
(2009) 12 BOM CK 0062
In the Bombay High Court
Case No : Writ Petition No. 107 of 2002

Smt. Nikita Badkar

APPELLANT

Vs

State of Goa and Others

RESPONDENT

Date of Decision : 05-12-2009

Acts Referred:

Constitution of India, 1950 — Article 187, 187(3), 309
Goa Legislature Secretariat (Recruitment and Conditions of Service) Rules, 1988 — Rule 3

Citation : (2010) 2 BomCR 814

Hon'ble Judges : V.K. Tahilramani, J;N.A. Britto, J

Bench : Division Bench

Advocate : V.A. Lawande, for the Appellant; S. Vahidulla, Government Advocate for Respondent No. 1, A.N.S. Nadkarni and H.D. Naik, for Respondent Nos. 2 to 4 and M.S. Sonak, for the Respondent

Final Decision : Dismissed

Judgement

N.A. Britto, J.—The Petitioner herein started her career as a L.D.C. on 13-1-1988 in the Legislature Department, and has now been promoted as a Section Officer w.e.f. 20-3-2007, after filing of the petition.

2. Her grievance now appears to be that Respondent No. 5 could not have marched over her, in seniority by direct recruitment. As can be seen from Order dated 20-6-2008 the name of Respondent No. 5 figures at serial No. 14 and that of the Petitioner at serial No. 15, both being Section Officers in the said Department. Prior to the re-designation of the posts in the said Department, a Junior Assistant was known as a L.D.C. and a Section Officer was known as a Superintendent. The Petitioner's case is based on GDD Legislature Department (Non gazetted) Recruitment Rules, 1981 (RR of 1981, for short) by which the posts of Superintendents/Sections Officers, Assistants/Senior Assistants had to be filled in by promotion, failing which by transfer, and failing both, by direct recruitment. The entire case of the Petitioner is that Respondent No. 5 could not

have been appointed by direct recruitment. Her case is that either the Petitioner ought to have been appointed by giving relaxation of qualifying service or the post ought to have been filled in by transfer on deputation.

3. The case of the Petitioner, further is that the said Rules were amended by Notification dated 12-4-1993, and the method of filling of vacancies prescribed was by promotion failing which by transfer on deputation and failing which by direct recruitment, and the promotion had to be made from U.D.C's/Assistants having at least five years experience in the grade, and as far as the deputation is concerned, the Rules provided that the deputation would be from a suitable official holding analogous post under the Government of Goa and the deputation period was not to exceed three years. The case of the Petitioner at the time of filing of the petition was that there were four vacancies in the post of Senior Assistants and the Petitioner came to know that the same were being filled in by direct recruitment which advertisement did not confirm to the said Recruitment Rules which provided the age limit for direct recruitment as 35 years but the advertisement stipulated the age not to exceed 40 years, and moreover the educational and other qualifications under the said Recruitment Rules required Konkani and/or Marathi which requirement was dispensed with by the advertisement.

4. The case of the Petitioner is that the Department had to first explore the possibility of filling up the vacancy by promotion and in case it was not possible to fill up the vacancy by promotion due to unavailability of eligible candidate then the Respondents had to fill up the post on transfer by deputation and only when the vacancy could not be filled in by the above methods then only recourse could be taken to fill the vacancy by direct recruitment.

5. The case of the Petitioner further is that whenever there were vacancies to the post of Senior Assistants, the Respondents filled the same by promoting the Assistants even though they had not completed five years of service by giving relaxation in their period of service which in turn enhanced the chances of promotion of L.D.C's/Assistants to the higher grade. The Petitioner stated that one Ganpat Palni was promoted to Senior Assistant by Order dated 14-1-1998 by giving him relaxation of five months and that one Hemchand Talkar was promoted to Senior Assistant by giving him relaxation of more than one year. It was her case that she was the senior most Assistant in the cadre and had completed four years three months in service in the grade as in March, 2002, and, therefore the Department ought to have promoted the Petitioner to the post of Senior Assistant by giving relaxation for the period of service as was done in the cases of Ganpat Palni and Hemchand Talkar, and in case the Department did not wish to consider the Petitioner for promotion, to the post of Senior Assistant on account of lack of period of required service the Department ought to have filled up the vacancy by transfer on deputation, and thus it was not permissible for the Department to fill up the vacancy by direct recruitment when Rules provide that the same had to be filled in by transfer on deputation. It is the case

of the Petitioner that suitable officials holding analogous posts could be transferred on deputation for filling up the posts. The Petitioner therefore filed the present petition with the following reliefs:

a). by a writ of mandamus or any other appropriate writ, the Respondents be directed to fill up the vacancy to the post of Senior Assistant by promotion or by transfer on deputation.

aa). And further to quash and set aside the appointment of Respondent No. 5 and/or in the alternative to maintain the seniority rating of the Petitioner over and above that of Respondent No. 5 by commanding the Respondents to uphold the seniority status of the Petitioner over and above that of Respondent No. 5.

6. The Petitioner suppressed the fact that she had made a representation dated 21-3-2002 to the Secretary of the Department which was rejected by Memorandum dated 3-4-2002 by which the relaxation sought by her was declined, and she was further informed that on completion of the eligibility period of five years, that she would be entitled for being considered for the promotion to the post of Senior Assistant.

7. The petition has been contested by the Department, by affidavit filed of the Secretary to the Legislature Secretariat. According to him, the Petitioner has suppressed material facts. He has stated that Rule 3 of the Goa Legislature Secretariat (Recruitment and Conditions of Service) Rules, 1988 (RR of 1988, for short) provide that the recruitment to a post in the Goa Legislature Secretariat can be made either by promotion or by direct recruitment and that is the foremost Rule made by the Governor under Article 187 of the Constitution providing for an independent Secretariat for the Legislature. He has stated that the Petitioner has conveniently not referred to Rule 3, and has also not produced a copy of the said Recruitment Rules of 1988 along with the petition. He has further stated that the Petitioner has suppressed this material fact, and, therefore the petition is liable to be rejected.

8. Indeed, we find that Rule 3 of the RR of 1988 provides for the method of recruitment. It states that recruitment to a post or class of posts may be made by any one of the following methods i.e. (a) by promotion of a person employed in the Legislature Secretariat; (b) by direct recruitment.

9. The said Secretary has further stated that the petition suffers from laches, and that the Petitioner approached the Court when the entire recruitment process was about to be completed. He stated that the advertisement was published on 17-8-2001, and thereafter written test was held and an interview was also conducted. According to him, the RRs made applicable to the post of Senior Assistants, the incumbent who completes five years of service in the grade of Assistant is eligible to the post of Senior Assistant and that the Petitioner as on 31-3-2002 the Petitioner had completed two years and seven months of service on ad hoc basis and regular service of one year and eight months in the grade of Assistant, and since the Petitioner did not fulfill the requirement of five years of

service in the grade as required under the RRs, and without prejudice, even if the Petitioner's ad hoc service was to be counted, she fell short of nine months of service and in case her ad hoc service was not counted she fell short of three years and three months of service to that of five years as required under the RRs. He stated that the Petitioner's representation dated 21-3-2002 was examined, and after examination of the Petitioner's service records, her application for relaxation was rejected and was duly communicated to her. He stated that the Petitioner did not have five years of qualifying service, and, therefore the Petitioner was not considered for promotion, and since there was no other candidate having five years of qualifying service, the Department adopted the mode of direct recruitment as per Clause 3 of the said Recruitment Rules of 1988. He further stated that the Goa Legislature Secretariat is constituted under Article 187 of the Constitution of India and is not a Government Department, and the Petitioner cannot insist for deputation of Government employees in the State Legislature as the nature of duties in the State Legislature are different from the duties prescribed for the post in the Government Department, and that is the reason why separate RRs were brought into force, and in accordance with the Constitution and in accordance with the principle of separation powers. He further stated that two vacancies for the post of Senior Assistants of the year 2001 were advertised and around 2000 candidates appeared out of which about 67 candidates passed the tests and they were called for an essay writing competition in English on 2-4-2002 for assessing their drafting skills, and out of those 14 candidates were called for oral interview on 5-4-2002, and out of the two vacancies one was reserved for Scheduled Castes and as no Scheduled Caste candidate was found fit in the examination even after relaxation of standards, it was required to carry forward the said vacancy for the next recruitment drive and one candidate was selected by name Shri Rajiv S. Kulkarni, and he was offered the appointment subject to the outcome of the petition. It is further stated that nothing prevented the Petitioner from participating in the recruitment process, in case she was confident of her mettle, and she could have herself got selected for the post.

10. It is stated that the RRs of 1981 were framed when Goa, Daman & Diu was an Union Territory, and Goa having attained statehood in 1987, Article 187 was invoked to frame Recruitment Rules for the Goa Legislature Secretariat which has now become a separate and independent Secretariat, and the Governor after consultation with the Speaker has framed the RR of 1988 which contained the said Rule 3, and which mandates only two methods of the recruitment to the posts of Goa Legislature Secretariat, and that is to say by promotion and direct recruitment. It is stated that there is no express provision of repeal in the Goa Legislature Secretariat Rules, 1988 framed under Article 187 of the Constitution of India, and that the said Rules did not contain a schedule detailing out qualification, eligibility period for promotion and thus the schedule to the Recruitment Rules, 1981 continued to be followed. However, the method of recruitment mentioned in the schedule (Promotion, Deputation and Direct

Recruitment) stood superseded in view of Rule 3 of the Recruitment Rules, 1988, and which in terms of Rule 3 of the 1988 Rules, recruitment would be confined to two methods that is by promotion and direct recruitment, and to the extent the RRs of 1981 were repugnant to the Rules of 1988, the Rules of 1981 are void by implied repeal. In 1993, the schedule to RR of 1981 has been amended to restore the provision for deputation but the said amendment of 1993 is void since it amended a provision in the Recruitment Rules, 1981 which was non-existent and became invalid due to repugnancy with Clause 3 of the RRs of 1988, and as long as Rule 3 is part of RRs of 1988 and operates without amendment to it, Clause 3 will hold the field as far as the recruitment methodology is concerned, and the amendment made in 1993 cannot be enforced, as Rule 3 of 1988 Rules remained unamended and in case there is a conflict in the main provision and supplementary provisions in the schedule, it cannot be held that the scope of an express provision in the main Rule is subjected to texts in the schedule to the main Rule. On the other hand, it should always be held that the express provision in the main Rule determine and restrict the scope and operation of what is contained in the schedule and the schedule should be given way to the main Rule. It is stated that the methodology mentioned in the schedule to the Recruitment Rules of 1981 stands superseded with the advent of the Recruitment Rules of 1988 which were framed afresh under Article 187 of the Secretariat of the Goa Legislative Assembly which came into being after Goa attained statehood and once the Rules of 1988 took over, the methodology has been clearly stated in the body of the Rules itself, which confines the recruitment to promotion and direct recruitment. It is stated that the Petitioner has referred to the amendment made in 1993 to the Rules of 1981, and that by the said amendment, Rule 3 of the Rules of 1988 has not been amended, and, therefore the Petitioner cannot insist that the post should be filled by deputation upon failure to fill the post by direct recruitment.

11. Respondent No. 5 has also filed his affidavit. According to him, the Petitioner has no locus standi to file the petition as she was not eligible for promotion to Senior Assistant, as she did not have five years regular service as assistant in terms of RRs. Respondent No. 5 has stated that the Petitioner has suppressed material facts by not disclosing the relevant RRs which are relevant for the purpose of the petition. Respondent No. 5 has further stated that the Petitioner was promoted as Senior Assistant on 17-5-2005 and the Petitioner and he were promoted to Section Officers on 20-3-2007 and as such the Petitioner cannot have grievance against his appointment to the post of Senior Assistant in the year 2002. As far as the age is concerned, Respondent No. 5 has stated that the Governor by virtue of Notification dated 9-5-2001 was pleased to amend all the Rules in respect of Class C and Class D employees and in terms thereof the age was enhanced from 35 to 40 years and even otherwise Respondent Nos. 1 to 4 had power to relax age. Respondent No. 5 has also stated that there was no analogous post in the Government to the post of Senior Assistant whose duties are entirely different and which he was performing. He has also stated that he is

a law graduate who has left the legal profession to join the post and in case his appointment is interfered with, it will cause irreparable loss to him. He has stated that the Petitioner is not a law graduate.

12. Shri V.A. Lawande, learned Counsel on behalf of the Petitioner, in terms of the petition has submitted that the Department had relaxed qualifying years of service in the case of two candidates, namely, Ganpat Palni and Hemchand Talkar and they could have done the same in the case of the Petitioner. He further submits that the Petitioner was falling short of only nine months and in case the Petitioner was unsuitable then the Department, in terms of the Rules had to bring a candidate on transfer, that being the next option available to the Department. Learned Counsel further submits that the advertisement published was contrary to the Rules which otherwise provide the age of 35 years and which could be relaxed only in the case of Government servants. Learned Counsel has submitted that the Department was to follow the Recruitment Rules of 1981 and could not have filled the post by direct recruitment without first exhausting the second available mode that is to say by filling the post by a candidate on deputation.

13. The cases cited on behalf of the Petitioner, by learned Counsel are hardly of any relevance to the facts of the case at hand. In *The Union of India v. Shri A.R. Shinde and Anr.* : AIR 1987 SC 1004 what was held was that as there was no candidate eligible for appointment by promotion, appointment made by the next mode of transfer on deputation could not be considered as illegal in not anticipating that the candidate of promotion category would become eligible by acquiring three years experience on the date of extension of initial appointment. That was a case where the appointment on transfer was made initially for six months and then extended for two years. In the case of *Dr M.A. Haque and Others Vs. Union of India (UOI) and Others*, the Apex Court deprecated the practice of making appointments contrary to the Rules framed under Article 309 of the Constitution and by bypassing the Public Service Commissions and in the case of *Gujarat Housing Board Engineers Association and Another Vs. State of Gujarat and Others*, the Apex Court, considering the Service Rules in question held that an appointment on deputation could be made only in case a suitable candidate was not available in the Department. That was a case where the Service Rules had provided appointment by three modes, namely, by promotion, deputation and direct recruitment.

14. Admittedly, the RRs of 1981 held the field prior to the framing of the Recruitment Rules of 1988. As can be seen from the RRs of 1988 they have been framed by the Governor after consultation with the Speaker in exercise of powers conferred under Article 187(3) of the Constitution. As per the RRs of 1981 the posts of Section Officers or for that matter Senior Assistants had to be filled in by promotion, failing which by transfer and failing both, by direct recruitment. Then, after Goa attaining statehood the RRs of 1988 came to be framed, and as already seen, Rule 3 thereof provides for only two modes of recruitment that is

to say by promotion and by direct recruitment. If the Respondents are silent on the matter of filling up the post by transfer on deputation, as contended by learned Counsel, on behalf of the Petitioner, the Petitioner has maintained a deafening silence on the very existence of RRs of 1988. However, inspite of the said RRs of 1988 have been brought into force, an amendment came to be issued to the RRs of 1981, by which column Nos. 6, 10 and 11 of the Schedule were substituted. In fact these are only clarifications. For example Column No. 6 was to be read from 35 years (relaxable for Government servants to not exceeding 35 years) (relaxable for Government servants by five years). Likewise, Clause 10 was to be read from promotion, failing which transfer, failing both direct recruitment to promotion, failing which transfer on deputation, failing both direct recruitment. One fails to understand the need or the motive of the Under Secretary of the Department to have issued the said amendment to the RRs of 1981 as sought to be done by Notification dated 12-4-1993 published on Gazette dated 6th May, 1983(at page 21 of the paper book). Learned Senior Counsel appearing on behalf of Respondent Nos. 1 to 4 fairly concedes that issuance of Notification was a mistake which needs to be corrected, and states that it will be corrected. We accept the statement.

15. The Petitioner has not only suppressed that her representation dated 21-3-2002 was rejected by the Department by Memorandum dated 3-4-2002 but has also suppressed the very existence of RRs of 1988, which indeed provide only for two modes of recruitment namely by promotion and by direct recruitment. On this count alone, the petition deserves to be dismissed.

16. There is no challenge to the said RR of 1988 which are still in force. It is also not the case of the Petitioner either in the petition or at the time of hearing that the RR of 1981 as amended, prevail over RR of 1988. With the framing of RRs of 1988 in accordance with the Constitution, there will now be only two modes of recruitment namely, promotion and direct recruitment and not three. As rightly pointed out on behalf of the Respondents as long as Rule 3 of the RRs of 1988 holds the field and provides only for two methods of recruitment, namely by promotion and by direct recruitment, filling of the posts of the Senior Assistants by direct recruitment could not be faulted. The Department itself is to be blamed for creating a confusion in the minds of the Petitioner and the like by carrying out a so called amendment to the RRs of 1981 when RRs of 1988 constitutionally framed held the field. Sooner, the amendment is withdrawn, better it will be to all concerned. Admittedly, the Petitioner was not qualified to be appointed as Senior Assistant. It would have been too much to have granted her relaxation of three years, three months and her representation was rejected, rightly. If the requirement for promotion was five years in the grade, that had to be necessarily on a regular basis and not ad hoc or stop gap. The decision in the case of Union of India and Ors. v. K.B. Rajoria AIR 2000 SC 1819 is of no assistance to the Petitioner. Since there is no challenge to the RRs of 1988 in the present petition, and since direct recruitment was done to the post of Senior Assistant as there were no persons qualified to fill the post by promotion, filling the post by direct

recruitment, in our view, could not be faulted. As regards age, the Government itself by Notification dated 9-5-2001 had provided in case of Class C and D posts that the age should not exceed 40 years and that being the case, Respondent Nos. 2 to 4 could not be faulted in prescribing the same when they invited applications for the filling of the post of Senior Assistant with age limit of not exceeding 40 years. The appointment of Respondent No. 5 is in accordance with the RR of 1988 which are very much in force. The petition therefore is without merit and is liable to be dismissed with costs of Rs. 5000/to be paid by the Petitioner to Respondent No. 5. Rule discharged.