
(2009) 09 GAU CK 0084
In the Gauhati High Court
Case No : W.A. No. 37 of 2009

Shri Kh. Jilla Singh

APPELLANT

Vs

The State of Manipur and Others

RESPONDENT

Date of Decision : 11-09-2009

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2009) 1 GLD 72 Supp : (2009) 5 GLT 711 : (2010) 3 SLR 221

Hon'ble Judges : T. Nandakumar Singh, J; Mutum B.K. Singh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

T. Nandakumar Singh, J.—The unsuccessful writ petitioner filed this appeal against the judgment and order of the learned Single Judge dated 9.4.2009 dismissing the writ petition being W.P. (C) No. 150 of 2009 filed by the present appellant/writ petitioner, assailing the order of the Government of Manipur being No. 1/14/2006-TD (Service), dated the 13th February, 2009 (Annexure-A/8 to the writ petition) for allowing the private respondent No. 3-Shri L. Gopal Singh to function as Executive Engineer of the Tribal Development Department, Manipur on in-charge basis without extra remuneration with immediate effect and until further orders in public interest and also the order of the Government of Manipur being No. 1/14/2006-TD (Service), dated, the 13th February, 2009 (Annexure-A/9 to the writ petition), for transfer and posting/allocation of works of the appellant/writ petitioner and the private respondent No. 3 as the Executive Engineer-I and Executive Engineer-II respectively in the Tribal Development Department, Government of Manipur.

2. Heard Mr. Y. Nirmolchand, learned Counsel appearing for the appellant/writ petitioner. Also heard Mr. R.S. Reisang, learned Government Advocate appearing for the respondent No. 1, Mr. N. Jotendro, learned Counsel for the respondent No. 2 as well as Mr. H.S. Paonam, learned Counsel for the private respondent No. 3.

Background Facts:

3. Both the appellant/writ petitioner and the private respondent No. 3 are the regular Assistant Engineers of the Tribal Development Department, Government of Manipur, The Government of Manipur prepared a final seniority list of the Assistant Engineers of the Tribal Development Department vide Office Memorandum being No. 1/3/2000-TD, dated, the 6th January, 2001 (Annexure-A/2 to the writ petition). Under the said final seniority list, the present appellant/writ petitioner is, admittedly, senior to the private respondent No. 3-Shri L. Gopal Singh, inasmuch as, the name of the appellant/writ petitioner appeared at SI. No. 1 whereas the name of the private respondent No. 3 appeared at SI. No. 2. As an austerity measure, because of the financial crunch of the Government of Manipur, a policy decision had been taken by the Government of Manipur for reducing some posts in the Directorate for Development of Tribals & Scheduled Castes, Manipur. Pursuant to the said policy decision, the Government of Manipur issued an order being No. 26/69/2001-TD (Misc.) Pt., dated, the 7th January, 2005 (Annexure-1 to the writ petition), in supersession of the earlier order of the Government being No. 26/69/2001-TD (Misc.) dated the 25th June, 2003, under which, the number of posts of Executive Engineer in the Directorate for Development of Tribals & Scheduled Castes, Manipur is reduced to only 1 (one). The said order of the Government of Manipur, dated 07.01.2005 for reducing the post in the Directorate for Development of Tribals & Scheduled Castes, Manipur, shall effect only when regular incumbent(s) retire or vacate the respective post as the case may be.

4. Admittedly, after coming into effect of the said order of the Government of Manipur dated 7.1.2005, there is only one post of Executive Engineer in the Directorate for Development of Tribals & Scheduled Castes, Manipur. This fact of existence of only one post of Executive Engineer in the Directorate for Development of Tribals & Scheduled Castes, Manipur is fortified by the letter of the Director of the Directorate for Development of Tribals & Scheduled Castes, Manipur being No. 1/999/2009-DTSC, dated the 23rd March, 2009, informing the State Government Counsel, High Court, Manipur, Imphal, in connection with the related writ petition being W.P.(C) No. 150 of 2009 that there is only one post of Executive Engineer which was created for the Department vide order No. 1/31/79-TW, dated 6.7.1979.

5. The appellant/writ petitioner being the senior-most Assistant Engineer in the Tribal Development Department, Manipur, vide order being No. 2/15/99-TD, dated, the 26th April, 2000 was promoted and appointed as Executive Engineer in the said Department on ad-hoc basis for a period of six months against the lone post of Executive Engineer in the Tribal Development Department, Manipur with immediate effect till the post is filled up on regular basis, whichever is earlier. Though the term of the ad-hoc appointment of the appellant/writ petitioner as Executive Engineer in the Tribal Development Department, Manipur was not extended but, by the order of the Government of Manipur being No.

2/15/99-TD, dated, the 2nd June, 2001, the appellant/writ petitioner was allowed to exercise the power of the Executive Engineer (TD) in his substantive grade pay w.e.f. 1.5.2001 or till his ad-hoc extension as Executive Engineer is given for smooth functioning of Engineering Cell of the Tribal Development Department, Manipur, in the interest of public. Since then, the appellant/writ petitioner is continuing to function and work as Executive Engineer, TD. The appellant/writ petitioner being aggrieved by order of the Government of Manipur dated 20.2.2004, changing final seniority list of the Assistant Engineers, which had already been published on 6.1.2001, filed the writ petition W.P. (C) No. 177 of 2004 before this Court. This Court passed the interim orders dated 24.3.2004 and 14.6.2004 respectively in W.P. (C) No. 177/2004 to the effect that the position of the appellant/writ petitioner who has been exercising the power of the Executive Engineer, Tribal Development Department, Manipur in view of the Government order dated 2.6.2001, shall not be disturbed till disposal of the said writ petition i.e. W.P. (C) No. 177 of 2004; and the said writ petition is still pending. It is the further case of the appellant/writ petitioner that the service condition of the appellant/writ petitioner under the said order of the Government of Manipur dated 02.06.2001 under which the appellant/writ petitioner is allowed to exercise the power of the Executive Engineer in the Tribal Development Department, Manipur has been protected by the said interim orders dated 24.3.2004 and 14.6.2004 respectively passed by this Court in W.P. (C) No. 177 of 2004 and the said interim orders are still in force. In spite of the above interim orders passed by this Court as well as the said policy decision of the Government of Manipur for reducing the number of posts of the Executive Engineer to only one, the Government of Manipur vide order being No. 1/14/2606-TD (Service), dated the 13th February, 2009, allowed the private respondent No. 3-Shri L. Gopal Singh, Assistant Engineer to function as Executive Engineer of the Tribal Development Department on in charge basis without extra remuneration with immediate effect and until further orders in public interest. The Government of Manipur had also issued another order having the same number and date i.e. No. 1/14/2006-TD (Service), dated the 13th February, 2009 for transfer and posting/allocation of works of the present appellant/writ petitioner and the private respondent No. 3 as Executive Engineer-I and Executive Engineer- II respectively in the Tribal Development Department, Government of Manipur, where, admittedly, there is only one post of Executive Engineer.

6. The appellant/writ petitioner filed the writ petition being W.P. (C) No. 150 of 2009, assailing the impugned order dated 13.2.2009 (at Annexure-A/8 to the writ petition) and the impugned order dated 13.2.2009 of the Government of Manipur (at Annexure-A/9 to the writ petition) for transfer and posting/allocation of works, allowing the private respondent No. 3-Shri L. Gopal Singh to function as Executive Engineer-II, Tribal Development Department on in charge basis, on the inter alia grounds that:

(i) the impugned orders having the same date i.e. 13.02.2009 are in infraction of the said interim orders dated 24.3.2004 and 14.06.2004 respectively passed by

this Court in W.P. (C) No. 177 of 2004, wherein and whereunder, the State-respondents are directed not to disturb the appellant/writ petitioner who is working as Executive Engineer against the lone post of Executive Engineer in the Tribal Development Department, Government of Manipur vide order of the Government of Manipur dated 02.06.2000, inasmuch as the impugned order dated 13.2.2009 had disturbed the smooth function of the appellant/writ petitioner as Engineer, Tribal Development Department, Manipur by withdrawing the major portion of his work allotted to him as Executive Engineer;

(ii) there cannot be two Executive Engineers against one post of Executive Engineer, in other words, two Assistant Engineers cannot function as Executive Engineers against lone post of E.E. in the Tribal Development Department;

(iii) by the policy decision of the Government of Manipur, which is binding to the Tribal Development Department, there should be only one post of Executive Engineer in the Tribal Development Department, Manipur and, as such, appointment of more than one Executive Engineer in the Tribal Development Department is not permissible but, Tribal Development Department, Government of Manipur indirectly by issuing the impugned orders dated 13.2.2009 allowed two Assistant Engineers to function and work as Executive Engineers; and

(iv) the past orders of the Government of Manipur for allowing 2/3 Assistant Engineers to function and work as Executive Engineer against the lone post of Executive Engineer in the Tribal Development Department, Manipur will not make the impugned orders dated 13.2.2009 legal.

7. The respondent No. 2-Director, Tribal Development Department, Government of Manipur and the respondent No. 3-Shri L. Gopal Singh had filed their affidavit-in-oppositions and their affidavit-in-oppositions are also similar. The stand taken by the respondents for justifying the impugned orders dated 13.2.2009, allowing the private respondent No. 3 to work and function as Executive Engineer in addition to the appellant/writ petitioner who, admittedly, is already working and functioning as Executive Engineer in the Tribal Development Department, Government of Manipur, are that though the Tribal Development Department was once a minor Department, at present the said Department is developed into a considerable important Department enlarging its activities, requiring more additional hands who are qualified and experience to meet engineering works in the Department and in view of ensuing ban on creation of posts, the Department in spite of exigency of another additional post, is not in a position to create another post and thus, have resorted to the arrangement vide the order impugned in the writ petition to meet the administration exigency and also that in the past 2/3 Assistant Engineers are allowed to function and work as Executive Engineer against the lone post of Executive Engineer under different orders of the Government of Manipur.

8. In normal parlance, under the Service Law, the expression "appointment" includes filling up of the posts by promotion, by direct recruitment, by deputation

and other methods and also means "an actual act of posting a person to a particular Office". According to the Black's Law Dictionary, the expression "appointment" means "designation of a person, by the person or persons having authority therefore to discharge the duty of some Office". Therefore, under the Service Law there should be a post for appointment of a person.

9. In the case in hand, this Court asked the pointed questions to the learned Counsels appearing for the State-respondents and also the learned Counsel appearing for the Tribal Development Department as to which provision of law allowed the two Assistant Engineers to function as Executive Engineer-I and Executive Engineer-II respectively against the lone post of Executive Engineer in the Tribal Development Department and also as to why the Government of Manipur indirectly appointed/allowed two Assistant Engineers to function as Executive Engineer-I and Executive Engineer-II respectively in the Tribal Development Department in spite of the said policy decision for reducing the number of posts of the Executive Engineer to only one in the Tribal Development Department, Government of Manipur. But, both the learned State Counsel and the learned Counsel appearing for the respondent No. 2 could not give any satisfactory answer; the learned Counsels only submit that in the past there were instances of allowing more than two Assistant Engineers to function as Executive Engineers against one post of Executive Engineer in the Tribal Development Department on in charge basis.

10. We are afraid that the executive order/order of the Administrative authority cannot be equated to the order of the judicial authority which could be treated as precedents nor can they be elevated to the level of precedents. Merely because the authority has passed one illegal and unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over and again. (Ref. : Chandigarh Administration and another Vs. Jagjit Singh and another, The relevant portion of the judgment in Jagjit Singh's case (supra) is quoted hereunder:

...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 around 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.... In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its

own merits, factual and legal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial world....

11. The Apex Court in Harpal Kaur Chahal (Smt) v. Director, Punjab Instructions held that illegality once committed cannot be pleaded to legalise other illegal act. The relevant portion of para 3 of the SCC in Harpal Kaur Chahal's case (supra) reads as follows:

3. It is next contended that along with the appellant two more candidates were selected and were appointed and their appointments were upheld by the High Court. Denial to her is violative of Article 14 of the Constitution. We find no force in the contention. The view of the High Court is obviously illegal and the judgment rendered would not form the ground for our holding that the others who got the benefit by illegal orders will be extended in favour of other candidates though illegally appointed. Article 14 cannot be extended to legalise the illegal orders though others had wrongly got the benefit of the orders.

....

The Apex Court in G.V. Ramanaiah Vs. The Superintendent of Central Jail, Rajahmundry and Others, held that two wrongs never make a right. Para 17 of the AIR in G.V. Ramanaiah's case (supra) reads as follows:

17. Mr. P.K. Rao next contends in a somewhat half- hearted manner that even if the State Government had extended the benefit of its G.O., owing to a mistake to four other persons, similarly placed, it was not fair to deny the same treatment to the petitioner. This contention must be repelled for the obvious reason that two wrongs never make a right.

The Apex Court did not accept the contention of Mr. P.K. Rao.

12. It is fairly well settled principle of law that even the Constitutional authority cannot do indirectly what is not permitted to do directly, In the instant case, by the impugned order dated 13.2.2009, the private respondent No. 3 is allowed to function and work as Executive Engineer in addition to the present appellant/writ petitioner who is already functioning as Executive Engineer in the Tribal Development Department, Government of Manipur, though there is only one post of Executive Engineer in the said Tribal Development Department, inasmuch as more than one Assistant Engineers are allowing indirectly to function as Executive Engineers in the Tribal Development Department by virtue of the impugned orders dated 13.2.2009. We are constrained to observe that such indirect method of having two Executive Engineers against the lone post of Executive Engineer in the Tribal Development Department, Government of Manipur by issuing the impugned orders dated 13.2.2009 is a fraud to the said policy decision of the Government of Manipur as an austerity measure for having only one Executive Engineer in the Tribal Development Department, Manipur.

13. The Apex Court in *Dr D.C. Wadhwa and Others Vs. State of Bihar and Others*, held that:

It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision (Ref. : Relevant portion of para No. 7 of the AIR in *Dr. D.C. Wadhwa's case* (supra)).

14. The Tribal Development Department, Government of Manipur is permitted to appoint only one Executive Engineer in the prescribed manner, inasmuch as it is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. Such modes of having one more Executive Engineer by issuing the impugned order dated 13.02.2009 in addition to the appellant/writ petitioner who is already functioning as Executive Engineer in the Tribal Development Department, is necessarily forbidden in the case in hand. Regarding this point, we may conveniently refer to the decision of the Apex Court in *Hukam Chand Shyam Lal Vs. Union of India (UOI) and Others*, and *Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others*,

Para No. 18 of the AIR in *Hukam Chand Shyam Lal's case* (supra) reads as follows:

18. It is well settled that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all, and all other modes of performance are necessarily forbidden. It is all the more necessary to observe this rule where power is of a drastic nature and its exercise in a mode other than the one provided, will be violative of the fundamental principles of natural justice. Now, in the present case, if the telephones of the appellants were to be disconnected on the ground of misuse, then they had to give, in consonance with the principles of natural justice, opportunity to the appellants to explain their conduct before taking action under Rule 427 read with Rules 416 and 421. Resort to the wrong and more drastic course provided in Rule 422, on a ground which was not germane to an action under that Rule, vitiates the impugned order, particularly when it is manifest that in making the impugned order, the General Manager was influenced more by this ground and less, if at all, by the existence of "public emergency" certified by the Delhi Administration.

The Apex Court in para No. 40 of the SCC in *Bhavnagar University's case* (supra) held that:

40. The statutory interdict of use and enjoyment of the property must be strictly construed. It is well settled that when a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all. The State and other authorities while acting under the said Act are only creature of statute. They must act within the four corners thereof.

15. It is also fairly well settled law that what is given by one hand should not be taken away by another hand. The present case is a clear example, inasmuch as by the earlier order of the Government of Manipur dated 2.6.2001, the present appellant/writ petitioner was allowed to function as the Executive Engineer against the lone post of Executive Engineer in the Tribal Development Department, Government of Manipur. Surprisingly, what is given to the appellant/writ petitioner under the said order dated 2.6.2001 had been taken away by another hand to an extensive extent by issuing the impugned order dated 13.02.2009. Reference may be invited to the decision of the Apex Court in Bhavnagar University's case (supra). Para No. 37 of the SCC in Bhavnagar University's case (supra) reads as follows:

37. The said words indicate the intention of the legislature to the effect that by providing revision of final development plan from time to time and at least once in ten years, only the procedure or preparation thereof as provided therein, is required to be followed. Such procedural requirements must be followed so far as it is reasonably possible. Section 21 of the Act, in our opinion, does not and cannot mean that the substantial right conferred upon the owner of the land or the person interested therein shall be taken away. It is not and cannot be the intention of the legislature that what is given by one hand should be taken away by the other.

16. Over and above, the arm of the High Court is long enough to reach in justice wherever it is found. (Ref. : All India Statutory Corporation v. United Labour Union and Ors. 1997 (2) Supreme 165).

17. For the foregoing reasons, with due respect to the learned Single Judge, we cannot endorse the reasons for dismissing the writ petition being W.P. (C) No. 150 of 2009 by passing the impugned judgment and order dated 9.4.2009. Accordingly, we are constrained to interfere with the impugned judgment and order of the learned Single Judge. In the result, the impugned judgment and order dated 09.04.2009 passed by the learned Single Judge in W.P. (C) No. 150 of 2009 is set aside; and the two impugned orders of the Government of Manipur having the same number and date i.e. No. 1/14/2006-TD (Service), dated the 13th February, 2009 (Annexure-A/8 and Annexure-A/9 respectively to the writ petition being W.P. (C) No. 150 of 2009) are also set aside.

However, it is left to the wisdom of the State-respondents to take appropriate measures for smooth and efficient functioning of the Tribal Development Department, Manipur more particularly the Engineering Cell is concerned, according to law and also by following the prescribed procedures.

18. With the aforesaid observations, this writ appeal is allowed. Appeal allowed.