

(1997) 05 GAU CK 0022

In the Gauhati High Court

Case No : Writ Appeal No. 29 of 1996 and Civil Rule No. 2 10 of 1996

State of Tripura : Sukumar Chhetri

APPELLANT

Vs

Prafulla Kumar Das : State of Tripura

RESPONDENT

Date of Decision : 02-05-1997

Acts Referred:

Citation : (1997) 2 GLJ 128 : (1997) 2 GLT 497

Hon'ble Judges : A.K.Patnaik, J and N.G.Das, J

Bench : Division Bench

Advocate : A.Chakraborty, A.Lodh, A.M.Lodh, A.Ghosh, S.Deb, S.Bhowmik, P.Pal, P.K.Paul, M.Dutta, Advocates appearing for Parties

Judgement

A. K. Patnaik, J.—As a common question of fact and law arises in the writ appeal and in the civil rule, they are being disposed of by this common judgment.

2. The facts, briefly, are that by an order dated 17.1.90, the Inspector General of Prisons, Tripura notified that a departmental examination for promotion to the post of Chief Head Warder would be held on 19th & 20th February, 1990 at Agartala Central Jail and all Head Warders and Warders who had completed five years of service on the 1st day of January, 1990, were eligible for appearing in the departmental examination. Along with the said order, the syllabus for the departmental examination was also enclosed. Thereafter, on 17.4.90, the Joint Secretary cum Inspector General of Prisons, Tripura, issued a Memorandum stating that all those Warders/Head Warders who had appeared in the departmental examination for the purpose of departmental promotion to the posts of Head Warders and Chief Head Warders and had got 50% marks were declared to have passed the departmental examination and were not required to appear in future in the departmental examination for the purpose of promotion. In the said Memorandum, however, it was clarified that for such promotion in future, ACRs and service records would be taken into account. The case of the respondents 1 to 4 in Writ Appeal No.29 of 1996 and the case of respondents 4 to 7 in Civil Rule No.210 of 1996 is that they have taken the said departmental

examination and they have passed the same, and their names have been included in the list of successful candidates. Further case of the aforesaid private respondents is that on the basis of the said select list of candidates who had passed the departmental examination, promotions to the posts of Head Warders and Chief Head Warders were made from time to time; but when the turn of the said private respondents for promotion came, the Govt. of Tripura in the Jail Department by memo dated 6th April, 1994, cancelled the earlier memorandum dated 17.4.90 and further notified that the results of the departmental examination held in March, 1990, of the Warders and Head Warders for promotion to the posts of Head Warders and Chief Head Warders shall have no effect for the purpose of the aforesaid promotion and for such promotions a fresh departmental examination would be held as and when required. Aggrieved by this memo dated 6.4.94 of the Govt. of Tripura in the Jail Department, the private respondents 1 to 4 in Writ Appeal No.29 of 1996 filed Civil Rule No.202 of 1994 in this Court under Article 226 of the Constitution, and after hearing the learned counsel for the parties, the learned Single Judge by judgment and order dated 7.3.96 quashed the impugned memo dated 6.4.94, and further directed the appellants in the writ appeal to consider the case of the said private respondents and the selected persons who were similarly situated with the private respondents for appointment on promotion to the posts of Chief Head Warders and Head Warders on the basis of the said select list preferably within a period of two months from the date of receipt of the judgment and order, and pass necessary orders in the matter.

3. Aggrieved by the said judgment and order dated 7.3.96 in Civil Rule No.202 of 1994 of the learned Single Judge, the State appellants have preferred this appeal. Since by the said judgment, the memo dated 6.4.94 of the Government of Tripura in the Jail Department cancelling the earlier memo dated 17.4.90 has been quashed, seven writ petitioners in Civil Rule No.210 of 1996 have challenged the earlier memo dated 17.4.90 of the Joint Secretary cum Inspector General of Prisons, Tripura in the said civil rule.

4. At the hearing of the writ appeal, Mr. A. Chakraborty, learned Advocate General, Tripura, submitted that Appendix 29 to the Civil Service Regulations the procedure for making promotions and functioning of the Departmental Promotion Committees of the Central Govt. has been adopted by the State Govt. of Tripura and Rule XII. 1 of the said Appendix stipulated that the panel drawn up by DPC would normally be valid for one year and in any case, it would cease to be in force on the expiry of a period of one year and six months or when a fresh panel is prepared, whichever is earlier, under the said rule, therefore, any select list prepared for promotion cannot remain valid for more than one year and six months in any case. Hence the memo dated 17.4.90 declaring the list of successful candidates for promotion to the posts of Head Warders and Chief Head Warders had long since lapsed after one year and six months and, therefore, the Govt. of Tripura in the Jail Department had for this reason among other reasons cancelled the said memo dated 17.4.90, and the action taken by the Govt. was in

accordance with the rules and was not arbitrary and should not have been quashed by the learned Single Judge by the impugned judgment and order dated 7.3.96.

5. Mr. S. Deb learned counsel appearing for the writ petitioners in Civil Rule No 210 of 1996 relying on paragraph 11 of the writ petition, submitted that only those Warders who had completed 5 years of service as on 1.1.90 were allowed by memo dated 17.1.90 issued by the Inspector General of Prisons, Tripura, to take the departmental examination as under the recruitment rules they were eligible for promotion to the posts of Head Warders and Chief Head Warders; and the petitioners No.5,6 and 7 could not sit in the said departmental examination because as on 1.1.90 they had not completed five years of service. As a consequence of memo dated 17.4.90 declaring that all those Warders and Head Warders who has appeared in the departmental examination held in March, 1990, for the purpose of departmental promotion to the posts of Head Warders and Chief Head Warders and got 50% marks were not required to appear in future in the departmental examination for the purpose of such promotion, no departmental examinations were being held for selecting candidates and the said writ petitioners were deprived of their rights of equal opportunity in matters of promotion to the higher posts guaranteed under Articles 14 and 16 of the Constitution. Mr. Deb stated that since the memo dated 17.4.90 had been cancelled by memo dated 6.4.94 of the Govt. of Tripura, Jail Department, the petitioners did not challenge the said memo dated 17.4.90 before this Court earlier; but now that the said memo dated 17.4.90 has been received by the judgment and order of the learned Single Judge dated 7.3.96 quashing the said memo dated 6.4.94 of the Govt. of Tripura in the Jail Department, the petitioners have filed the present Civil Rule No.210 of 1996 for appropriate relief.

6. Mr. AM Lodh, assisted by Mr. A. Lodh, learned counsel appearing for the private respondents in both writ appeal and the civil rule, on the otherhand, sought to sustain the judgment and order of the learned Single Judge dated 7.3.96 in Civil Rule No.202 of 1994. Learned counsel for the private respondents contended that by the said judgment, the learned Single Judge has rightly held that by memo dated 17.4.90 certain rights have been conferred and that those rights could not be taken away without following the principles of natural, justice. They further argued that after the issue of memo dated 17.4.90 declaring the list of successful candidates for promotion, several candidates have been promoted to higher posts of Head Warders and Chief Head Warders during the years 1990 to 1994, and when the chances of the present private respondents for such promotion came; the State Govt. has acted in a discriminatory manner and cancelled the memo dated 17.4.90. In support of their submission, they cited the judgment of the Supreme Court in the case of Asha Kaul (Mrs) & another vs State of J&K & others, (1993) 2 SCC 573, where the Supreme Court has held that the Govt. cannot pick and choose candidates out of select list. They further relied on a judgment of the learned Single Judge of this Court in the case of Ramesh Singh Nath vs State of Assam, 1994 (1)GLJ 532, in which

candidates duly selected for appointment to the post of constable were denied appointment on the ground that the select list remained valid for one year. But the learned Single Judge held that the candidates had a right to be appointed on the basis of selection to the existing vacancies and directed the State respondents to appoint them within a period of three months.

7. We have perused the judgment of the learned Single Judge impugned in the writ appeal and we find that the learned Single Judge has held that on the basis of memo dated 17.4.90, the private respondents had certain rights, namely; that they were successful candidates in the departmental examination; they had got 50% marks; they were not required to appear in future in the departmental examination for the purpose of promotion; and their promotion would be considered on the basis of their ACRs and service records. The learned Single Judge has further held that the aforesaid rights of the writ petitioners/private respondents had been taken away by memo dated 6.4.94 as a result of which the writ petitioners/private respondents were required to appear in the flesh departmental examination as and when required by the authority concerned in future, and this had been done without any notice and reasonable opportunity of being heard being afforded/given to the private respondents. On the basis of the aforesaid finding, the learned Single Judge quashed the memo dated 6.4.94; but held that the Court could not compel the appellants Govt. to appoint the writ petitioners/private respondents on promotion to the posts of Chief Head Warders and Head Warders on the basis of the select list/result by issuing a writ of Mandamus. Learned Single Judge however observed that in the existing facts and circumstances of the case, he hoped and trusted that the Govt. appellants would consider the case of the private respondents and selected persons/candidates who were similarly situated for appointment on promotion to the posts of Chief Head Warders and Head Warders on the basis of the select list preferably within a period of two months from the date of receipt of the judgment and order and pass necessary orders in the matter. The question for determination in the present writ appeal is as to whether the aforesaid findings of the learned Single Judge are sustainable in law, and the answer to this question will depend upon the provisions in the relevant rules.

8. Copies of the recruitment rules for the posts of Chief Head Warders and Head Warders framed under Article 309 of the Constitution and notified under Notification dated 10th August, 1982, have been annexed to the writ appeal and civil rule as Annexure 1 and 2. In column 5 of the recruitment rules for the post of Chief Head Warders under the Jail Department, Tripura, it has been indicated that the said post of Chief Head Warder is a selection post and hence the appointment to the post of Chief Head Warder has to be made on merit. In column 10 of the said recruitment rules, it has further been indicated that the method of recruitment would be by promotion failing which by direct recruitment, and in column 11 thereof it has been stated that such promotion would be from amongst Head Warders and such Warders who have completed five years of service as Warder on the 1st day of January of a year in which DPC

is convened on the basis of departmental examination as prescribed by the State Govt.. Accordingly, all Head Warders and such Warders who have completed five years of service as Warders on the 1st day of January of the year in which DPC is to be convened are eligible to be considered for appointment on promotion to the post of Chief Head Warders. This being the position in the recruitment rules, in every year in which DPC is convened for promotion to the post of Chief Head Warder which has fallen vacant, all Head Warders and such Warders who have completed five years of service as Warders on the 1st day of January of that year are eligible to be considered for promotion to the post of Chief Head Warder and in case they are not considered for promotion on the basis of their merit, their rights under the said recruitment rules as well as under Articles 14 and 16 of the Constitution, i.e. equality in the matter of promotion, would be adversely affected. Similarly, in column 5 of the recruitment rules for the post of Head Warder under the Jail Department, it has been stated that the said post is a selection post meaning thereby that the appointment to the said post has to be made on merit. In column 10 of the said recruitment rules, it has been stated that the method of recruitment to the said post would be by way of promotion failing which by way of direct recruitment, and in column 11 thereof it has further been stated that the promotion to the said post would be from amongst the Warders with minimum five years of service in the grade subject to passing of departmental examination as prescribed by the State Govt.. The result is that all Warders with minimum five years of service in the grade and who have passed the departmental examination as prescribed by the State Govt. are entitled to be considered for promotion to the post of Head Warder on the basis of merit not only by virtue of the aforesaid recruitment rules but also in furtherance of their right of equality in the matter of promotion as guaranteed under Articles 14 and 16 of the Constitution,

9. If there rights of the eligible Warders and Head Warders under the recruitment rules and Articles 14 and 16 of the Constitution for being considered for promotion to the higher posts on the basis of merit are not to be violated, they have to be given an opportunity to compete on merit with all other eligible Warders and Head Warders for promotion to the respective higher posts and any action of the authorities in depriving such eligible Warders and Head Warders to take the departmental examination for the purpose of promotion to the higher posts would be violative of the recruitment rules as well as the provisions of Articles 14 and 16 of the Constitution. The object of Rule XII. 1 of Appendix 29 to the Civil Service Regulations adopted by the State Govt. of Tripura stipulating that a panel prepared by the DPC for promotion will remain valid till the next selection or for one year or for one year and six months at most is only to ensure that Govt. servants are not deprived for their right to be considered for promotion to higher posts as and when vacancies occur during different years. But by Memo dated 17.4.90, it was declared that all those who had taken the said departmental examination and got 50% marks in the said departmental examination were not required to appear in future at the departmental

examination for the purpose of promotion as a consequence of which no departmental examinations have been held during the period from April, 1990 to March, 1994, and all Head Warders and all Warders who became eligible for promotion to the posts of Chief Head Warders and Head Warders after 1.1.90 did not get the opportunity to take the departmental examination and have been deprived of their said rights to be considered for promotion to the higher posts. In case, the Govt. now remedied the situation and issued the Memo dated 6.4.94 directing that the result of the departmental examination held in March, 1990, of Warders and Head Warders for promotion to the posts of Head Warders and Chief Warders would have no effect for the purpose of the aforesaid promotions and that fresh departmental examination would be held as and when required, we fail to see how such an order violates the rights of the private respondents. In our opinion, the finding of the learned Single Judge in the judgment and order impugned in the present writ appeal that the private respondents acquired certain rights on the basis of Memo dated 17.4.90 may be right in the sense that the successful candidates in the departmental examination held in March, 1990, who had got 50% marks were not to appear in another departmental examination for the purpose of promotion; but the said rights of the successful candidates, in our opinion, were subject to the recruitment rules, Rule XII.1 of the Appendix 29 to the Civil Service Regulations, adopted by the State Govt. of Tripura, and the provisions of Articles 14 and 16 of the Constitution under which the Warders and the Head Warders who became eligible for consideration for promotion to higher posts after 1.1.90 were also entitled to take the departmental examination and compete with the successful candidates, such as the private respondents, for promotions to higher posts in future. We are also of the considered opinion that as the action taken by the State Govt. of Tripura in the Jail Department under Memo dated 6.4.94 not to give any further effect to the result of the aforesaid departmental examination held in March, 1990, for the purpose promotion to the posts of Head Warders and Chief Head Warders and to hold fresh departmental examination as and when required for promotion was consistent with the said recruitment rules, Rule XII.1 of Appendix 29 to the Civil Service Regulations, adopted by the State Govt. of Tripura, and Articles 14 and 16 of the Constitution no notice or reasonable opportunity of hearing was required to be given to the private respondents before the said Memo dated 6.4.94 was issued, and the said Memo could not be quashed on the ground that it was issued in violation of the principles of natural justice.

10. In the decision of the Apex Court in the case of *Asha Kaul (Mrs) & another vs. State of Jammu and Kashmir & others* (supra), cited by Mr. AM Lodh, learned counsel appearing for the private respondents, the Supreme Court has held in paragraph 8 that mere inclusion in the select list does not confer upon the candidates included therein an indefeasible right to appointment and has quoted the judgment of the Constitution Bench of the Apex Court in *Shankar Sanjay Das vs. Union of India*, (1991) 3 SCC 47, in which the Constitution Bench held that on selection, the selected candidates did not acquire any right to the post, and

unless the relevant recruitment rules so indicated, the State was under no legal duty to fill up all or any of the vacancies. In the said judgment in the case of *Asha Kaul vs. State of Jammu and Kashmir* (supra), the Supreme Court while interpreting Rules 39 and 41 of the Jammu and Kashmir Civil Services (Judicial) Recruitment Rules, 1967 observed:

"..By merely approving the list of twenty, there was no obligation upon the Govt. to appoint them forthwith. Their appointment depended upon the availability of vacancies. A reading of Rule 41 makes this aspect clear. The list remains valid for one year from the date of its approval and publication. If within such one year, any of the candidates therein is not appointed, the list lapses and a fresh list has to be prepared. In this case, no doubt, a number of complaints appear to have been received by the Govt. about the selection process. We have seen the note file placed before us. It refers to certain facts and complaints. But if the Govt. wanted to disapprove or reject the list, it ought to have done so within a reasonable time of the receipt of the select list and for reasons to be recorded. Not having done that and having approved the list partly (thirteen out of twenty names), they cannot put forward any ground for not approving the remaining list. Indeed, when it approved the list to the extent of thirteen, it ought to have approved the entire list of twenty or to have disapproved the entire list of twenty. The objections the Govt. have pertain to the very process of selection i.e., to the entire list, and not individually to any of the remaining seven candidates." (emphasis supplied)

In the aforesaid judgment, the Supreme Court has held that during the period of one year when the select list remains in force under the rule, the Govt. cannot pick and choose from the list and fill up the vacancies as and when they arise but if within such one year, any of the candidates therein is not appointed, the list lapses and a fresh list has to be prepared. In the instant case, the list that was prepared in April, 1990, on the basis of the departmental examination held in March, 1990, amongst the candidates who were eligible for promotion as on 1.1.90 cannot possibly continue to be valid for more than three years contrary to the provisions of the recruitment rules and Rule XII.1 of Appendix 29 to the Civil Service Regulations adopted by the State Govt. of Tripura.

11. Coming now to the decision of the learned Single Judge in the case of *Ramesh Singh Nath vs. State of Assam* (supra), cited by Mr. Lodh, learned counsel appearing for the private respondents, the learned Single Judge himself clarified in paragraph 4 of the judgment that there may be cases where because of change in circumstances, there may be the extreme necessity to cancel the previous select list and come for fresh appointment, but this cannot be resorted to generally without bonafide and honest reason, otherwise the selection made earlier by the authority giving legitimate expectation in the minds of the candidates shall be belied. In that particular case, however, the learned Single Judge found that there was absolutely no material to show for what reason the earlier select list was given a go by and a fresh advertisement was made. In the

instant case, on the other hand, we have found that under the recruitment rules, Appendix 29 to the Central Service Regulations, adopted by the State Govt. of Tripura, and the provisions of Articles 14 and 16 of the Constitution, the list of successful candidates for such promotions on the basis of the departmental examination held in March, 1990. could not continue to remain valid any longer and was cancelled by order dated 6.4.94 by the Govt. of Tripura in the Jail Department consistent with the aforesaid Rules and the Constitution.

12. For the reasons stated above, the impugned judgment and order dated 7.3.96 of the learned Single Judge passed in Civil Rule No.202 of 1994 is set aside and the Writ Appeal No.29 of 1996 is allowed. Since by this judgment, the order dated 6.4.94 of the Govt. of Tripura in the Jail Department, cancelling the earlier Memo dated 17.4.90, and directing that for future promotions to the posts of Head Warders and Chief Head Warders, fresh departmental examination would be held as and when required, becomes operative again, the grievance of the writ petitioners in Civil Rule No.210 of 1996 has been redressed and it is not necessary for us to quash the Memo dated 16/17.4.90. With this observation, Civil Rule No.210 of 1996 is also disposed of.

However, considering the entire facts and circumstances of the case, we leave the parties to bear their own costs.