
(2012) 09 GAU CK 0104
In the Gauhati High Court
Case No : W.A. 20 (K) of 2011

Smt. Keruupfeu

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 14-09-2012

Acts Referred:

Citation : (2013) 2 GLT 651 : (2013) LabIC 1507

Hon'ble Judges : Subhasis Talapatra, J;P.K. Saikia, J

Bench : Division Bench

Advocate : B.N. Sharma, assisted by Kekhrienengulie, for the Appellant; C.T. Jamir, learned Sr. Counsel assisted by Wati Jamir, for the Respondent

Final Decision : Allowed

Judgement

Subhasis Talapatra, J.—Heard Mr. B.N. Sharma, learned senior counsel assisted by Mr. Kekhrienengulie, learned counsel appearing for the appellant as well as Mr. C.T. Jamir, learned senior counsel assisted by Mr. Wati Jamir for the respondent Nos. 3 to 7 and Mrs. Y. Longkumer, learned senior Government Advocate for the respondent Nos. 1 and 2. The Writ Appeals being No. 20(K) of 2011 and Writ Appeal No. 21(K) of 2011 are tied up together for the reason that an identical question involved in these matters requires to be attended to.

2. In the writ petition being W.P.C. No. 284(K) of 2007, the appellant challenged the regularisation of the respondent Nos. 3 to 7 in the post of the Sr. Lecturer in the District Institute of Education and Training under the respondent No. 2. The Writ Appeal being W.A. No. 20(K) of 2011 has emerged therefrom. The appellant set in the writ proceeding being W.P. (C) 173(K) of 2007 for striking down the seniority list published by Office Memorandum No. EDS/DIET/I/05 (PT) dated 17.11.2006 (Annexure-M to the writ petition), wherefrom the Writ Appeal No. 21(K) of 2011 has emerged.

3. The learned single Judge by the separate judgments and orders dated 1.7.2011 has dismissed both the writ petitions on identical observations.

4. The essential fact that is required to be noted for purpose of appreciation is that, the petitioner was initially appointed as the Sr. Lecturer on contract basis by the order dated 30.3.1993 (Annexure-A to the writ petition being W.P. (C) No. 173(K)/2007) and her service was regularized as the Sr. Lecturer w.e.f. 16.1.2004 by the order dated 15.6.2005 (Annexure-C to the said writ petition). The respondent No. 3 in the writ petition 173(K) of 2007 was initially appointed on deputation by the order dated 30.10.1992 (Annexure-F to the writ petition) and absorbed in the cadre of Lecturer w.e.f. 15.1.2001 by the order dated 28.3.2001 (Annexure-G to the said writ petition) and thereafter he was promoted on officiating basis as the Sr. Lecturer w.e.f. 20.1.2001 vide order dated 20.9.2002 (Annexure-H to the said writ petition). Then he was appointed on deputation to the post of Sr. Lecturer w.e.f. 8.4.1997 by the order dated 20.9.2002 (Annexure-H/1 to the said writ petition). On the recommendation of the DPC, his service was regularised w.e.f. 20.1.2001 by the order dated 10.3.2005 (Annexure-H/1A to the said writ petition) and thereafter he was promoted on officiating basis in the post of Principal by the order dated 22.1.2007 (Annexure-J to the said writ petition).

5. The respondent No. 4 was appointed on contract basis in the post of Lecturer by the order dated 30.10.1992 (Annexure-F/1 to the said writ petition) and regularised in the post of Lecturer w.e.f. 15.1.2001 by the order dated 28.3.2001 (Annexure-G/1 to the said writ petition) and thereafter she was promoted on officiating basis w.e.f. 14.11.2003 by the order dated 20.11.2003 (Annexure-H/3 to the said writ petition) and regularised on the basis of the recommendation of the D.P.C. as the Sr. Lecturer w.e.f. 14.11.2003 by the order dated 8.11.2007 (Annexure-15 to the writ petition being W.P. (C) No. 284 of 2007).

6. The respondent No. 5 was also appointed on contract basis in the post of Lecturer by the order dated 30.10.1992 (Annexure-F/1 to the said writ petition being W.P. (C) No. 173(K) of 2007). She was regularized w.e.f. 15.1.2001 by the order dated 28.3.2001 and thereafter she was promoted on officiating basis to the post of Sr. Lecturer w.e.f. 14.11.2003 by the order dated 20.11.2003. On the recommendation of the D.P.C., her service was regularised in the cadre of Sr. Lecturer w.e.f. 14.11.2003.

7. The respondent No. 6 was appointed initially as the Lecturer on deputation basis by the order dated 18.2.1993 (Annexure-F/2 to the said writ petition) and got absorbed as the Lecturer w.e.f. 15.1.2001 by the order dated 28.3.2001 (Annexure-G to the said writ petition). He was also promoted as Sr. Lecturer on officiating basis w.e.f. 20.1.2001 by the order dated 20.11.2003 (Annexure-H/2 to the said writ petition) and regularized on recommendation of the D.P.C. to the post of the Sr. Lecturer w.e.f. 20.1.2001 by the order dated 8.11.2007 (Annexure-15 to the writ petition being W.P. (C) No. 284(K) of 2007). He was also promoted on officiating basis to the post of Principal by the order dated 22.1.2007 (Annexure-9 to the writ petition being W.P. (C) No. 284(K) of 2007).

8. The respondent No. 7 was appointed as the Lecturer on deputation by the

order dated 31.3.1993 (Annexure-F/3 to the writ petition) being W.P. (C) No. 173(K) of 2007 and she got absorbed as the Lecturer w.e.f. 15.1.2001 by the order dated 28.3.2001 (Annexure-G to the said writ petition being W.P. (C) No. 173(K) of 2007). Thereafter she was promoted on officiating basis as the Sr. Lecturer w.e.f. 20.1.2001 by order dated 20.11.2003 (Annexure-H/2 to the writ petition being W.P. (C) No. 173(K) of 2007). She was also regularized as the Sr. Lecturer on due recommendation of the D.P.C. w.e.f. 20.01.2001 by the order dated 8.11.2007 (Annexure-15 to the writ petition being W.P. (C) No. 284(K) of 2007) and further promoted after filing of the writ petition as the Principal on officiating basis by the order dated 1.10.2011 (Annexure-X to the affidavit in opposition filed by the respondent No. 1 in W.A. 20(K) of 2011).

9. On appreciation of the records, it transpires to the Court that the controversy is based on two points namely:

(i) Whether the regularization of the private respondents has been caused as the per the provisions of the Nagaland State Council of Educational Research and Training Services Rules, which has come into effect from 30.4.2007.

(ii) Whether the seniority position as drawn up by the State-respondents and as circulated by office memorandum dated 17.11.2006 (Annexure-M to the writ petition being W.P. (C) No. 173(K) of 2007 hereinafter referred as the said writ petition unless is otherwise indicated) has been settled in accordance with the provisions as relevant. The order that has been directed to be maintained by the State-respondents causing grievance of the appellant is reproduced hereunder:

1. Shri Yevito Sema, respondent No. 3 in the writ petition being W.P. (C) 173(K) of 2007, not a party in the proceeding being W.P. (C) 284(K) of 2007.

2. Shri Limatoshi Ao, respondent No. 6 of the said writ petition.

3. Mrs. Temsumenla (now deceased), never made a party in the proceedings.

4. Smt. Aiemla Jamir, the respondent No. 7 of the said writ petition.

5. Smt. Imlikokla Longchar, respondent No. 4 of the said writ petition.

6. Smt. Atula Wai, respondent No. 5 of the said writ petition.

7. Smt. Keruupfue, the writ petitioner.

10. Mr. B.N. Sharma, learned senior counsel appearing for the appellant submitted that in the schedule appended to the Nagaland State Council of Educational Research and Training Services Rules, 2003 which has been given effect from 30.4.2007 the following has been provided:

It appears that 75% of the post of Sr. Lecturer have to be filled up by way of promotion whereas 25% of the vacant posts shall be filled by direct recruitment by the Nagaland Public Service Commission. The writ petitioner-appellant was directly recruited but not in terms of the said rules, she was appointed by dint of the Government policy as embodied in the Memorandum No. AR-5/ASSO/98

dated 12.5.2004 (Annexure-B/1 to the said writ petition) issued by the Chief Secretary to the Government of Nagaland where it has been provided:

In partial modification of this Department Memorandum of even number dated 18th February, 2004, the Governor of Nagaland is pleased to order that the reference date of counting the years of Contract/Ad-hoc service as stipulated in the para 6 therein will be 16th January, 2004 and not 26th February, 2001. This means that those employees who have completed 5(five) years or more on 16th January, 2004 will be considered for regularisation in accordance with the para 3(a) and (b) of the aforesaid Memorandum.

11. As per the said policy the petitioner was absorbed in the post of the Sr. Lecturer against the direct recruitment quota. At the relevant point of time, the Nagaland State Council of Educational Research and Training Services

Rules were not in force, even though those rules were framed in 2003.

12. It appears from the minutes of the D.P.C. (Annexure-7 to the Affidavit-in-Opposition filed by the respondent No. 1 in W.P.C. 173(K) of 2007) that the private respondents were regularised in the post of Lecturer and Sr. Lecturer. The respondent No. 3 was recommended for regularization to the post of Lecturer w.e.f. 15.1.2001 and he was also recommended for regularization in the post of Sr. Lecturer w.e.f. 20.1.2001. The respondent No. 4 was recommended for regularization as the Lecturer w.e.f. 15.1.2001 and in the post of Sr. Lecturer w.e.f. 14.11.2003. The respondent No. 5 was recommended for regularization as the Lecturer w.e.f. 15.1.2001 and in the post of Sr. Lecturer w.e.f. 14.11.2003. The respondent No. 6 was recommended for regularization as the Lecturer w.e.f. 15.1.2001 and in the post of Sr. Lecturer w.e.f. 20.1.2001 whereas the respondent No. 7 was recommended for regularization to the post of Lecturer w.e.f. 15.1.2.011 and in the post of Sr. Lecturer w.e.f. 20.1.2001.

13. The said recommendations were accepted by the appropriate authority by the Notification dated 8.11.2007 (Annexure-C to the Affidavit in Opposition filed by the respondent No. 1) with effect from the date as recommended by the D.P.C. in the post of Lecture and Sr. Lecturer. The said Annexure-C, Notification dated 8.11.2007 was assailed by the appellant in W.A. 20(K) of 2011. The final seniority list as stated was published by the Office Memorandum dated 17.11.2006 (Annexure-M to the said writ petition) and that was put under challenge for obvious reason. The seniority position of the appellant was prejudicially affected for the said regularization with retrospective operation.

14. Mr. B.N. Sharma, learned senior counsel stoutly submitted that when the said Nagaland State Council of Educational Research and Training Services Rules came into operation w.e.f. 18.4.2007 all the incumbents including the private respondents are bound to be governed by the provisions of the said rules. It appears that no Sr. Lecturer can be appointed unless he or she completes continuous qualifying service of 5 years in the grade of Lecturer in the DIETs. It appears that while considering the retrospective promotion to the post of Sr.

Lecturer, the D.P.C. has completely ignored the said provision. As a result, even before the completion of 5 years of continuous qualifying service in the grade of Lecturer, the private respondents had been promoted to the post of Sr. Lecturer. Their promotions were given retrospectively and based thereupon the impugned seniority list was prepared. Mr. B.N. Sharma, learned senior counsel also submitted that the said action is grossly illegal and unsustainable inasmuch as there is no room for caprice on the face of the legal imperatives.

15. On the other hand, Mr. C.T. Jamir, learned senior counsel appearing for the private respondent Nos. 3 to 7 contended with sufficient vehemence that the said consideration was made by the D.P.C. on consideration of their officiating service. He further pointed out that this Court would find that those persons were initially appointed on the officiating basis when there was sufficient vacancies to appoint them on regular basis but the same was not done by the authorities and as such retrospective operation of their promotion cannot be treated illegal. He has shown that the private respondents were appointed on officiating basis prior to the appointment of the petitioner as the Sr. Lecturer even though on deputation basis and as such the petitioner cannot be allowed to contend that she has been affected adversely in any manner.

16. Mrs. Y. Longkumer, learned Sr. Government Advocate for the respondent Nos. 1 and 2 supported the contention of Mr. C.T. Jamir, learned senior counsel appearing for the respondent Nos. 3 to 7 and contended that if the retrospective operation of those promotions had not been given, they would have been deprived of their legitimate expectation. The consideration as made in the D.P.C. has not been challenged and the learned single Judge has rightly dismissed the writ petition.

17. Previous to our consideration of the rival contentions as advanced by the learned counsel for the parties, it would be appropriate to reproduce the findings of the learned single Judge on the basis of which both the writ petitions were dismissed.

14. The aforesaid minutes of the DPC meeting held on 17.1.2005 and 28.9.2007 on the basis of which the impugned orders were passed regularising his services of the private respondents 3 to 7 as Sr. Lecturers have not been challenged by the petitioner in this writ proceeding. The petitioner has challenged the orders which have been issued by the respondent-authorities consequent upon the recommendation of the DPC. If the recommendation of the DPC remains undisturbed as not being quashed, no order can be passed by the Court setting aside or quashing the consequential order of regularization of the private respondents. So also the further order of promotion to the post of Principal vide impugned order dated 22.1.2007 issued in favour of respondent Nos. 3 and 6. Judicially settled position is that irregular appointees cannot claim seniority over regular appointees though appointed earlier and absorbed in cadre and such irregular appointees should be treated as junior to regular appointees in the cadre. Reference in this regard can be made to a decision rendered by the Apex

Court in the State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, which has been followed by this Court in Nitoli and Others Vs. State of Nagaland and Others, . In the present case, no doubt, the petitioner was appointed directly as Sr. Lecturer on contract basis on 20.3.93 but her service as stated in the writ petition was regularized w.e.f. 16.1.04 as approved by the State Cabinet decision on 16.5.05. On the other hand, respondent Nos. 3 to 7, who were initially appointed/absorbed as Lecturers, were promoted to the post of Sr. Lecturers and their services were regularized as Sr. Lecturers w.e.f. 15.1.01. In respect of respondent Nos. 3, 4, 5, 6 and 7, they were regularized on 14.11.03. It means that the private respondents were in the cadre of Sr. Lecturers prior to petitioner who entered in the cadre of Sr. Lecturer much after on 16.1.04. This factual aspect is found to be undisputed inasmuch as the petitioner in her averments made in the writ petition as well as in her rejoinder to the counter-affidavit of the respondents, has not been rebutted. The petitioner has been claiming seniority over the private respondents under the 3:1 scheme granted by the State vide notification dated 16.11.2006. The benefits of past service under the ratio of 3:1 as stated earlier, has already been quashed and set aside by this Court vide judgment and order dated 28.5.09 as stated earlier and the petitioner admitting this position filed an affidavit on 8.6.09 stating that her claim in so far it relates to benefits under notification dated 16.11.06, has become infructuous except the other prayers. This Court is no longer burdened with the task of discussion on it but it must be said that by forgoing the scheme under aforesaid notification dated 16.11.06, the petitioner has weakened her claim for seniority position over the private respondents and her claim for further promotion to the post of Principal before such promotion is given to the private respondents. Considering thus, no challenge can be made by the petitioner to the impugned order dated 22.1.2007 whereby the respondent Nos. 3 and 6 have been promoted to the post of Principal.

15. In this case, the actual issue relates to encadrement and regularization in the post of Sr. Lecturer. It has been discussed and found that the services of the private respondents 3 to 7 were regularized before the service of the petitioner was regularized the service of the petitioner was regularized and they have been encadred earlier to the petitioner in the post of Sr. Lecturers. It may be proper to refer to the decision of the Apex Court in the State of U.P. Vs. Rafiquddin and Others, wherein it has been held that the employees must belong to the same stream before he can claim seniority vis-a-vis others. It was further held that those appointed irregularly who belong to a different stream cannot claim seniority vis-a-vis those, who may have been regularly and properly appointed. In the present case, the petitioner on her own statements and pleadings, admitted that she does not belong to the same stream to which the private respondents belong in the stream of 2002-2003 as Sr. Lecturer. The petitioner in fact, belongs to the stream of 2005. Thus, the petitioner and the private respondents cannot be regarded as Sr. Lecturers of same stream. The petitioner having been encadred subsequent to the private respondents, cannot claim

seniority. Moreover, the regularisation of the petitioner as Sr. Lecturer was done as per the approval of the Cabinet which is dehors the accepted rules and procedures as her case was never placed before the DPC and recommended by the DPC, whereas the regularization of services of the private respondents as Sr. Lecturers were done as per recommendation of the DPC constituted by the Govt. and there was no irregularity in such regularization. The respondent-authorities, therefore, committed no irregularities or mistake in preparing and publishing the impugned seniority list showing the inter se seniority position of the petitioner and private respondents placing the petitioner as junior to the private respondents in the cadre of Sr. Lecturer.

18. It transpires that the learned single Judge stated that if the recommendation of the D.P.C. had not been quashed no order can be passed quashing the consequential regularization or setting aside the final seniority list as published by the State-respondents at Annexure-M to the writ petition.

19. We have considered the reasons as assigned by the learned single Judge but unfortunately we cannot agree to such proposition of law. It is well settled that the recommendation of the D.P.C. is not binding upon even on the appointing authority. It is merely recommendation and the appointing authority has to examine the recommendation whether those were appropriate or not. The recommendation is an opinion of the expert for consideration of the appointing authority. The appointing authority thought it appropriate to reconvene the D.P.C. for arriving at a decision. It appears from the D.P.C. minutes that there was no consideration of the Nagaland State Council of Educational Research and Training Services Rules as was given effect from 30.4.2007 and hence the D.P.C. in all the cases made recommendation without relevant consideration of the said rules and their consequences so far regularization of the Sr. Lecturer was concerned and treaded a wrong premise. The D.P.C. did not look into the matter whether the private respondents have completed the required continuous qualifying service of 5 years in the feeder grade or not. Apart that, the law is well settled that the executive is well within its jurisdiction to reconvene the D.P.C. but while operating any regularisation retrospectively it has to take care that no prejudice is caused to the incumbent already in the cadre. Moreover, being in the grade for that matter has to be understood as being in the grade on regular appointment. Unless the qualifying service as prescribed is complete in the grade, there cannot be any lawful consideration.

20. Be that as it may in this case, the question that has been taken for consideration by this Court is confined to whether the State-respondent Nos. 1 and 2 have acted in accordance with the provisions of law while accepting the recommendation of the D.P.C. The answer is bound to be in the negative. The relevant provision as to the qualifying service as appearing in the Nagaland State Council of Educational Research and Training Services Rules, 2003, as given effect from 30.4.2007, was not at all considered by the D.P.C. while making recommendations for regularisation in the post of Sr. Lecturer and as such both

the recommendations of the D.P.C. as well as the notification, consequent thereupon, dated 8.11.2007 (Annexure-C to the Affidavit in opposition filed by the respondent No. 1) stand quashed.

21. This Court would not interfere with that part of the notification whereby the private respondents have been appointed in the cadre of Lecturer. This order has to be confined for the cadre for the Sr. Lecturer only. As consequential thereof, the respondent Nos. 1 and 2 are directed to take immediate steps for reconvening of the D.P.C. for purpose of fresh recommendation for regularisation of the private respondents in the post of Sr. Lecturer on strict observance of the rules as provided in the schedule appended to the said Rules, 2003 (effective from 30.4.2007) and thereafter to issue the appropriate order of promotion in the post of the Sr. Lecturer.

22. As corollary to this, the impugned seniority list is also struck down. The seniority position can only be settled after the reconvening of the D.P.C. for promotion to the post of Sr. Lecturer in terms of the provisions of the Nagaland State Council of Educational Research and Training Services Rules, 2003.

23. It is made clear that the private respondents who are now occupying the post of Principal of DIETs on officiating basis would be allowed to continue in their positions but that shall remain subject to the outcome of the recommendation of the D.P.C. and the consequential orders of promotion as would be made by the respondent Nos. 1 and 2.

24. For the reasons as stated above, the impugned judgment and order as passed by the Ld. single Judge is interfered with and set aside.

25. The exercise of reconvening the D.P.C. for making fresh orders of promotion to Sr. Lecturers in the DIETs and determining the seniority position in the said cadre has to be completed within a period of 6 (six) months from today without fail. In the meanwhile, no vacancy in the higher grade from the cadre of Sr. Lecturer shall be filled up by the State-respondents. Accordingly both the writ appeals stand allowed to the extent as indicated above. It is made clear that if the appellant is found suitable for the post of the Principal on completion of the exercise as directed, her appointment shall be made with expected expedition.

There shall be no order as to costs.