
(2016) 06 GAU CK 0009
In the Gauhati High Court
Case No : WA No. 280 of 2014

Smt. Keneingunuo Clara

APPELLANT

Vs

Z. Lovikali Yepthomi

RESPONDENT

Date of Decision : 03-06-2016

Acts Referred:

Constitution of India, 1950 — Article 16, 166(1), 166(2), 24

Citation : (2016) 5 GauLJ 180 : (2016) 5 GauLR 83

Hon'ble Judges : Mr. Ajit Singh, CJ. and Mr. Suman Shyam, J.

Bench : Division Bench

Advocate : Mr. K.N. Choudhury, Senior Advocate and Ms. A. Deka, Advocate, for the Appellant; Mr. D.K. Mishra, Senior Advocate, Mr. B. Prasad, Advocate, Ms. T. Khro, Government Advocate, Nagaland, for the Respondents

Final Decision : Allowed

Judgement

Mr. Suman Shyam, J. (Cav)—Heard Mr. K.N. Choudhury, learned senior counsel assisted by Ms. A. Deka, learned counsel for the appellant. Also heard Mr. D.K. Mishra, learned senior counsel assisted by Mr. B. Prasad, learned counsel appearing for the respondent Nos. 1 and 2/writ petitioners as well as Ms. T. Khro, learned Government Advocate, Nagaland.

2. This appeal is directed against the judgement and order dated 17/07/2014 passed in WP(C) No. 115(K)/2010, whereby the learned Single Judge had allowed the writ petition filed by the respondent Nos. 1 and 2, inter-alia, challenging the seniority list dated 15/06/2010 by means of which, the appellant was held to be senior to respondent nos. 1 and 2 in the cadre of District Transport Officer/Enforcement Officer.

3. The brief facts of the case, briefly stated, is that the appellant was initially appointed as an Enforcement Officer (EO) under the Directorate of Transport Commissioner, Govt. Of Nagaland, on recommendation of the Nagaland Public Service Commission (hereinafter referred to as NPSC), by the order dated

20/12/2002 in the scale of pay of Rs. 6500-200-10500/- per month plus other allowances admissible under the Rules. Subsequently, her services were regularised in the post of EO. The respondent No. 1 was appointed in the post of District Transport Officer (for short "DTO") (Class-II gazetted) on recommendation of the NPSC vide order dated 03/03/2005. The respondent No.2, who was initially appointed as a Motor Vehicle Inspector (MVI) vide order dated 17/09/1992, was promoted to the post of DTO by the notification dated 20/04/2005 on the basis of recommendation of the NPSC.

4. Although, a draft Service Rules of the Motor Vehicle Department in the State of Nagaland was framed as far back as in the year 1990, yet, the draft Rules never received the approval of the Government, as a result of which the same could not be notified. Notwithstanding the same, the department of Transport has all along been guided by the spirit of the draft Rules of 1990 in matters of promotion and appointments in the Transport Department. Under the draft Rules of 1990, although the post of DTO and Enforcement Officer were shown to be belonging to two different cadres, yet, both these posts were treated by the department as interchangeable and/or inter-transferable in nature. Such being the position, by the order dated 08/10/2007, the appellant, who was holding the post of EO, was transferred and posted as DTO, Dimapur. Thereafter, on 15/06/2010, the Additional Secretary to the Government of Nagaland had published the final seniority list of all gazetted Officers in the Motor Vehicle Department falling under the Transport Commissioner, wherein the name of the appellant had been shown at sl. No. 7 whereas the names of respondent nos. 1 and 2 had been shown at sl. No. 10 and 9 respectively.

5. Thereafter, the Chief Secretary to the Government of Nagaland had issued an Office Memorandum dated 26/04/2010 circulating the tentative seniority list of gazetted officers of the Motor Vehicles Department inviting objections, if any, within 30 days from the date of issuance of the Office Memorandum. Even in the said list, the name of the appellant figured above the respondent nos. 1 and 2.

6. Being aggrieved by the seniority position given to the appellant, respondent nos. 1 and 2 had submitted representations to the higher authorities, inter-alia, contending that the cadre of EO being different from that of DTO and the appellant having been appointed in the cadre of EO, she could not have been assigned a seniority position above the respondent Nos. 1 and 2 in the inter-se seniority list of DTOs. The representations submitted by the respondent Nos. 1 and 2 had been forwarded by the Joint Transport Commissioner to the Government of Nagaland for consideration, which, however, stood rejected by the order dated 11/06/2010. Situated thus, the respondent Nos. 1 and 2 had approached this Court by filing WP(C) No. 115(K)/2010 challenging the order of transfer dated 08/10/2007 as well as the final seniority list dated 15/07/2010 with a further prayer for issuance of a direction upon the state respondents to confine the seniority of the appellant in the cadre of DTO with effect from the date on which she was appointed in the said post.

7. Record reveals that since the year 1990, although a number of draft Service Rules had been framed by the Department of Transport, Nagaland, yet, none of those draft rules actually received the approval of the Government, as a result of which the rules were never notified. From a reading of the draft Rules framed in the year 1990, it is discernable that the cadre of DTO and EO have been treated as two separate cadres. As per the draft rules, the strength of service in the cadre of DTO was 4 (four) permanent posts and 2 (two) temporary posts, whereas the cadre of EO contains only 1 (one) temporary post. That apart, the schedule appended to the draft Rules of 1990 also indicated that the post of DTO was required to be filled up 50% from amongst the MVIs, whereas 50% of the post of EO was required to be filled up from amongst the Senior Enforcement Inspectors. The next higher post of Assistant Transport Commissioner/Regional Transport Officer was required to be filled up only by promoting DTOs having five years of qualifying service in the cadre. It would be significant to note that although the posts of DTO and EO belonged to the same grade carrying the same pay scale, yet, the draft Rules of 1990 did not provide for any promotional avenue for the EO.

8. Taking note of the aforesaid situation as well as the need to convert some technical posts to non-technical posts, the Additional Transport Commissioner had submitted a proposal dated 12/09/2003 before the Government suggesting restructuring of the Motor Vehicles Department, inter-alia, proposing that the lone post of Enforcement Officer be merged with that of DTO. In paragraph 31 of the proposal dated 12/09/2003, the Assistant Transport Commissioner had furnished the justification for the merger of the posts DTO and EO stating that the same would go a long way in solving the problems faced by the department due to non-availability of requisite manpower.

9. Taking cognizance of the proposal of restructuring dated 12/09/2003, the Under Secretary to the Government of Nagaland had conveyed the administrative approval of the Government to the proposal for restructuring the Motor Vehicles Department. Thereafter the Service Rules, viz. "The Nagaland Motor Vehicles Department Service Rules, 2010" (hereinafter referred to as the Rules of 2010) was framed by the Government and the same was notified in the official gazette on 15/11/2010.

10. It would be pertinent to mention here-in that although the proposal dated 12/09/2003 had recommended merger of the posts of DTO and EO, the Rules of 2010 did not introduce merger of the two posts. Instead, as per the schedule-I appended to the Rules of 2010, the posts of DTO have been integrated to form a combined cadre along with the EO and the total strength of the combined cadre has been shown to be 8 (eight). Eventually, the administrative decision of the Government of Nagaland to integrate the posts of DTO and the EO into a common cadre had been given a final shape by notifying the Rules of 2010.

11. From a perusal of the pleadings contained in the writ petition, it can be seen that the respondent Nos. 1 and 2/writ petitioners Nos. 1 and 2 had neither

challenged the order dated 06/05/2005 granting administrative approval by the Government to the restructuring proposal dated 12/09/2003 nor have they challenged the Rules of 2010. Notwithstanding the same, by the impugned judgement and order dated 17/07/2014, the learned Single Judge has allowed the writ petition by setting aside the seniority position assigned to the appellant.

12. Assailing the impugned judgement and order, Mr. Choudhury, learned senior counsel submits that integration of different posts into a common cadre is a matter of policy decision of the Government and the respondent Nos. 1 and 2 would not be entitled to challenge such a decision. Considering the fact that the posts of DTO and EO are of equivalent grade, carrying the same pay scale, having similar nature of duties and in view of the fact that both these posts have been treated as inter-transferable, the Government had rightly taken the decision to integrate both the post into one cadre. Since the appellant is senior to the private respondent as per the date of joining the service, hence, she was senior to the respondent Nos.1 and 2 and has been rightly declared so. The learned senior counsel submits that once the administrative decision of the Government for merger of the posts into one cadre has been conveyed, the mere fact that the said decision had not been notified as per Article 166 (1) and (2) of the Constitution of India, would not render the said approval as invalid in the eye of law, more so, when the policy decision of the Government has eventually crystallised in the form of the Rules of 2010. In support of his aforesaid arguments, Mr.Choudhury has relied upon the following decisions :-

- (i) (1976) 4 SCC 838 (Reserve Bank of India v. N.C. Paliwal and others)
- (ii) (1975) 1 SCC 319 (A.K. Subraman and others v. Union of India and Ors)
- (iii) AIR 1962 SC 1139 (Kishori Mohanlal Bakshi v. Union of India)
- (iv) 1988 (Supp) SCC, 221 (Desoola Rama Rao and Another v. State of Andhra Pradesh and Others)
- (v) (1980) 3 SCC, 97 (Tamil Nadu Education Department Ministerial and General Subordinate Service Association and Others v. State of Tamil Nadu and Others)

13. Per contra, Mr. Mishra, learned senior counsel representing the respondent Nos. 1 and 2 has contended that the posts of DTO and EO have all along constituted two separate cadres and the said position has remained unaltered even after the Rules of 2010 had been notified. According to the learned senior counsel, the various inter-departmental communications merely indicated that the proposal for merger of the posts of DTO and EO was under consideration of the Government but in reality, there was no approval of the Government for merger of the two posts. The learned senior counsel submits that the letter dated 06/05/2005 merely conveyed the administrative approval of the proposal for restructuring of the Motor Vehicles Department but no order under Executive power of the State under Art 166(2) was ever issued to that effect.

14. By relying upon the decision of the Supreme Court in the case of Anil Kumar

Vitthal Shete and others v. State of Maharashtra and another reported in (2005) 12 SCC 148, Mr. Mishra submits that in the absence of any Rule framed under the proviso to Article 309 of the Constitution of India, the Government could not have integrated the two cadres of DTO and EO by means of an executive fiat so as to permit them to circulate a combined inter-se seniority list dated 15/06/2010 taking the respondent Nos. 1 and 2 completely by surprise.

15. The learned senior Counsel for the respondent Nos 1 and 2 has also relied upon the decisions of the Supreme Court in the case of (2013) 7 SCC 335 (S. Sivaguru v. State of Tamil Nadu and others), to submit that even assuming that a merger of the posts of DTO & EO was called for, yet, in the facts of the present case, the same was not permissible as none of the relevant factors laid down by the Supreme Court such as, (i) nature of duties of the post, (ii) responsibilities and powers exercised by the Officers and the extent of territorial responsibilities, (iii) minimum qualification and (iv) salary of the post, are compatible in case of both the posts. Mr. Mishra, therefore, submits that the job of DTO is of purely technical nature and the EO cannot function as Licensing and Registering Authority under the Motor Vehicles Act.

16. According to Mr. Mishra, since the posts of DTO and EO are yet to be merged, hence, the appellant can hold lien only in respect of one of the posts, which is EO, since no Government servant can be permitted to hold lien over two posts. He however, adds that even assuming that there was integration of the two posts into one cadre, even in that case the appellant's seniority in the cadre of DTO can at best be reckoned from that date on which she was borne in the cadre of DTO, and that would obviously make her junior to the respondent Nos 1 and 2 in service. In support of his aforesaid arguments, the learned senior counsel has relied upon the following decisions :-

(i) (1996) 9 SCC 266 (State of Maharashtra v. Purshottam and others)

(ii) (2014) 5 SCC 101, (Panchraj Tiwari v. Madhya Pradesh State Electricity Board and Others)

(iii) (1981) 4 SCC 130 (State of Maharashtra and another v. Chandrakant Anant Kulkarni and others)

(iv) (1997) 6 SCC 538 (Jagdishlal and others v. State of Haryana and others).

17. We have given our anxious consideration to the rival submissions made by and on behalf of the parties and have also perused the materials on record.

18. As noted above, ever-since the year 1990, the Motor Vehicles Department, Government of Nagaland has been following the draft Service Rule of 1990. It was only on 15/11/2010 that the Rules of 2010 was notified in the official gazette. A reading of the 2010 Rules leaves no manner of doubt that although both the posts of DTO and EO had been retained in the department, yet, those have been integrated into a common cadre and such integration appears to be based on the re-structuring proposal submitted by the Additional Transport

Commissioner on 12/09/2003 recommending merger of the posts of DTO & EO as well as the administrative approval of the Government communicated vide letter dated 06/05/2005. Since the post of DTO was a technical post as compared to that of EO, by the letter dated 06/05/2005, the Additional Transport Commissioner was asked to submit a separate proposal for conversion of non-technical to technical posts and re-designation along with financial implications. In response to the same, the Additional Transport Commissioner had written a letter dated 13/09/2006, inter-alia, stating as follows :-

"The line post, of Enforcement Officer shall be also convert to the post of District Transport Officer, Enforcement and merge with the District Transport Officer Cadre as pay scale of both the posts are identical at Rs. 6500-200-10500/-. The merger of Cadre is required as the lone Enforcement Officer shall have no progression of career if keep (kept) away from the main Cadre as a meeting point of Cadre is not possible."

19. It is also significant to mention herein that by another letter dated 02/03/2007, the Government had once again enquired from the Transport Department as to whether the present incumbent in the post of EO has the required experience and qualification to hold the post of DTO and in response to the said letter, the Transport Commissioner had replied on 22/03/2007, stating as follows :-

"5. The prescribed Qualification for both District Transport Officer and Enforcement Officer is Bachelor Degree. The District Transport Officer and Enforcement Officer are sent to same training Institute for the same course and are all equally trained. In fact the present Enforcement Officer is holding a Master Degree and is more competent and active than most of the present District Transport Officer."

20. It was only after a threadbare examination of the pros and cons of the restructuring proposal furnished by the Transport Department that the Government had conveyed its administrative approval which ultimately culminated into integration of two cadres in the Rules of 2010 in the exigencies of administration.

21. Whether or not two or more categories of posts should be integrated into one cadre is a matter of policy decision for the Government to take and the same cannot be the subject matter of challenge before the court unless the same in any way offends the provisions of Articles 14 and 16 of the Constitution. In the case of Chuba Jamir and Ors v. The State of Nagaland and Ors reported in (2009) 15 SCC 169, the Supreme Court has held that in the interest of administration it is open to the State Government, as a matter of policy, to bring about merger of post/cadres and ordinarily the matter does not warrant any interference by the court.

22. Similar view has been expressed by the Supreme Court in the case of Reserve Bank of India (Supra) which is quoted below :-

"15. Now, the first question which arises for consideration is whether the Reserve Bank violated the constitutional principle of equality in bringing about integration of non-clerical with clerical services. We fail to see how integration of different cadres into one cadre can be said to involve any violation of the equality clause. It is now well settled, as a result of the decision of this Court in *Kishori Mohanlal Bakshi v. Union of India* {AIR 1962 SC 1139} that Article 16 a fortiori also Article 14 do not forbid the creation of different cadres for Government service. And if that be so, equally these two Articles cannot stand in the way of the State integrating different cadres into one cadre. It is entirely a matter for the State to decide whether to have several different cadres or one integrated cadre in its services. That is a matter of policy which does not attract the applicability of the equality clause. The integration of non-clerical with clerical services sought to be effectuated by the Combined Seniority Scheme cannot in the circumstances be assailed as violative of the constitutional principle of equality."

23. In the proposal for restructuring dated 12-09-2003, the Additional Transport Commissioner had painted a detailed picture of the organisational set up existing at that point of time and had suggested corrective measures so as to improve the functional efficiency of the department. In the said report, ample justification has been furnished for merging the lone post of EO with DTO, which included proper explanation for conversion of the non-technical post (EO) to a Technical Post (DTO) for job flexibility. It was on consideration of the above aspects highlighted in the proposal dated 12-09-2003 that the Government had conveyed its administrative approval in the matter. The merit of the proposal for merger of two posts into one cadre cannot, therefore, be the subject matter judicial review.

24. The learned Single Judge had allowed the writ petition primarily on the ground that there was no notification issued in terms of Article 166 of the Constitution of India to show that the proposal for merger of the post of EO and DTO had been issued by the Government. The observations made by the learned Single Judge in paragraph 55, 56, 57, 58, 59, 60 and 61 are quoted herein below for ready reference :-

"55. On the perusal of the aforesaid letters/orders/notifications at Annexure-N to Annexure-Q, more particularly, letter at Annexure-N, Annexure-R and Annexure-S, I have found that all those communications clearly demonstrate that there was a proposal for merger of the post of "EO" with the post of "DTO" but said proposal has always remained in the stage of proposal only since there is absolutely nothing on record to show that the proposal for the merger of the post of "EO" with the "DTO" had ever been expressed and authenticated as required under Article 166 of the Constitution of India.

56. Being so, there cannot be any escape from the conclusion that the proposal for merger of the post of "EO" with the "DTO" has never been brought to its logical conclusion. In other words, on the date on which the Notification dated 08.10.2007 and Notification dated 15.06.2010 were issued which are impugned in the present proceeding, the post of DTO and the Post of EO in the Department

remain the post of two different cadres which make both the Notification aforesaid unsustainable in law.

57. Even one considers for one reason or other that the post of "DO" was merged with the post of "DTO" with effect from 06.05.2005, even then, he needs to conclude that the private respondent was born in the cadre of "DTO" only with effect from 06.05.2005 and not a day before. Since the petitioners had joined the Department as "DTO" well before 06.05.2005, the respondent No. 4 cannot be made senior to the petitioners inasmuch as it is a settled law that no one can claim seniority in a cadre from the date on which he was not born in such cadre.

58. One may note here that the private respondent claims that since her service was regularised well before the regularisation of services of the petitioners, she needs to be given seniority above the petitioners and having given her seniority above the petitioners, the State respondents committed no wrong whatsoever. We have already found that the post of "EO" and the post of "DTO" form two separate cadres in the Motor Vehicles Department and such posts have not yet been merged to form one cadre.

59. In view of above, the regularisation of the service of the respondent No.4 before the regularisation of the service of the petitioners cannot give the respondent No.4 seniority over the petitioners in the cadre of the "DTO". Being so, aforesaid claim of the respondents is also found to be without any substance and same is, therefore, required to be rejected.

60. Here, it may be mentioned that the respondents claim that under the Rules of 2010, the distinction between the post of "DTO" and thus post of "EO" has been done away with and as such, in terms of the Rule of 2010, the respondent No.4 became senior to the petitioners. This proposition has been disputed by the petitioners stating that under the Rules, 2010 too the distinction between the post of "EO" and the post of "DTO" has been maintained.

61. Without entering into the merit of the aforesaid claims, it needs to be stated that it is a cardinal principle Service Jurisprudence that the Service Rules cannot have retrospective effect. It is prospective in operation. Therefore, even if the post of "DTO" and the post of "EO" stood merged in to one cadre in view of the Rules of 2010, said service Rules had nothing to do with in so far the seniority of the petitioners and the respondent is concerned.

25. The findings and observations of the learned Single Judge appear to be based on the law declared by the Supreme Court in the case of Gulabrao Keshavrao Patil and Ors. v. State of Gujarat and Ors. reported in (1996) 2 SCC 26. In the said decision, the Supreme Court had observed that the Governor of the State being the head, the decision of the Minister under the Business Rules could not be final or conclusive until the requirements in terms of Clause (1) & (2) of Article 166 are complied with. The said observations were made by the Supreme Court in the context that until such an order is made in accordance with Article 166(1), the Government cannot be bound by what is stated in the file. The

decision in the case of Gulabrao Keshavrao Patil (Supra), in our respectful opinion, does not lay down any authority in support of the proposition that in the absence of any notification issued under Article 166 (1) & (2) of the Constitution of India, the decision/administrative approval of the Government would become non-est in the eye of law. From an analysis of the facts of this case, it is evident that the stand of the Government in the matter of integration of the posts of DTO and EO into a common cadre has all along been consistent and the same has eventually be re-affirmed in the form of the Rules of 2010.

26. In the case purshotom (supra) relied upon by Mr. Mishra it was a case where the Junior Engineers working on work charge basis were claiming benefit of seniority in service on their absorption in the regular establishment. In was in such factual background that the Supreme Court had held that seniority would be determined on the basis of their date of absorption in the regular cadre. Similarly, in the case of Panchraj Tiwari (supra) the post held by the appellant, who was working as Junior Engineer in the Rural Electricity Co-operative Society , Rewa, was merged with the Madhya Pradesh State Electricity Board after his original post was dissolved pursuant to a policy decision of the Government. The present is, however, not a case where the post of EO has been abolished and the incumbent EO had been merged with the cadre of DTO. As a matter of fact the Rules of 2010 makes it amply evident that both the posts of DTO and EO continue to exist but in a combined cadre. Therefore, the decisions cited by the learned senior counsel would be of no assistance to him in the facts of the present case. The Rules of 2010 assuredly integrates the two cadres of DTO & EO into one combined cadre. Since the Rules of 2010 are not under challenge, hence, we are not inclined to go into the question of validity of such integration as sought to be raised by Mr. Mishra.

27. Coming to the question of inter-se seniority of the candidates in the combined cadre, law is pretty well settled since the decision in the case of Desoola Rama Rao (supra) that in the absence of any rule of preference of one over the other, the determination of inter-se-seniority would be by the date of first appointment to the service. Even in the present case, the rules do not provide for any preference to be given to the DTOs in their seniority position in the combined cadre. Therefore, the seniority of the Officers in the combined cadre of DTO/EO obviously would have to be determined with reference to their date of joining the service under the department of Transport, Nagaland.

28. For the reasons stated above, we are of the considered opinion that the learned Single Judge was not correct in allowing the writ petition by interfering with the order dated 08/10/2007 as well as 15/06/2010. This appeal, therefore, must succeed and is hereby allowed. The impugned judgment and order dated 17/7/2014 passed by the Single Judge stands set aside.

29. No order as to costs.