(1995) 07 GAU CK 0019

In the Gauhati High Court

Case No : Civil Rule No. 2457 of 1994

Tulika Das APPELLANT

Vs

State of Assam RESPONDENT

Date of Decision : 03-07-1995

Acts Referred:

Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Rules, 1983 — Rule 4, 4, 5(3), 5(3)

Citation : (1995) 2 GLJ 1 : (1995) 2 GLR 449 : (1995) 2 GLT 450

Hon'ble Judges : V.K.Khanna, C.J. and A.K.Patnaik, J

Bench : Division Bench

Advocate : Ranjan Gogoi, K.H.Choudhary, P.K.Goswami, A.Sharma, H.Roy, G.N.Das, G.K.Bhattacharyya, D.P.Chaliha, D.N.Choudhary, B.C.Das, A.R.Barthakur, A.Dutta, B.Chakraborty, N.Dutta, Advocates appearing for Parties

Judgement

V.K. Khanna, C. J.

1. At the outset, it may be mentioned that in the present Civil Rule an application for interim order was made and on 7.7.94, the learned Single Judge was pleased to pass an interim order directing the authority to send 12 names against the existing 3 vacancies to the Public Service Commission as provided under the Rules and without following the procedure no promotion shall be made. It was also directed that the name of the petitioner in the Civil Rule Smti Tulika Das shall be considered as to whether she is entitled to preference under the Rules as she belongs to Scheduled Tribes (Plains). An application was moved for vacation/ modification/alteration of the order dated 7.7.94 passed by the learned Single Judge in Civil RuleNo.2457 of 1994 on behalf of the respondent No.7 in the Civil Rule Shri NN Bhuyan, Deputy Commissioner of Taxes, Zone A, Guwahati. The aforesaid application was finally disposed of in Misc Case No.885 of 1994 by the order passed by the learned Single Judge on 12th August, 1994. The learned Single Judge held that the interim order passed on 7.7.94 required no modification save and except the fact that the learned Single Judge wrongly relied on the sections which had application to the cases of direct recruitment.

The misc. case was accordingly rejected.

2. Writ Appeal No.394 of 1994 was filed by Shri AK Dutta praying that the decision of the learned Single Judge dated 12.8.94 in Misc CaseNo.885 of 1995 in Civil Rule No.2457 of 1994 was incorrect and unsustainable in law and was liable to be set aside.

3. Writ Appeal No.395 of 1994 was filed by Shri NN Bhuyan, Deputy Commissioner of Taxes, Zone A, Guwahati, respondent No.7 in Civil Rule praying for the same relief, i.e., the setting aside of the order passed by the learned Single Judge on 12.8.94.

4. On 13.9.94 in Writ Appeal No.395 of 1994, we heard Shri Ranjan Gogoi, learned counsel appearing for the appellant and Mr.PK Goswami appeared for the contesting respondent/writ petitioner and Mr.BC Das, learned Addl. Senior Govt. Advocate appeared for the Staterespondents. After hearing the learned counsel for the parties it was ordered that the Writ Appeal No.395 of 1994 be connected with similar Writ Appeal No.394 of 1995 and the learned counsel appearing for the parties in both the appeals made a statement that the Civil Rule itself may be finally disposed of by this Court as the controversy involved in the appeals is precisely the same as was involved in the Civil Rule itself. The parties were allowed sufficient time to exchange affidavits in the Civil Rule and it is in these circumstances that the two Writ Appeal Nos.394 of 1994 and 394 of 1995 and the main Civil Rule No.2457 of 1994 have been heard together.

5. We have heard Mr.AR Barthakur, assisted by Mr.GK Bhattacharyya, Mr.GN Das and Mr.B.Chakraborty for writappellant, Mr.AK Dutta in Writ Appeal No.394 of 1994, Mr .Ranjan Gogoi, assisted by Mr.A.Dutta for writ appellant, Mr .NN Bhuyan in Writ Appeal No. 395 of 1994 and Mr.PK Goswami, assisted by Mr. A.Sarma for Smti T. Das, writ petitioner/respondents and Mr.BC Das, Addl Senior Govt. Advocate and Mr. DP Chaliha,Govt Advocate appearing for the State of Assam.

6. Before us Mr.PK Goswami has appeared on behalf of the petitioner Smti Tulika Das and according to him the petitioner belongs to the Scheduled Tribe (Plains) and was appointed as Superintendent of Taxes with effect from 15.6.84 and a person holding the post of Superintendent of Taxes is entitled to promotion to the next higher post of Senior Superintendent of Taxes after putting in 8 years of service. The Govt. by notification dated 24.8.95 (Annexure 5 to the affidavit) promoted 3 Superintendent of Taxes directly to the rank of Deputy Commissioner of Taxes without first promoting them to the post of Senior Superintendent of Taxes. According to the petitioner there were 15 posts of Senior Superintendent of Taxes available and after the aforesaid 3 candidates were promoted the rank of the petitioner in the gradation list stood at Sl.No.59 and that she was within the zone of consideration against these 15 post and as she belongs to Scheduled Tribes (Plains) she was by Govt. notification dated 24.8.92 (Annexure A to the writ petition) promoted to officiate as Senior Superintendent of Taxes alongwith

13 others.

7. According to the petitioner, on 28.2.94 one post of Joint Commissioner fell vacant and the matter was placed before the Selection Committee constituted by the Government by notification dated 12.5.93 (Annexure VI to the affidavit). One officer of the rank of Deputy Commissioner was promoted to the rank of Joint Commissioner and the senior most Superintendent of Taxes was promoted to the rank of Deputy Commissioner of Taxes by notification dated 21.5.94 (Annexure C to the writ petition). Subsequenntly another post of Joint Commissioner fell vacant on 3 0.4.95 and the process for filling up the said post of Joint Commissioner and the resultant vacancy of Deputy Commissioner were initiated and the ACRs of the officers were being called for. It was al so alleged that another post of Joint Commissioner is likely to fall vacant in June, 1994 and the Govt. filled up the said post immediately. It is at this point that the petitioner Smti Tulika Das filed this writ application on the basis that her name is at SI. No. 12 of the Senior Superintendent of Taxes and that since 3 posts were likely to occur during the year 1994 and all these 3 posts should be filled up at a time and as per Rule 7(1), 12 names have to be considered which would include the name of the petitioner,

8. It was also alleged by the petitioner Smti Tulika Das that under the Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Service and Posts) Act, 1978, the first vacancy as per the roaster is required to be filled up by promoting Scheduled Tribes (Plains) Officer and that there was a back log and she was entitled to be promoted against the resultant vacancy. In other words, if the three vacancies are taken up together and 12 names are considered, she will automatically be promoted.

9. It may be pertinent to note that Mr. DP Chaliha, Govt. Advocate on behalf of the State of Assam has made a categorical statement before us that at the present moment there are three existing vacancies for the post of Deputy Commissioner of Taxes.

10. All the counsel appearing for the parties have agreed that the sole legal question arising for determination in the present cases is regarding the interpretation of Rule 7 (1) of the Assam Taxation Service Rules in regard to the manner in which the vacancies occurring during a year have to be filled up. To understand the controversy which has been raised, the present factual situation as is existing may be notice insofar as the rival contentions of the counsel appearing for the parties have been made before us.

11. Shri PK Goswami, learned counsel appearing before us has made a submission that on a true interpretation of Rule 7 (1) of the Assam Taxation Service Rules, the Government shall project the vacancies which are in fact existing during a particular year and are likely to occur during that year and should prepare a list of officers eligible for promotion. After preparing a list not exceeding four times the number of vacancies in the order of senioritycummerit

it shall be forwarded to the Commissioner. In effect, the real argument is that as there are 3 (three) vacancies in existence, the Government ought to have sent 12 names. Learned counsel appearing for the private respondents have, however, urged that a reading of Rule 7(1) of the Rules do not require any such procedure to be followed and the Government is required to send 4 names whenever a vacancy occurs and a reading of the Rule does not require that they should project the vacancies during a particular year and shall send four times the names of the number of the vacancies which are likely to occur during a year.

12. The controversy for deciding the legal question, therefore, centres round the interpretation of Rule 7 (1) of the Assam Taxation Services Rules, which provides as follows :

" Selection for Promotion (1) Government shall prepare a list of officers eligible for promotion in any case not exceeding four times the number of vacancies in the order of senioritycummerit and shall forward it to the Commissioner together with such other documents as may be relevant for the purpose of making of selection by the Commission."

13. The very first question which becomes very important for giving interpretation to the present Rule7 (1) of the Rules is as to whether it would make any material difference that the Government adopts the procedure for filling up of the first post which has fallen vacant first and thereafter proceeds to fill up the subsequent posts in the same manner which fall vacant and, in case the Government follows the procedure of sending names for all the posts which have in fact fallen vacant or likely to fall vacant during a particular year.

14. In our opinion, following of either of the procedure will not make any difference and will not give advantage to any candidate in view of the criteria which has been specifically mentioned for the purposes of making the selection for promotion. The important thing which has to be noted down is that the list which has to be prepared of the eligible candidates has to be on the basis of senioritycummerit. It that be so, the Apex Court in its decision in the case of State of Kerala vs. NM Thomas, AIR 1976 SC 493, has laid down that"... with regard to promotion, the normal principle is either meritcumseniority or senioritycummerit. Senioritycummerit means that given the minimum necessary merit requisite for efficiency of administration the senior though the selection is on the basis of senioritycummerit, the procedure which has to be follows is not to judge inter se merit, but the merit of the senior most person has to be judged first. In case, the senior most person is not found suitable for job in that case his name would not be recommended and this very process will be followed in accordance with the seniority of other officers in the gradation list

15. It appears that the apprehension in the mind of the contesting respondents is only on the basis that if 12 names are sent, the name of the petitioner, whose name is at Sl.No. 12 in the gradation list would also be included. But if individual vacancies have to be considered, her name would not be included.

16. We are, however, of the opinion that the apprehension of the respondents is not wellfounded. The criteria for promotion which has been made applicable to the Govt. for the purposes of sending the names i.e. the criteria for sending the names in the order of senioritycummerit will also be applicable to the Commission while making the recommendation of selection. It is, thus clear that at both the levels that is at the Govt level and the Commission level it is the merit of the senior most person which would be judged individually and there will be no comparison of his merit with other juniors as the criteria is not merit subject to due consideration of seniority, but the criteria is senioritycummerit.

17. As we have observed above, Mr.DP Chaliha, Govt. Advocate has made a statement before us that there are 3 existing vacancies for the post of Deputy Commissioner of Taxes. If that be so, we are of the opinion that the Govt. after following the criteria as laid down in Rule 7(1) will send the names of eligible candidates after preparing the list of officers eligible for promotion not exceeding four times the number of vacancies in the order of senioritycummerit (emphasis provided). Such a list would be forwarded to the Commission and as we have stated that the Commission would also follow the same criteria for recommendation i.e. criteria of senioritycummerit for making recommendation.

18. We may also observe that, we are taking this view of Rule 7(1) because following the procedure that the first vacancy should be filled up at the first instance and thereafter, the process of selecting the candidate for other vacancies should be taken later on would result in a situation that the vacancies though they are existing will not be filled up immediately and the process would take a long time. As we have stated above the process of sending the names for all the vacancies together does not prejudice the claims of the person who are senior and prossess merit.

19. As far as the argument raised by the learned counsel for the petitioner that she is entitled of preference because of the provisions of Assam Scheduled Casts and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Rules, 1983, we are of the opinion that Rule 5 (3) has provided for submission of separate list of candidates belonging to Scheduled Castes, Scheduled Tribes (Hills) and Scheduled Tribes (Plains). These lists are required to be submitted for those posts for promotion wheresuch posts for promotion are reserved for Scheduled categories. Rule 5 of the aforesaid Rules runs as follows :

"5. Reservation for Scheduled Castes and Scheduled Tribes in vacancies to be filled up by promotion Reservation for members of Scheduled Castes and Scheduled Tribes in vacancies to be filled up by promotion in any establishment shall be regulated in the following manner :

(a) There shall be reservation at seven percent for members of the Scheduled Castes and ten percent for the members of Scheduled Tribes (Plains) and five percent for the member of the Scheduled Tribes (Hills):

Provided that the State Government may from time to time review the implementation of the reservation policy and take adequate measures including increase of percentage, mentioned in clause 5 (a) of this Act.

(b) a separate twenty point roster in the form given in Schedule shall be maintained by every establishment."

20. From Rule 5 (b) it is clear that a twenty point roster has been given in the Scheduleand naturally it is expected that while filling up the vacancies by promotion, the provisions of Rule 5 of the aforesaid Rules will, be kept in mind. Learned counsel for all the parties have raised no submission in respect of this legal position.

21. For the reasons stated above, we are of the opinion that the State of Assam will now take immediate steps for filling up three vacant posts of Deputy Commissioner of Taxes in accordance with the provisions of Rule 7 (1) of the Assam Taxation Service Rules and in accordance with the provisions of the Assam Scheduled Castes and Scheduled Tribes (Reservation of Vacancies in Services and Posts) Rules, 1983 and in the light of the observation made in this judgment.

The Civil Rule is accordingly finally disposed of.