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**(1993) 07 GAU CK 0017**  
**In the Gauhati High Court**  
**Case No : Civil Rule No. 119 (K) of 1992**

Toluvi Kibami

APPELLANT

Vs

State of Nagaland

RESPONDENT

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**Date of Decision :** 16-07-1993

**Acts Referred:**

Constitution of India, 1950 — Article 226, 226

**Citation :** (1993) 2 GLJ 199

**Hon'ble Judges :** W.A.Shishak, J

**Bench :** Single Bench

**Advocate :** T.Koza, D.K.Mishra, C.Jajo , B.N.Sharma, Advocates appearing for Parties

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## Judgement

1. In this application under Article 226 of the Constitution the petitioner questions legality of Government Notification dated 26th March 1991 by which the respondent 3 was promoted and appointed to the post of Additional Chief Engineer, PHFD on the grounds that respondent 3 is not qualified to be appointed as Additional Chief Engineer in terms of Rule 7 and Schedule VI of the Nagaland Engineering Service Rules, 1984 which came into force with effect from 30th September, 1985, that the said post of Additional Chief Engineer is reserved for a qualified degree holder or a qualified person having equivalent degree in the concerned Engineering Branch of a recognised University or a holder of a certificate of having passed Sections A and B of the Associate Membership Examination of the Institution of Engineers, and that the petitioner is the senior most Engineer in the concerned Department having requisite qualification to be promoted to the post of Additional Chief Engineer inasmuch as the said post is reserved for a degree holder as it is clearly set forth in Schedule VI of Rule 7.

2. Shri DK Mishra, learned Additional Advocate General appears on behalf of respondents 1 and 2 and Ms. C. Jajo learned counsel appears on behalf of respondent 3. Affidavits have been filed on behalf of the respondents.

3. At the outset in terms of para 2 of the Government affidavit, the learned

Additional Advocate General prays that the question of maintainability of this petition be heard and decided first. Ms. C. Jajo also makes a similar prayer. I have heard the parties on the question of maintainability. The main contention of Mr. DfC Mishra and Ms. C Jajo in this regard is that the petitioner himself not being qualified to be promoted to the post of Additional Chief Engineer, he cannot seek remedy or question the legality of the order of promotion issued in favour of respondent 3. It is contended that none of the legal rights of the petitioner have been violated or infringed in giving promotion to respondent 3. In support of the contentions raised as stated above Mr. Mishra has referred me to AIR 1952 SC 12, AIR 1962 SC 1044, AIR 1964 SC 685 and also AIR 1980 AP 243 and contends in terms of the decisions rendered in the aforesaid cases that Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is therefore contended in terms of AIR 1962 SC 1044 (supra) that it is therefore clear that the persons other than those claiming fundamental rights can also approach the Court seeking a relief thereunder. The relief asked for must be one to enforce a legal right. The right that can be enforced under Article 226 also should ordinarily be the personal or individual right of the petitioner himself. In terms of AIR 1952 SC 12 (supra) it is submitted that the language of the Article shows that the issuance of Directions by the Court is founded only on its decision that a right of the aggrieved party under Part III of the Constitution has been infringed. In other words the submission of the learned counsel is that the existence of a right is the foundation of the exercise of jurisdiction of this Court under Article 226 of the Constitution. While referring to AIR 1980 AP 243 (supra), it is submitted that any one is not entitled to invoke the jurisdiction of this Court under Article 226 and as such the petition is not maintainable unless the petitioner satisfies the Court that he has a valuable right and that right has been infringed.

4. While supporting the submission made by Mr. Mishra, Ms. Jajo appearing for respondent 3 refers me to AIR 1968 AP 328 and submits that the petitioner had no vested legal right on the date of filing this petition for being appointed as Additional Chief Engineer and therefore he has no right to invoke the jurisdiction under Article 226 of the Constitution. As against this Mr. BN Sarma, learned counsel for the petitioner refers me to para 2 of the writ petition and submits that the petitioner claims to be a person qualified to hold the post of Additional Chief Engineer in terms of Schedule VI of Rule 7 of the Nagaland Engineering Service Rules, 1984. He also submits in terms of paras 3 and 4 of the writ petition that the petitioner claims that he has a right to be considered for promotion to the post of Additional Chief Engineer. It is further submitted that in the event of regularisation of the service of the respondent 3 in the post of Additional Chief Engineer, all the qualified degree holders of the Department will be deprived of holding the said post indefinitely and this would amount to usurpation of quota of 100% reserved for degree holders. As regards this preliminary point of maintainability, on perusal of the pleadings, especially the

contentions of the petitioner taken in the writ application, I see there is a clear assertion of right of the petitioner to be considered for promotion to the post of Additional Chief Engineer. At the same time the claim of the petitioner is based on relevant Recruitment Rules framed in this regard. I am therefore of the view that the petitioner is clearly entitled to approach this Court under Article 226 of the Constitution. In this view of the matter I have proceeded to decide the matter on merits.

5. I have heard the learned counsel of the parties. I have also perused the writ petition, affidavits filed on behalf of the parties, documents those are filed and made available at the time of hearing and also relevant Recruitment Rules pertaining to the present dispute.

6. The specific case of the petitioner is that the impugned order of promotion and appointment of respondent 3 to the post of Additional Chief Engineer, PHED being clearly outside the scope and purview of Rule 7 Schedule VI of the relevant Recruitment Rules of 1984, is not sustainable and is liable to be quashed. I have heard the learned counsel of the parties at length with specific reference to Rule 7 and Schedule VI. After the coming into force of the 1984 Rules, the earlier 1977 Rules came to be repealed. In order to have a closer examination of the said Rule 7 Schedule VI together with the proviso which has become the bone of contention, it is necessary to extract the relevant portion.

"Recruitment to various grade of the service after the commencement of these rules shall be regulated as per the terms and conditions stipulated in Schedule VI provided that :

In the event of Additional Chief Engineer being not available or, but not found suitable the post of Chief Engineer shall be filled up by promotion from among confirmed Superintending Engineer(s) who have completed a minimum period of 7 (seven) years of continuous service."

Schedule VI specifies that in order to fill up the vacancies in the post of Executive Engineer ratios are of the order of 75% by degree holders and 25% by diploma holders. In respect of the post of Superintending Engineer vacancies are to be filled up in the ratios of 90% by degree holders and 10% by diploma holders. It is to be stated here that the posts of Additional Chief Engineer and the Chief Engineer are to be filled up 100% by degree holders. This means that in terms of 1984 Rules a diploma holder could go as high as Superintending Engineer and not beyond.

7. As stated above the Government order which is questioned by the petitioner is in respect of filling up of the post of Additional Chief Engineer by a diploma holder. It is in this situation that much debate has been generated as regards the application/interpretation of proviso to Rule 7. In other words before proceed further I may state here that it is the case of the respondents that the impugned order of promotion dated 26th March, 1991 is within the purview of this proviso. This contention has been vehemently resisted on behalf of the petitioner. On the

face of Schedule VI the case of a diploma holder for appointment and promotion to the post of Additional Chief Engineer or Chief Engineer is clearly barred. Therefore admittedly Schedule VI stands in the way of respondent 3's promotion. The question therefore which I must answer is whether the case of the respondent 3 could be brought within the purview of proviso to Rule 7.

8. In the face of clear provisions in terms of Schedule VI of Rule 7 as regards the manner in which the posts of Additional Chief Engineer and Chief Engineer are to be filled up, i.e. 100% by degree holders, the learned Additional Advocate General submits that although, he cannot make submissions contrary to the clear provisions, he still submits that there are circumstances which would justify issuance of the order of promotion and appointment in respect of respondent 3. The only relevant portion of the record which I have gone through is regarding the decision of the Cabinet to upgrade the post of Superintending Engineer to the post of Additional Chief Engineer. Certain justifications for such upgradation have been seen in the note sheets of the relevant file No.PHE/EST/133/90. It appears I have nothing to say as regards the upgradation of post from Superintending Engineer to Additional Chief Engineer. At the same time I must make it clear that the issue before me does not pertain directly to the upgradation of the post of Additional Chief Engineer. The specific issue with which I am concerned is whether respondent 3 is indeed entitled under the provisions of relevant Recruitment Rules to hold the post of Additional Chief Engineer. Government affidavit has been drawn up in terms of the reasons considered by the Government in favour of respondent 3 for promoting him to the post of Additional Chief Engineer. I have carefully perused the note sheets on pages 11 and 12. Some of the reasons which have been given in the note sheets to justify promotion of respondent 3 are that respondent 3 is the senior most Superintending Engineer of the Department, that he has good experience in the field, that he received various training in and outside the country and also that he is found to be sincere and dedicated to his duties. It is also recorded in this note sheet that respondent 3 possesses all the technical know how required for the post. On careful perusal of the relevant note sheets, it appears to me that the relevant Recruitment Rules have been completely by passed by the Government decision. Para 4 on page 11 of the note sheet is as follows :

"As laid down by the Nagaland Engineering Service Rules, 1984 (Class 1 and Class II) Schedule VI, the post of Additional CE and the post of CE are entirely meant for Degree holder."

Having come to this conclusion it is hard to understand how a decision contrary to the statutory provisions could be taken by the Government. It appears that the Government also has read the relevant Rules in their proper perspectives. The decision of the Government does not take the help of proviso to Rule 7. In other words, it is not the decision of the Government that the case of respondent 3 would come within the purview of proviso to Rule 7. It appears the Government is clear as regards the interpretation and application of the relevant

provisions of Recruitment Rules as regards the filling up of the posts of Additional Chief Engineer and Chief Engineer.

9. As stated above it has been strenuously argued by Mr. Mishra and Ms. C. Jajo that the case of respondent 3 falls within the purview of proviso to Rule 7. However, it is the submission of Mr. BN Sarma that when the main Rule clearly bars promotion of diploma holder to the post of Additional Chief Engineer and Chief Engineer, it is impermissible that proviso would override the main provision. Obviously there is no expressed Rule as regards length of service for promotion to the post of Additional Chief Engineer. It is therefore submitted on behalf of the petitioner that proviso is also provided for the purpose of consideration of qualified Engineers who hold the post of Superintending Engineer to fill up the post of Chief Engineer in some exceptional circumstances and situation. There can be no doubt that the situation envisaged in this proviso is in respect of the post of Chief Engineer.

Such situation may never arise or may arise but very rarely. It is now for this Court to see whether it is the wisdom of the Government to look for a diploma holder in such an extremely rare situation. Although Mr. BN Sarma submits that the 1977 Rules cannot be looked into after the coming into force of 1984 Rules, on the submissions made by learned Additional Advocate General, and after he refers me to the Constitution of India by Mr. Seervai on pages 74 and 76 as regards the interpretation of Constitution that if there be some ambiguity and inconsistency or absurdity or inconvenience this Court can also look to the old law in order to find out intent of the legislation, I am inclined to peruse the relevant Recruitment Rules of 1977 in the interest of justice. I may however, make it clear here that I see no ambiguity in Rule 7 read with Schedule VI and proviso

10. It appears to me that it is the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. In other words a proviso cannot by permitted by construction to defeat the basic intent expressed in the substantive provision. No doubt if there is ambiguity, the Court may have to look for some other materials including laws which were enforced in the past. This view of mine finds support from Mr. Seervai's Book referred to above. However, where the language of the main enactment is clear and unambiguous, a proviso can have no repercussion in the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its expressed terms.

While dealing with the similar matter, this Court in (1985) 1 GLR 296 in para 10 held as follows :

"To discern the intention of the Rule making authority the proviso is to be understood by looking at the subject matter and the object sought to be achieved by the Rule making authority. Where the words are unambiguous the intention of the Rule making authority is best declared by the words incorporated

in the Rules. What the Rule making authority while making "the Rules"<sup>5</sup> intended or did not intend could only be legitimately ascertained from what it had chosen to represent, either in the express words or by reasonable and necessary implication. The words which have been used in the setting, sensibly and clearly create certain restrictions or embargo on the candidates. As such, unless the Rules are ambiguous, we cannot subtract from it or insert anything in it. The basic rule is that the Courts should not take upon itself the duty to supply commissions as it amounts to assuming the function of legislators. We cannot rewrite the proviso when its language is plain and unambiguous. It is not open to us to read into words which are not in it. In a Court of Law what is unexpressed has the same value as what is unintended. This Rule of constructions is enunciated by the Supreme Court. In *Venakataraman vs. State of Mysore*, AIR 1960 SC 675 and *Mahadeolal vs. Administrator General, West Bengal*, AIR 1960 SC 936. In *CST vs Parson Tools and Plants*, (1975) 4 SCC 22, the Supreme Court has ruled that the duty of the Court is to give effect to words used without canning the wisdom or policy of legislature and without engrafting, adding or implying anything which is not congenial to or consistent with such express intent of the law giver. Even if there be "canus omissus" the defect can only be remedied by the Rule making authority."

11. In view of what have been stated above. It seems clear to me now that the proviso is something subordinate to the main clause and, generally, what is contained in the proviso is not to be imported by implication into the clause.

12. I may now examine the relevant provisions of 1977 Rules as well as of 1984 Rules to find out and to appreciate the wisdom of the Government in replacing the 1977 Rules by the 1984 Rules. In terms of 1977 Rules also the posts of Additional Chief Engineer and Chief Engineer were to be filled up 100 % by degree holders. It may, however, be stated that the length of continuous service in the post of Superintending Engineer for consideration for promotion to the post of Additional Chief Engineer was five (5) years and 2 years for the post of Chief Engineer from the post of Additional Chief Engineer. As stated above in terms of 1984 Rules no length of service has been prescribed. One interesting difference I find between the 1977 Rules and the 1984 Rules is that in respect of filling up of the post of Superintending Engineer from amongst the eligible Executive Engineers, the ratios are 70% by degree holders and 30% by diploma holders in terms of 1977 Rules, whereas in terms of 1984 Rules the ratio is 90% by degree holders and 10% by diploma holders. This clearly goes to show that with the passage of time, the ratio/percentage in respect of diploma holders is reduced and that of the degree holders is increased. It appears, it is so because of the fact that in view of the rapid advancement in Science and Technology the Government is trying to keep pace by utilising the more qualified persons in filling up senior posts of the Department. In such a situation I am of the view that the wisdom of the Government in framing the relevant Recruitment Rules in this regard is to see that gradually less qualified persons are eliminated for manning the higher posts in order that more and more qualified persons are

employed to cope with the fast advancement of Science and Technology. Government affidavit states that all the Superintending Engineers of the Department were sent up for consideration for promotion to the post of Additional Chief Engineer. As stated above, in view of the fact that (he respondent 3 is the senior most Superintending Engineer, that he has got sufficient experience and technical know how and that he is sincere, he was promoted to the post of Additional Chief Engineer. It has been contended on behalf of the petitioner that the case of the petitioner was not really considered in the eyes of law. It is further submitted that all the relevant biodatas in respect of the petitioner were not placed before the Government. It is stated that although 6 (six) names of Superintending Engineers are shown in Annexure 2 of Government affidavit, in reality it is only the petitioner whose case could have been validly considered in terms of relevant Recruitment Rules for promotion to the post of Additional Chief Engineer. This submission is made on the ground that respondent 3 is completely barred in terms of the Recruitment Rules to hold the post of Additional Chief Engineer. Serial No. 2 of Annexure 2 (list of SEs) is already retired. Serial No.3 has been on deputation for sometime and he was on deputation at the relevant time when respondent 3's promotion was considered. Serial No. 4 who was under suspension at the relevant time died in August, 1991. Serial No.5 is under suspension now. It is stated that even at the relevant time although serial No. 5 was promoted to the post of Superintending Engineer, it was done only to hold the post of Superintending Engineer during the deputation period of serial No. 3. It appeared in view of what I have stated above, it is not necessary for me to discuss in detail the various submissions regarding the averments as regards the aforesaid Superintending Engineers.

13. During the course of hearing my attention has been drawn to Civil Rule No.153 (K) of 1992 to say that by Government order dated 26.8.1992, one regular incumbent of the office of the Chief Engineer of this Department was posted out as OSD Planning by creating an Excadre post. It is stated that the said officer had held the post of Chief Engineer for 2 (two) years and was an educationally qualified person to hold the post of Chief Engineer in terms of relevant Recruitment Rules. It is therefore submitted on behalf of the petitioner that if there is a serious situation now obtaining in the Department such situation has been created by the Government and that also in order to accommodate respondent 3. Be that as it may, since the officer has already been posted out I am not called upon to give any finding while disposing of this petition.

14. I may also state here an interesting statement which I find in Government affidavit. Vide para 3 (vii) which is to the following effect :

"The deponent respectfully begs to state that none of the Superintending Engineers including the petitioner were qualified to be promoted as Addl. CE. Under the circumstances the respondent No. 3, who had qualified length of service and enough experience, was found it to be appointed and promoted as Additional CE. Accordingly by order dated 26th March, 1991 (Annexure A to the

writ petition) the respondent No. 3 was promoted and appointed as Additional CE."

15. In order to justify the order of promotion it has been brought to my notice that the respondent No. 3 had also held the post of Executive Director, Technology Mission wef 14.6.90. It is stated that the petitioner was given officiating promotion to the post of Superintending Engineer in place of respondent No. 3 while he was working as Executive Director as stated above. The main case of respondent No. 3 is that he has put in 7 (seven) years service as Superintending Engineer and therefore he stands qualified to be appointed as Additional Chief Engineer. This statement is not correct and is clearly belied by Government affidavit referred to above. At the relevant time respondent 3 had not completed 7 (seven) years. Even assuming that he had put in 7 (seven) years at the time of his promotion to the post of Additional Chief Engineer as stated above, it would clearly appear to me that his case would not come within the purview of proviso to Rule 7 as narrated above.

16. It appears to me that proviso to Rule 7 is to meet an extreme case in filling up the post of Chief Engineer. Hence 7 (seven) years length of service is prescribed. It appears to me that Diploma holders are clearly outside the scope of this proviso. It may be stated again that when the main Rule is abundantly clear that the posts of Additional Chief Engineer and Chief Engineer shall be filled up 100% by degree holders I do not see any reason how by putting in simply 7(seven) years of service as Superintending Engineer, the case of diploma holder can be considered to fill up such senior post of the Department.

17. Recruitment Rules are framed by the Government in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India. Hence such Rules are statutory Rules. Once Rules are framed they must be adhered to. Statutory Rules cannot be by passed by executive orders.

18. After hearing learned counsel of the parties and on careful perusal of the relevant Recruitment Rules and other relevant documents, I am of the view that it is the wisdom of the Government to exclude diploma holders from the purview of the post of Additional Chief Engineer and Chief Engineer and I have no reason to question it.

19. In the light of the facts narrated by me above the impugned order of appointment and promotion of respondent No. 3 to the post of Additional Chief Engineer by order dated 26th March, 1991 is in clear violation of Rule 7 Schedule VI of 1984 Rules. The said Rules are mandatory. What cannot be allowed directly under the statutory provisions cannot be allowed indirectly by means of an executive fiat, for, to do so will defeat the very purpose for which such Rules are framed.

20. In the result the petition is allowed. The impugned Notification dated 26th March, 1991 by which respondent No. 3 was appointed and promoted to the post of Additional Chief Engineer is quashed. It is not for this Court to say who should

man the post of Additional Chief Engineer or Chief Engineer. It is however, unbelievable that the Government of Nagaland would be helpless to find a qualified and competent officer to hold the post of Additional Chief Engineer or Chief Engineer. In terms of the relevant provisions of 1984 Rules, the petitioner has right to be considered for the post of Additional Chief Engineer, inasmuch as the petitioner is a degree holder and as no length of service is prescribed for promotion to the post of Additional Chief Engineer from the post of Superintending Engineer in terms of Rule 7, Schedule VI of 1984 Rules.

21. It is shocking to know that ever since this Department was created in 1974, there has not been any sitting of the Departmental Promotion Committee as stated in para 10 of the writ application. This statement is confirmed by statement made in para 12 of the affidavit filed by respondent 3 to the effect: "this deponent admits that there has been no sitting of DPC in the PHED since 6.6.74. However, while admitting that this deponent had been holding the post of SE on an officiating basis at the time of his promotion in 1991, it is pointed out the since 6.6.75, all the past and present office under PHED have served/are serving on officiating capacity and promotion to even the highest office, ie, the post of Chief Engineer PHED have been made without exception of an officer serving in the lower post in an officiating basis subject to regularisation by DPC. By the same token, the petitioner too has not been regularised by the DPC in the post of Assistant Engineer, Executive Engineer or Superintending Engineer till today." This means that all the officers of this department are holding their respective posts on officiating basis. This is simply not right. This kind of inaction of the Government can bring about frustration among the employees. The Department should wake up from its deep slumber and clean up its mess. In my view such action does not brook delay, otherwise, a time will soon come when the Department will become unmanageable.

22. With the above directions and observations, the petition is disposed of. I make no order as to costs.