
(2016) 03 GAU CK 0056
In the Gauhati High Court
Case No : W.A. No. 8(K) of 2014

Vichosunuo Kintso & Another

APPELLANT

Vs

State of Nagaland & Others

RESPONDENT

Date of Decision : 29-03-2016

Acts Referred:

Constitution of India, 1950 — Article 309, 366(19)

Citation : (2016) 2 GauLT 1232

Hon'ble Judges : Ajit Singh, C.J. and N. Chaudhury, J.

Bench : Division Bench

Advocate : A. Zho, Inaholi, Rosemary, Moa Jamir, Advocates, for the Appellant;
Vilika Chishi, GA, for the Respondent

Final Decision : Allowed

Judgement

N. Chaudhury, J.—Whether Nagaland Services (Revision of pay) Rules, 1999 (hereinafter referred to as "the ROP Rules 1999") did not stand amended vide Office Memorandum dated 09.10.2002 issued under proviso to Article 309 of the Constitution of India because of its non-publication in official gazette and whether consequently the writ appellants are entitled to pay scale under the unamended ROP Rules, 1999 w.e.f. their initial date of joining in the service as lecturers of Govt. Polytechnics are the two questions in issue in the present writ appeal.

1. The Hon'ble Single Judge dismissed the writ petition deciding the aforesaid questions in the negative and against the petitioners by his judgment and order dated 14.2.2015 in W.P (C) No. 139 (K) of 2013 and hence this writ appeal.

2. Brief facts involved in this writ appeal are required to be stated at the threshold for better understanding of the case. The two writ petitioners are Government servants working as lecturers in two Polytechnics in the State of Nagaland. Pursuant to recommendation made by the Nagaland Public Service Commission (for short, the NPSC), they were appointed by a common

appointment order dated 13.9.2004 as lecturers of Government Polytechnics in the pay scale of Rs. 7450-225-11,500/ - plus all other allowances as are admissible to the employees of the State Government under the rules in force from time to time with effect from the date of their joining at their respective places of posting. The petitioners immediately joined to their respective places of posting and started drawing salary. At the time of joining, the petitioners were not aware that under the ROP Rules, 1999, lecturers of Govt. Polytechnics are entitled to pay scale of Rs. 8000-13500 although their appointment letter disclosed that they were appointed in the pay scale of Rs. 7450-225-11,500/-. Subsequently, having come to know about the same, they submitted representation before the Additional Director, Higher and "Technical Education, Kohima on 12.02.2010 claiming that they should be paid at the pay scale of Rs. 8000-275-13500 with effect from their initial date of joining as per the provision of ROP Rules, 1999. The Additional Director forwarded the representation to the Commissioner and Secretary to the Government of Nagaland, Higher and Technical Education, Kohima to consider the case of the petitioners. Another representation on 20.07.2010 to the same effect was submitted by the appellants before the Commissioner and Secretary, Higher and Technical Education, Kohima with the same prayer wherein they mentioned that similarly situated lecturers appointed either in 2001 or in 2006 were getting scale as per ROP Rules, 1999 whereas their salary was being paid on allover and unrevised pay scale. Upon such representation being filed, Government asked the office of the Additional Director and respective Heads of the Departments as to why different scales are being applied to similarly situated lecturers. In course inquire", it came to light that as per the ROP Rules, 1984. the pay scale of Polytechnic Lecturers were Rs. 2100-4000 and subsequently by the ROP Rules, 1999, it was raised to Rs. 8000- 13500/-. The Government, however, subsequently issued an office memorandum on 9.10.2002 and thereby made an amendment to ROP Rules, 1999 under proviso to Article 309 of the Constitution of India and thereby downgraded the scale to Rs.7400-11500/-. The Additional Director, therefore, requested the Government either to consider the case of the appellants for granting financial benefits or to come out with a clear direction that they are not entitled to the same as they had appeared before the NPSC knowing the pay scale to be Rs. 7450-11500/-. Again with effect from 1.4.2007, the Govt, restored the pay scale of polytechnic lecturers at Rs.8000-13500/- but still the petitioners were being paid at the scale of Rs. 7400-11500/-. So, the Government, by letter dated 27.09.2011 asked the Director, Department of Technical Education to explain as to why these two officers were not brought over the re-revised pay scale in 2007 and were still being paid in the pay scale of Rs. 7450-13500/-. The Director by his reply dated 25.10.2011 stated in no uncertain words that the appellants are entitled to Rs. 8000-275-13500 from the date of their initial appointment in Class-I Gazetted Scale. However, even thereafter by reply communication dated 19.03.2012, the Under Secretary to the Government of Nagaland, Higher and Technical Education Department informed the Director that the appellants are not entitled to pay scale of Rs.

8000-275-13500/-.

3. Situated thus, the petitioners preferred W.P (C) No. 139 (K) of 2013 before this Court asking for an appropriate direction for giving them pay scale of Rs. 8000-275-13500/- from their initial date of joining with consequential benefits by setting aside the office memorandum dated 09.10.2002 w hereby amendment of ROP Rules, 1999 had been ordered. The impugned Notification dated 09.10.2002 has been annexed as Annexure-M to the writ petition which goes to show at Serial No. 3 that the salary of lecturer in Government Polytechnic was revised to Rs. 7450-255-11,500 from the existing pay scale of Rs. 1800-60-2400-3100-75-3475/-. However, at the 2nd page of the Notification, it is also mentioned that lecturer of Polytechnic who have been paid at the existing pay scale of Rs. 2100-4000/ - would be revised to Rs. 7450-11500/ - by amending the existing Entry No. II of Annexure-II of ROP Rules, 1999. According to the writ petitioners this Notification was never published in official gazette or elsewhere and so, it never came into force.

4. This Notification has been shown to have been issued in exercise of powers conferred under proviso to Article 309 of the Constitution of India. It starts as below :-

" Dated Kohima the 9th Oct"2002 No.FIN/ROP-PC/1/08-99: In exercise of the powers conferred by the provision to Article 309 of the Constitution of India, the Government of Nagaland is pleased to make the following amendments to the Nagaland Services (Revision of Pay) Rules, 1999, with effect from 2002."

5. By filing affidavit-in-opposition, the State respondent Nos. 1,2 and 4 refuted the claim of the writ petitioners and stated that during 2003, four posts of Lecturers (Class-1 Gazetted) were created as per ROP Rules, 1999 in the scale pay of Rs. 8000-275-13500 but the ROP Anomaly Committee revised the same to Rs. 7450-225-11500/-. The petitioners joined the service knowing that the scale of pay was Rs. 7450-225-11500/- However, a letter dated 05.08.2011 addressed to the Commissioner and Secretary to the Government of Nagaland, Department of Higher and Technical Education was annexed as Annexure-2 to this affidavit whereby the Director had recommended to the Government for considering the case of the present appellants. It is not denied that the notification dated 09.10.2002 was never published.

6. Official respondent No.3 filed separate affidavit-in-opposition and annexed Notification dated 09.10.2002 claiming that pay scale of Lecturer in Government Polytechnic was revised from the existing scale of Rs. 1800-3475 to Rs. 7450-225-121500/- by amendment. This Notification has been annexed by the petitioners in the writ petition as Annexure - M. The second page of this Notification though available at Annexure-M of the writ petition, is not available in Annexure-I to the affidavit-in-opposition submitted by respondent No.3. In that page, it is mentioned that the existing scale of lecturer of Polytechnic at Rs. 2100-4000 was revised to the scale of Rs. 7450-11500/ -. It still remains a

question that as on 9.10.2002 when the notification for amendment was issued, the existing scale of lecturers of Govt, poly techniques was neither Rs. 2100-4000 nor was it Rs. 1800-3475. As on that date, the lecturers were drawing salary at revised pay scale of Rs. 8000-275-13500. However, by annexing another notification dated 12.07.2007 as Annexure-2 the Respondent No.3 showed that the pay scale of lecturers of govt. Polytechnics again stood revised to Rs. 8000-255-13500. The deponent asserted in that affidavit that the appellants were being paid now at the pay scale of Rs. 8000-13500 with effect from 01.03.2007 in view of the aforesaid Notification dated 12.07.2007. On the basis of this affidavit, it came to light that the writ petitioners started getting salary in the revised pay scale of Rs. 8000-13500/- as was proposed in the ROP Rules, 1999 and so their prayer for enhancement remains alive only with effect from their date of appointment till 28.02.2007.

7. The ease of the appellants before the Hon''ble Single Judge was that the lecturers appointed prior to 09.10.2002 and after 01.03.2007 have been drawing salary at the pay scale of Rs. 8000-13500 but the writ petitioners alone are being paid at the downgraded scale of Rs. 7450-11500/- which amounts to hostile discrimination. It was further argued that from Notification dated 09.10.2002 on the basis of which the writ petitioners were being paid at the downgraded pay scale of Rs. 7450-11500/- was itself not valid as the same was never notified in official gazette.

8. The Hon''ble Single Judge after hearing the learned counsel for the parties, passed the impugned judgment and order dated 14.2.2014 thereby dismissing the writ petition holding that the Notification dated 9.10.2002 was sent for information to various authorities like the Accountant General, Special Secretary to the Governor, Special Secretary to the Chief Minister, P.S to all Ministers, all Secretaries to the Government of Nagaland and all Head of the Departments and so it amounted to adequate publicity of the Notification dated 09.10.2002, and so it cannot to be held to be invalid. The petitioners having been appointed during the period when the pay scale of lecturer of Polytechnic stood downgraded, they are not entitled to the revised pay scale as per ROP Rules, 1999. According to the Hon''ble Single Judge, pa) scale of Rs. 8000-13500/- was prescribed under Annexure-2 to ROP Rules, 1999 but the same was amended by the Government by issuing Notification under proviso to Article 309 of the Constitution of India on 09.10.2010 and thereby the pay scale was downgraded to Rs. 7450-11500/- and the petitioners having been appointed on 30.09.2004, were paid under the downgraded pay scale and so they cannot claim the revised pay scale of Rs. 8000-13500/-.

9. By preferring this writ appeal against the judgment and order dated 14.02.2014 passed by the Hon''ble Single Judge, the writ appellants have claimed that the Notification dated 09.10.2002 was not publicly notified and so it had never attained the status of any Rule under proviso to Article 309 of the Constitution of India. Consequently, the Notification dated 09.10.2002 could not

have the effect of amending the ROP Rules, 1999 as if, the Notification dated 09.10.2002 was never issued. The writ appellants, therefore, are entitled to pay scale as per the ROP Rules, 1999 with effect from their initial date of joining vide appointment letter dated 30.09.2004.

10. We have heard Mr. A. Zho, learned counsel for the appellants and Ms. Vilika Chishi, learned Government Advocate appearing on behalf of the respondents. We have also perused the documents placed on record including the judgments relied on by the learned counsel for the appellants.

11. It is not in dispute that the present appellants were appointed as Polytechnic lecturers by an order dated 30.09.2004 pursuant to regular selection by the NPSC. It is also not in dispute that in their appointment letter pay scale was mentioned as Rs. 7450-225-11500 plus all other allowances as admissible under the Rules. The parties also do not dispute that ROP Rules, 1999 prescribed scale pay of Rs. 8000-13500 for such Polytechnic lecturers and till 09.10.2002 all the lecturers were being paid in the aforesaid pay scale. While it is the case of the respondents that the ROP Rules, 1999 stood amended insofar as the pay scale of Polytechnic lecturers are concerned with effect from that date and thereby the pay scale of new appointee after 09.10.2002 became Rs. 7450-11500, the appellants on the other hand, claim that the subsequent Notification dated 09.10.2002 purported to have been issued under the proviso to Article 309 of the Constitution of India is not valid as the same was never published in the official gazette or in any newspapers. "The Notification was not given due publicity and so nobody knew about such amendment

12. A Notification under proviso to Article 309 being as good as legislation, is required to be notified like any other Act and the same not having been done, the ROP Rules, 1999 did not come into force at all. The ROP Rules, 1999, as it stood on the appointed date, remained the same for the whole period. This means that on 30.9.2004 when the petitioners were appointed as lecturers of Govt. Polytechnics the scale of pay for the post was Rs. 8000-13500. The scale of pay mentioned in their appointment letter or even in the advertisement was contrary to Rules. It is established norm of service jurisprudence that relationship of employer and employee in Government service is and the terms and conditions of service are governed by the statutory rules and in absence of such rules by administrative instructions. In view of the judgment of the Hon'ble Supreme Court in the case of Roshanlal v. Union of India (AIR 1967 SC 1889), although origin of Government service is contractual but once appointed to a post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of parties but by statute or statutory rules which, of course, can be altered unilaterally by government, The net result is that irrespective of whatever is mentioned in the advertisement or in the appointment letter, the scale of pay of the post by the petitioners are determined by the provisions of the Rules holding the field from time to time. The appellants, therefore, are entitled to revised pay scale of Rs. 8000-13500 as

prescribed under the ROP Rules, 1999.

13. Now, it is to be seen as to whether the impugned notification did really come into force. In the case of *Harla v. State of Rajasthan* (AIR 1951 SC 467), the question as to whether the resolution of the council of ministers adopted on 11.12.1923 in view of the lack of notification was considered by the Hon'ble Supreme Court and thereby it has held that though the resolution was adopted by the council of ministers but in the absence of due publicity people did not know about it and so there was no justification for applying the same for the purpose of punishing the accused person. In the case of *I.N. Suxena v. State of Madhya Pradesh* (AIR 1967 SC 1264), the question for notification in regard to age of retirement of an employee came up for consideration and the Hon'ble Supreme Court held that the aforesaid notification did not amount to a Rule under Article 309 of the Constitution of India and so even though it was not published in official gazette, the same was enforceable. Considering all these judgments, the Hon'ble Single Judge held that the Notification dated 09.10.2002 having been duly endorsed to various authorities like, the Accountant General, Nagaland, the Special Secretary to the Governor, the Special Secretary to the Chief Minister, the P.S to all ministers, all the Secretaries to the Government of Nagaland and all the Head of the Departments, the same was sufficient compliance of publicity and so the Notification dated 09.10.2002 had really come into force. The aforesaid reason recorded by the Hon'ble Single Judge has come up for reconsideration before us.

14. The basic reason for public notification in respect to a legislation is that people in general must be aware as to what has been enacted or promulgated. In the absence of knowledge of the general public they cannot abide by the same and so unless the law made is duly notified, it cannot be deemed to have come into force. Thus public notification is necessary to bring legislation on force. Question arises as to whether mere endorsing the memorandum to few authorities for information as has been done in the present case, amounts to substantial public notification. The word "public notification" has been defined under Article 367 of the Constitution of India and quoted below :-

"366....

(19) "public notification" means a notification in the Gazette of India, or, as the case may be, the official gazette of a State."

15. In the case of *T. Narasimhulu & Ors. v. State of Andhra Pradesh & Ors.*, reported in (2010) 6 SCC 545, a similar question had arisen in regard to public notification of a Rule under Article 309 of the constitution of India. The Hon'ble Supreme Court has held in that case that a rule under proviso to Article 309 of the Constitution of India is as good as a piece of legislation like any Act and so it has to be notified like an Act. The procedure for notifying an Act has thus been made applicable in case of notification of a rule under proviso to Article 309 of the Constitution of India. The relevant paragraph of the aforesaid judgment is

quoted below for ready reference :-

"15. This is not to say that rules made under the proviso to Article 309 of the Constitution are not required to be published at alia rule made under the proviso to Article 309 of the Constitution has the same effect as an Act of the appropriate legislature regulating the recruitment and conditions of service of persons appointed to public services and post in connection with the affairs of the Union or of any State. Hence, even if Article 309 of the Constitution does not say that the rules made under the proviso thereto are required to be published, these rules are required to be published just as any other Act passed by the appropriate legislature is required to be published so that the persons affected by the rules or the Act are aware of the rule or the Act."

16. There is no dispute that an Act has to be published in official gazette for bringing it into force. All the Acts of the State of Nagaland are accordingly published in the official gazette of the State and it is only there upon the same is brought into force. Similarly, the rules framed under proviso to Article 309 of the Constitution are also always published by the State of Nagaland in its official gazette. For example, the Nagaland Services (Revision of Pay) Rules, 1999 with which we are concerned, was also published in official gazette of the State of Nagaland on 08.10.1999. A copy of the Notification dated 08.10.1999 notifying Nagaland (Revision of Pay Rules, 1999) has been provided by the learned counsel for the appellants before the Court. Thus, there is no doubt that an Act of the State of Nagaland and the rules framed under Article 309 of the Constitution are always published in the official gazette of Nagaland. The Notification dated 09.10.2002 having been expressly described to be a rule under proviso to Article 309 of the Constitution, it ought to have been published in the similar manner but the same has not been done. The State of Nagaland could not have taken a different stand for Notification dated 09.10.2002 whereas it has been publishing all Acts as well as the Rules under Article 309 of the Constitution in its official gazette.

17. Because of non-publication of the ROP Rules, 1999, the same was not in the knowledge either of the petitioners or of the general public. The copy of the notification was given only to persons of six categories by way of internal official circulation. It was endorsed to the Accountant General, Nagaland, Special Secretary to the Governor, Special Secretary to the Chief Minister, P.S to all ministers, all Secretaries to the Government of Nagaland and Head of the Departments. Obviously, this is an internal circulation and so it does not amount to public notification. Besides, it does not satisfy that test of "public notification" within the meaning of Article 366 (19) of the Constitution of India. The Hon"ble Single Judge had committed error in not taking this aspect of the matter into consideration.

18. There is yet another relevant aspect of this matter. All Polytechnic lecturers in the State of Nagaland were drawing salary in the pay scale of Rs. 8000-13500/- as prescribed under ROP Rules, 1999 and they continued getting so with effect

from 01.06.1998. Even the appointees after 01.04.2007 are drawing the same scale but the two writ petitioners were paid in the pay scale of Rs. 7450-11500 with effect from their date of joining vide appointment order dated 30.09.2004 till 28.02.2007 because of the aforesaid notification. Obviously, these two writ petitioners were paid at the lower scale though they were discharging the same duty as is being done by other lecturers. All of them have the same qualification and designation. Such action on the part of the Government of Nagaland is also hit by Article 14 of the Constitution of India. The writ petition, therefore, has merit. It ought to have been allowed. It is accordingly allowed. The impugned judgment and order dated 14.02.2014 passed by the Hon''ble Single Judge is accordingly set aside.

19. The writ appeal stands allowed. No order as to cost.

20. The respondents are directed to pay salary to the writ appellants/writ petitioners in the pay scale of Rs. 8000-13500/- as prescribed under the ROP Rules, 1999 with effect from the date of their joining. It is needless to say that they will be entitled to all consequential benefits.