
(2012) 09 GAU CK 0012
In the Gauhati High Court
Case No : W.A. No. 5 (K) of 2011

Tsusola Yimchunger

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 14-09-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 — Section 4

Citation : (2013) 2 GLT 565

Hon'ble Judges : Subhasis Talapatra, J; Prasanta Kumar Saikia, J

Bench : Division Bench

Advocate : P. Choudhury and Mr. Akum Jamir, for the Appellant; N.M. Jamir, GA and Mr. Taka Masa, for the Respondent

Final Decision : Allowed

Judgement

Subhasis Talapatra, J.—By the judgment and order dated 7.7.2010 as assailed in this writ appeal the appointments of the appellant and another Sri Tsuyiba, the respondent No. 6 in the writ petition have been struck down by the learned Single Judge holding that the services of the petitioners were illegally terminated without providing any notice whatsoever. Appointments of the respondent Nos. 5 and 6, the appellant and said Sri Tsuyiba who did not prefer appeal as yet, have been declared to have been made illegally by the department concerned at the instance of the then minister. It has been held that such a move had been taken by the State being politically motivated. It has been further held that the appointments of the appellant and said Sri Tsuyiba cannot sustain in law. The order dated 05.06.2003, Annexure-C to the writ petition, whereby the services of the writ petitioners were terminated has also been set aside by the learned Single Judge with a direction to the State respondents to take back the writ petitioners in the post earlier held by them within a period of two months from the date of receipt of the order. The genesis of the controversy is rooted in the appointments of the writ petitioners against the vacancy caused by "termination of the earlier incumbents". The petitioner No. 1 was appointed as Medical

Attendant by the Office Order No. DHS-3/520/PT-II/90-91/7665-68 dated 09.08.2000, Annexure-A to the writ petition, while the petitioner No. 2 was appointed as Medical Attendant by the Office Order No. CS-2/Esstt-14/99-2000/324-30 dated 11.05.2001, Annexure-B to the writ petition, in the same establishment and at the same place. For such appointments, it is the admitted position that there was neither any notification of vacancies to the employment exchange in compliance to the provision of Section 4 of the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959, nor any public notice. The writ petitioners alleged that at the instance of the Hon"ble Minister, in-charge of Mechanical Engineering, Art and Culture, the Government of Nagaland the writ petitioners were terminated by the order No. CS-2/Estt-14/2001-03/200-03 dated 05.06.2003, Annexure-C to the writ petition. Immediately thereafter the present appellant and Sri Tsuyiba were appointed against the said vacancies by the order No. CS-2/Esstt.14/2001-03/206-13 dated 05.06.2003. The writ petitioners alleged interference by the said Minister. For purpose of appreciating the nature, the mode of termination and the context, the order dated 05.06.1993 is excerpted hereunder:

ORDER

As per Hon"ble Minister of Mechanical Engineering and Art & Culture Letter No. MINC (MFA & C)-21/2003 dt. 20.05.2003 and Director of Health Services letter No. DHC-3/117/MA/TSG/2219-20 dated 23.05.2003, the following staffs are hereby terminated from service w.e.f. 05.06.2003 against Sotokur Sub-Centre under the establishment of District Family Welfare Officer, Tuensang as mentioned below:-

1. Smti. Kiuphula, M.A.
2. Shri Kiuthsang Chowkidar.

(Dr. N.T. Sangtam) Civil Surgeon Tuensang, Nagaland.

It is apparent that pursuant to the letter No. MINC/MF A & C)- 21/2003 dated 20.05.2003 and Director of Health Services letter No. DHC- 3/117/MA/TSG/2219-20 dated 23.05.20 the writ petitioners were terminated. Thereafter, the writ petitioners represented against the said order of termination on 10.06.2003 where it has also been stated that they had been threatened not to approach for any remedy against the said order of termination. On 02.02.2006 and 18.11.2009 both the writ petitioners reminded the Director, Health Services of the action so expected but without any avail. Even though from the forwarding dated 24.11.2009, Annexure-J to the writ petition it transpires that the said representations and the reminders were duly forwarded to the Principal Director, Health and Family Welfare, Government of Nagaland by the Deputy Chief Medical Officer, Tuensang, Nagaland.

2. The writ petition was disposed of within a very short spell. Even though respondents received notice some time in last part of June, 2010 but the entire

writ petition was heard on 07.07.2010. Neither the State respondents nor the present appellant or Sri Tsuyiba had any chance to file the affidavit-in-opposition. By the order dated 20.10.2011, this Court granted leave to the appellant and to the State respondents to file the affidavit-in-opposition. Accordingly, the State respondents and the appellant filed the affidavits-in-opposition. The State respondents by filing the affidavit-in-opposition contended that the Chief Medical Officer, Tuensang by the letter dated 07.12.2010 forwarded a letter addressed to the Principal Director, Health and Family Welfare by the Sotokur Village Council as regards the termination of the appellant from the post of Medical Attendant along with one Sri Tsuyiba who were so appointed for the land donation. The village council has categorically stated that the appellant and one Sri Tsuyiba are the genuine and the rightful land owners where the Sotokur Sub Centre is located. The said letter has been written on the basis of the resolution of the village council as available at Annexure-2 to the affidavit-in-opposition filed by the State respondents. Along with the said affidavit-in-opposition the letter dated 21.11.2011 and one agreement dated 25.07.2011 have been produced wherefrom it transpires that:

The Village Council and the land owner agree to donate land free of cost for the construction of Health Centre. It is also agreed that land owner will not ask for contract works or any other compensation.

The Village Council willingly decided to construct nurse quarters for the Health Centre and the Council request the Govt. to construct the Sub Centre building as soon as possible.

In the affidavit-in-opposition as filed incidentally by the respondent Nos. 5 and 6 in the appeal it further transpires that the claim of the appellant on the basis of the land ownership at Tuensang town is not supported by any-documentary evidence. In the said affidavit-in-opposition, it has been further contended that the respondent Nos. 5 and 6 in the writ appeal were terminated in clear violation of the principle of natural justice and upon the directives of the then minister. The said move was politically motivated. For the fear of the said minister the writ petitioners could only approach this Court after his expiry otherwise they were diligently pursuing the matters against all odds.

3. In the rejoinder to that affidavit as filed by the respondent Nos. 5 and 6 in the writ petition, one being the appellant, it has been pointedly stated that the writ petition has been filed after a period of 6 1/2 years without any sustainable explanation and by that time the appellant had completed 6 1/2 years of service under the respondent No. 4. The respondent Nos. 5 and 6 in the writ appeal has however stated at paragraph-10 of the writ petition as under

10. That, the petitioners humbly submits that they had been pursuing their cases diligently by submitting representations in spite of thread and intimidation without any positive reply till date. As such, there are sufficient reasons to condors the delay, if any. It is also submitted that it is an established principle of

law as decided by the Apex that the delay cannot be the sole ground of reject a Writ Petition when there is a clear violations of the petitioners' fundamental rights.

It has been further stated at para-5 of the said rejoinder filed by the appellant that the writ petitioners were appointed against the post vacated by their father and the elder sister by opting for voluntary retirement. Appointments of the respondent Nos. 5 and 6 in the appeal are grossly illegal, arbitrary and against the statutory mandate as referred. The appellant stated that in the year 1986 the father-in-law of the appellant, namely, Ahoshe Yimchunger looking at the poor condition of the villagers as regards the medical facilities in and around the village called Sotokur had decided to donate one of the ancestral plots of land measuring about two hectares to the Health Department for the purpose of constructing a dispensary in a place called Tukungungyim which is 5 kilometer away from Sotokur Village. This dispensary which was the only Health Center in and around a cluster of 13 villages. The donation of the said land was made without taking any compensation and it was backed by the assurance from the department that the family members would be provided with appointments in the category of the Grade-IV in the said dispensary. Since the family of said Ahoshe Yimchunger did not have any qualified person for the said post, the said land donor decided to recommend Smt. Yamrup & Shri. Ritsula, who were not the land owners, for appointment to the said Grade-IV posts. Accordingly the said persons were appointed as the nominees of the land donor to the Grade-IV post Smt Yamrup and Shri. Ritsula continued in the said post and thereafter opted for voluntary retirement to accommodate their son and sister respectively. It is on the record that the said respondent Nos. 5 & 6 were appointed in a clandestine manner without any notice either to the land donor as well as to the Village Council nor to the public. It is stated that the Village Council is conferred with such powers of having their say in the matters of appointments and development under the Nagaland Village and Area Council Act, 1978 (the Act, 1978 hereinafter). The Village Council came to know about the illegal and backdoor appointments of the respondents No. 5 & 6 in the appeal and adopted a very stringent attitude while demanding cancellation of the said illegal appointments of the respondents. A resolution in this regard was adopted on 20.02.2002 whereby it was categorically stated that the said Grade-IV posts should be filled up from the land owners who had donated their lands to the State-respondents free of cost.

4. Subsequently, as it transpires, another plot of land measuring two acres in the said village donated by the appellant's husband. After the Village Council came to know about the said illegal appointments, the Village Council registered their protest to the State-respondents including the Minister In-charge, Mechanical Engineering, Art & Culture, Nagaland who was also the MLA of the said area. On the basis of the said resentment expressed by the Village Council the Minister issued a letter dated 20.05.2003 for undoing the injustice as afflicted on the land owners. The Minister did not do any favour to the appellant but had directed the

respondent No. 3 to undo the illegalities. In 2009 the said dispensary was dismantled and it was shifted initially to a Church and thereafter to the market shed of the Village Council till the new building of the dispensary is constructed on the said plot of land donated by the husband of the appellant in 2009 in Sotokur village.

5. Mr. P. Choudhury, learned counsel appearing for the appellant questioned the Judgment and order as passed by the Ld. Single Judge in W.P.(C) No. 229(K) of 2009 on the premises as noted hereunder:

(a) The writ petition is seriously hit by laches;

(b) The Minister against whom the interference has been alleged has not been made party;

(c) Admittedly, the family members of the land owner who donated the land free of cost for a public purpose, would be rehabilitated by way of giving the employment in the Grade-IV category. Even though there is no dispute in this regard this aspect of the matter has not been considered at all while setting aside the order of appointments as issued in favour of the appellant and one Tsuyiba by the learned Single Judge. He further submitted that the concerned Minister was also the public representative of the said area and had forwarded the letter for undoing the injustice and that cannot be held to be unsolicited interference to favour any candidate; and

(d) The appointments as was given to the respondents No. 5 & 6 in the appeal were absolutely illegal and in defiance to the procedure as laid down for public appointment. Therefore, the writ petitioners (respondents No. 5 & 6 in the appeal) have no locus to challenge the termination order.

6. Mr. Choudhury, learned counsel in support of his contention stated that Government in their brief affidavit-in-opposition did not deny the fact that the appellant's husband donated a land for construction of the dispensary for the cluster of villages. Moreover, they have referred to the resolution of the village council where it has been categorically stated that as per assurance and the practice, the appellant has got right to be appointed in the Grade-IV category. Mr. Choudhury, learned counsel appearing for the appellant to buttress his contention referred a decision in Mohd. Masood Ahmad Vs. State of U.P. and Others, where the Apex Court held that:

In our opinion, even if the allegation of the appellant is correct that he was transferred on the recommendation of an MLA, that by itself would not vitiate transfer order. After all, it is the duty of the representatives of the people in the legislature to express the grievances of the people and if there is any complaint against an official the State Government is certainly within its jurisdiction to transfer such an employee. There can be no hard-and-fast rule that every transfer at the instance of an MP or MLA would be vitiated. It all depends on the facts and circumstance of an individual case. In the present case, we see no

infirmity in the impugned transfer order.

7. Mr. Choudhury, learned counsel appearing for the appellant further relied on a decision of this Court in *M. Balakrishna Reddy Vs. Union of India (UOI) and Others*, where it has been held that

There is no specific allegation of mala fide which would vitiate the transfer order and in this regard, the learned Tribunal has already held that mala fide whatsoever was not alleged specifically against any person including the concerned MLA who is said to have initiated the transfer order and, as such, it is not a case based on mala fide.

8. On the other hand, Mr. Taka Masa, learned counsel appearing for the writ petitioners (the respondent Nos. 5 & 6 in the appeal) submitted that there is no documentary proof that the appellant's husband has donated the land for constructing the dispensary and allied infrastructure as claimed. However, he admitted the practice of affording employment to the land donor's family. In refuting the contention of the appellant that the writ petition is hit by laches, Mr. Taka Masa submitted that out of fear of the minister the writ petitioners could not approach the Court in time and this Court would consider the exceptional circumstances and waive the laches for the purpose of protecting the fundamental right of the writ petitioners as has been denuded by the State respondents. The writ petitioners were deprived of any reasonable opportunity of having their say before termination of their services. Even though, the services were temporary in nature, the writ petitioners were definitely entitled to the notice before the order of termination was made. However, Mr. Taka Masa did not dwell upon the element of the backdoor appointments as advanced by the learned counsel for the appellant. Learned counsel for the writ petitioners (the respondent Nos. 5 & 6 in the appeal) stoutly defended the impugned order dated 07.07.2010 as passed by the learned Single Judge contending that if someone on receiving the notice from the Court does not appear to contest the case, the only reasonable alternative that is left to the Court is to decide the case in their absence.

9. Mr. N.M. Jamir, learned Government Advocate for the respondent Nos. 1 & 2 has fairly acceded that the land donors are usually accommodated with the employment in the Grade-IV category from their families and that was the consideration for appointing the appellant and one Tsuyiba. He however candidly submitted that the minister as referred by the writ petitioners definitely intervened in the process but no mala fide had been alleged or pleaded against the said minister nor has he been made a party in the proceeding. Therefore, finding of the learned Single Judge in this regard can hardly be maintained and he also admitted that no notice before the termination was issued by the respondents which the writ petitioners were definitely entitled to, even if they were engaged in the temporary service.

10. On appreciation of the rival contentions as advanced by the learned counsel

appearing for the parties as well as on perusal of the records as produced along with the respective affidavits filed by the parties, this Court has embarked upon a thoughtful exercise. The State respondents however did not furnish the records pertaining to the land in question since 1986 and the appointment of the writ petitioners and the appellant notwithstanding a categorical order having been passed by this Court on 11.09.2012. The State respondents definitely embarked on illegality by terminating the services of the writ petitioners without giving any notice. Ordinarily this Court would have no hesitation to waive the delay not so inordinate on the equitable ground, but the back door appointments of the writ petitioners disarmed the Court from embarking upon such exercise. Laches by delay of six and half years in filing the writ petition is so telling upon the maintainability of the writ petition that it cannot simply be stated that the laches can be waived or overlooked by this Court, Except in the representation dated 10.06.2003 there is no mention of "threat". Even in the said representation there is no reference of the said minister of threatening the writ petitioners. Moreover, no endeavour from the writ petitioners has surfaced thereafter. No records have been produced contrary thereto. The law in this regard is well settled in State of Madhya Pradesh Vs. Bhailal Bhai and Others, where the apex Court has held:

It appears to us however that the maximum period fixed by the legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking remedy under Article 226 can be measured. The Court may consider the delay unreasonable even if it is less than the period of limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to hold that it is unreasonable.

This decision has been followed in Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others, , Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, & The Municipal Council, Ahmednagar and Another Vs. Shah Hyder Beig and Others, .

11. In view of this, the laches and delay cannot be held to be reasonably or properly explained In view of this, the writ petition shall fail. Apart that, this Court is authorized to enquire into the process of appointments of the writ petitioners. Those are ex-facie illegal and therefore, on the basis of such appointments the writ petitioners cannot have the locus to challenge the termination or the appointments of the appellant and Tsuyiba inasmuch as they are appointed under a special scheme for the family of land-donors. The Government can formulate such policy to make good for the donors of the land. That executive fiat cannot be brought under the judicial review as the action cannot be said to be unreasonable and inequities. However, before terminating the writ petitioners, the State respondents ought to have given the notice by affording them the reasonable opportunity to have their say on the proposed action. Notwithstanding that lapse the writ petition cannot be sustained for

laches for doing complete justice.

12. It is the writ petitioners' contention that there is no document regarding the land donation by the appellant's husband but we find from the resolution as taken by the concerned village council that the husband of the appellant had donated the land. However, the said donation appears to the Court has been made much after the appointment of the writ petitioners. The appellant however claimed of a donation by her father-in-law in the year 1986. It is however is not clear to this Court that when the nominees of the land donor were once accommodated whether for the said donation the land donor's family can again avail of the benefit of appointment or not as far as the practice admittedly prevailing in the State of Nagaland.

13. Even though some unspecified allegations of intervention in the matter of appointments of the appellant and Sri Tsuyiba have been made, it transpires to this Court that no mala fide has been pleaded nor any material to indicate that the said Minister had acted unfairly or illegally or his action is tainted by mala fide. If such materials are not brought to specify the mala fide, merely for writing a letter calling for justice, no interference from this Court is warranted.

14. In view of this, we are not in agreement with the findings as arrived at by the learned Single Judge and as such the impugned order is interfered with and set aside. As corollary to this, the writ petition stands dismissed. This however shall not automatically revive the appointments of the appellant and one Sri Tsuyiba. As consequence thereof, we further direct that:

(i) It has to be scrutinized by the State respondents in consultation with the Village council whether the appellant and Sri Tsuyiba do come within the scheme of providing with the employment in the category of the Grade-IV employees for the land as claimed to have been donated by the father-in-law and the husband of the appellant. While deciding this, the Government shall scrutinize all relevant records regarding donation of land for the purpose of the construction of said dispensary and/or the allied infrastructure.

(ii) Till such decision is taken, the appellant and Sri Tsuyiba shall not be allowed to report their duties but if the Government comes to a decision contrary to as contemplated that the appellant and Sri Tsuyiba are entitled to continue in their service they should be allowed to resume their duties with the pay and allowances as entitled. It is made clear that this Court has remanded the matter for consideration of the appropriate authority in the State of Nagaland with expectation that they shall take decision in consonance to the principles of justice. The exercise as noted shall have to be completed within a period of two months from today.

With the above observation and direction, the writ appeal stands allowed to the extent as indicated above. There shall be no order as to costs.