Rules or other Rules and Regulations in force.

8. In the year 2011, 2 posts of Station Superintendent fell vacant due to promotion of 2 senior most Station Superintendents to the post of Assistant General Manager. However, in violation of provisions incorporated in Rule 6(a) of the Rules of 2009, the respondent No. 2 requested the respondent No. 1 to make necessary requisition for filling up the aforesaid 2 posts by way of direct recruitment vide letter dated 9/8/11.

9. Against such action on the part of respondent No. 2, the petitioner submitted a representation on 29/8/11 requesting the former to consider the case of the petitioner for promotion to the post of station superintendent in terms of Clause 6(a) of the Rules of 2009. However, respondent No. 2 did not consider the representation, so submitted by the petitioner. Instead, he was pleased to reject the same by his letter dated 14/9/2011.

10. Being aggrieved by and dissatisfied with the aforesaid conduct of the respondent authorities, the petitioner came up before this Court seeking the prayer aforementioned. This Court while taking cognizance of the matter, issued notice to the respondents. The State respondents as well as the Nagaland Public Service Commission (in short, NPSC) who was subsequently impleaded in this

proceeding submitted their written statements separately.

11. In their written statements, the State respondents have submitted that during the period from 2001 to 2010, as many as 7 posts out of 12 vacancies, were offered to the departmental promotees and consequently, as many number of Assistant Station Superintendents stood promoted to the post of Station Superintendent leaving only 5 posts to be filled up by way of direct recruitment. In order to rectify such mistake and also to meet the requirement made in Rule 6(A)(i)(a) of the Rules 2009, the State respondents had made effort to fill up the 2 posts which fell vacant in 2011 by the way of direct recruitment.

12. It has also been submitted that the petitioner cannot claim promotion to the post of Station Superintendent only on the basis of his seniority since as per Rule 17(ii), the criterion for promotion is merit-cum-seniority. In that connection, it has been pointed out that the petitioner's performance as Assistant Superintendent is far from satisfactory as it is evident from different communications which the department had made with him. To buttress such contention, he has referred me to the Annexures-A, B, C, D to the counter-affidavit of respondent Nos. 1 and 2.

13. The relevant part of the counter-affidavit is reproduced below:--

That with regard to the statements made in paragraph 6 of the writ petition, the deponent respectfully states that the claim of serving the department without any blemish record from his superior authority is contrary to records. The deponent states that the petitioner has been served with warning for willful absence from duty, leaving the station at will and without taking leave whereby the Sub-Station revenue earning has been adversely affected vide letter No. NST/DM/MRG/T/3/07-08/792-94 dated 31/1/08. Again the respondent authority has served an explanation call to the petitioner vide letter No. NST/TDC/129/366 dated 01/02/08 to which the petitioner has not responded and again on 15/04/11 vide letter No. NST/P/3542/88/1000 dated 15/4/11 the petitioner has been served with an Explanation Call. A warning letter has also been issued vide No. NST/ESTT/P/3542/98/533 dated 14/06/2011 reprimanding him to improve duty attendance and to improve the Sub-station revenue earning of the Mariani Sub-Station. In spite of this there is no sign of improvement.

It is respectfully submitted that in the absence of a time frame limit and to do justice to both categories, the vacancy has to be drawn up from the last ten years i.e. 2001 to 2010. During this period the respondents have given 7 (seven) posts out of 12 (twelve) vacancies which arose to the departmental promotes and only 5 (five) posts were given for direct recruitment. The respondents being the rule implementing authority had taken the decision to requisition the two posts for direct recruitment thereby equating the disparity between the two categories. This decision has been made in the interest of justice and fairplay and as such the question of violation of the fundamental right of the petitioner does not arise. Even assuming but not admitting that the petitioner's case for

promotion could have been considered, being the senior most alone does guarantee an officer's promotion as promotion shall be based on Merit-Cum-Seniority as stipulated in Rule 17(ii) of the Rules. The deponent may be allowed to refer to the Service Rules at the time of hearing.

14. Therefore, the learned counsel for respondent Nos. 1 and 2 has urged this Court to dismiss the proceeding with cost.

15. Mr. Joshua, learned counsel appearing for respondent No. 3 has stated that he has nothing to say on the matter in dispute in this proceeding. Any decision which this Court is pleased to give would be abided by the respondent No. 3.

16. I have considered the rival submissions having regard to the pleadings of the parties as well as the documents attached therein. Before I proceed further, I find it necessary to know whether it is within the competence of respondent No. 2 to fill up 2 posts of Station Superintendent by way of direct recruitment although service rules, 6(A)(i)(a) & (b) requires that 50% of the post are to be filled up by way of direct recruitment whereas remaining 50% are to be filled up by promotion from the feeder channel.

17. The learned counsel for the petitioner stated that it is beyond the competence of said respondent to fill up both the vacancies by direct recruitment in violation of rules aforementioned. According to him, unit of time, as contemplated in Rule 6(A)(1)(a) & (b), is a calendar year since Rule 6(A)(1)(a) & (b) speaks of calendar year and same is further evident from Rule 17(iii) as well.

18. His further case is that averments made in the counter-affidavit of the respondent Nos. 1 and 2, more particularly, in paragraph 10 is without any basis since the unit of time for the purpose of Rule 6(A)(i)(a) is a calendar year and as such, respondent cannot take into consideration the vacancies occurred over a period of 10 years as an unit in order to satisfy the requirement of Rule 6(A)(i)(a) of the Rules, 2009. A reading of Rule 6(A)(i)(a) & (b) together Rule 17(iii) the Rule of 2009 would make it clear.

19. In support of such contention, the learned counsel for the petitioner has referred me to the decision of Hon'ble Supreme Court in the case of Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., wherein it was held that 50% limit is to be considered by taking a year as a unit since the application of 50% rule to the entire strength of the cadre/service would be inconsistent with Article 16. Therefore, the rule of 50% should be applied taking each year as a unit.

20. The relevant part of the judgment is reproduced below:--

The reservations contemplated in Clause (4) of Art. 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the main-stream of

national life and in view of the conditions peculiar to and characteristic of them need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out.

The rule of 50% should be applied to each year. It cannot be related to the total strength of the class, category, service of cadre, as the case maybe.

21. The learned counsel for the petitioner also contends that quota, so fixed by the Service Rules for apportionment of posts between the direct recruit and promotee should be adhered to on year to year basis. In that connection, he has also referred me to the decision of the Hon"ble Supreme Court in the case of The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, .

22. His further contention is that if there is any mistake/error in apportionment of posts between the direct recruit and promotee over a period of time, then same cannot be corrected by adjusting all the vacancies, occurred in a year to a particularly stream which was deprived of its quota in proceeding year/years since that would again tantamount to violation of the dictum of Service Rules.

23. The learned counsel for the petitioner has again drawn my attention to the decision of this Court rendered in the case of Union of India and others v. Collector of Kamrup & others, reported in 1997 (2) GLT 343 wherein it has been held that State cannot be permitted to use equity jurisdiction to perpetuate unjust gain. The relevant part is reproduced below (paragraph-9):--

9. In M.P. Mittal Vs. State of Haryana and Others, , was a case where the appellant Managing Director of a company executed an agreement under which he guaranteed in his personal capacity the payment of dividend income due. The guarantee agreement stipulated that the dues on account of guarantee would be recoverable in the manner in which land revenue is collected by the Government. The Company defaulted in paying dividend to the Corporation and the Corporation applied to the Assistant Collector for instituting recovery proceedings. The Asstt. Collector after giving opportunity to the Company to pay up the amount due from him, commenced coercive measures for recovery and the appellant filed the writ petition in High Court which was summarily dismissed. On appeal by the Managing Director the Supreme Court held as follows:

Now there is no dispute that the appellant knowingly and deliberately entered into the guarantee agreement and is liable as Guarantor to make payment of the dividend due from Messrs Depto Foods Limited. Nor is it disputed that the amount due, with interest, stands at Rs. 2,02,166/- in respect of the period ending with the year 1977. It was not contended that the appellant in fact does not possess sufficient funds or cannot avail of sufficient personal property for the purpose of discharging the liability. The record also shows that before instituting coercive proceedings, the Assistant Collector provided the appellant an

opportunity to pay up the amount due from him and that the appellant made no attempt to discharge the liability. When that is so, we are of the opinion that he is not entitled to relief in these proceedings. The appeal arises out of the writ petition, and it is well settled that when the petitioner invokes the jurisdiction of the High Court under Article 226 of the Constitution, it is open to the High Court to consider whether in the exercise of its undoubted discretionary jurisdiction, it should decline relief to such petitioner if the grant of relief would always have power to refuse relief where the petitioner seeks to invoke its writ jurisdiction in order to secure a dishonest advantage or perpetuate an unjust gain. This is a case where the High Court was fully justified in refusing relief. On that ground alone, the appeal must fail.

24. Mr. T.B. Jamir, learned Addl. Advocate General appearing for the State respondents has, however, contended that the decisions, relied on by the petitioner, have no relevance whatsoever to the matter under consideration in this proceeding and as such the ratios laid down in those cases have no application to the matter in dispute herein.

25. The learned State counsel has further contended that argument, so advanced by the learned counsel for the petitioner has no substance since the petitioner who questioned the past conduct of the State respondents for promoting officers by violating the quota fixed by Service Rule tries to take advantage of the mistake committed by the State respondents since he became the beneficiary of the mistake of the State if any. Had there being no alleged mistake on the part of the State, he would not have occupied slot number 1 in the seniority list of Assistant Superintendents.

26. Since the petitioner never questioned the alleged past mistake of the State respondents in the apportionment of the posts between the promotee and since he becomes the illegal beneficiary of the past mistake of the State respondents, the petitioner cannot be allowed to take benefit which came to him at the cost of someone who legally deserves it, more so, when the State respondent try to rectify the mistake which they reportedly committed in the past.

27. Even otherwise, the claim of the petitioner cannot be accepted since no one can claim promotion as a matter of right, more so, promotion from the rank of Assistant Station Superintendent to Station Superintendent is to be done as per Rule 17(iii) on the basis of merit-cum-seniority. As it is evident from Annexure A to D, attached to the counter-affidavit, the performance of the petitioner is found to be far from satisfactory and as such, on such performance, perhaps, he cannot be promoted to the next higher grade. Learned Addl. Advocate General has, therefore, prayed this Court to dismiss the proceeding at hand.

28. I have considered the rival submissions, advanced by the learned counsel for the parties having regard to the pleadings of the parties as well as the documents attached therewith. I have also considered the relevant part of the Service Rule as well as the decisions, relied on.

29. I have found that as per Service Rules, particularly, 6(A)(1)(a) & (b) thereof, the vacancies which have occurred in a particular calendar year are to be apportioned between the promotees and direct recruits at the ratio laid down in the Service Rule. Such a requirement of law is mandatory and therefore, it brooks no deviation whatsoever. If in a particular calendar year, one stream was deprived of quota, same cannot be corrected next year by allotting all the vacancies in that year to the stream, so deprived in the previous year. That would be nothing but perpetuating the wrong committed before. A perusal of Rule 6(A)(i)(a) & (b) together with Rule 17(iii) and decision rendered in Indra Sawhney etc. etc Vs. Union of India and others, etc. etc., , makes such position abundantly clear.

30. The State respondents have again contended that even if one assumes for the sake of argument for a moment that the petitioner has a right to be considered for promotion against one of the vacancies that occurred in 2011 yet he cannot claim promotion to the aforesaid post as a matter of right in view of the provision incorporated in Rules 17(iii) of the Rules of 2009. Being so, on that count also, this proceeding is liable to be dismissed.

31. I have found such a contention to be without any force. It is a settled law that the right to be considered for promotion is a fundamental right and depriving a person there-from would mean violation of such fundamental right. Since one of the vacancies that occurred in 2011 is liable to be filled up by promotee and since the petitioner at the moment, being the senior most Assistant Station Superintendent, is evidently in the zone for consideration for promotion, the taking away his such a right undoubtedly offend the Constitutional guarantee. It is a different matter altogether whether he comes out successful in his promotional exercise.

32. Consequently, I have found that the impugned order dated 9/8/11 at Annexure-VI, letter dated 14/9/11 at Annexure IV as well as letter dated 25/8/11 at Annexure-VII of the additional affidavit are all found unsustainable in law and are liable to be set aside and quashed.

33. Resultantly, the impugned order dated 9/8/11 at Annexure-VI, letter dated 14/9/11 at Annexure-IV as well as letter dated 25/8/11 at Annexure-VII of the additional affidavit, all being unsustainable in law, are set aside and quashed.

34. The State respondents are further directed to take necessary steps to fill up the post of Station Superintendent in accordance with the procedures incorporated in the Recruitment Rules. In the facts and circumstances of the case, the parties are to bear their own cost.