
(2014) 07 GAU CK 0009
In the Gauhati High Court
Case No : Writ Appeal No. 194 of 2014

Vincent Daimary	Vs	APPELLANT
The State of Assam		RESPONDENT

Date of Decision : 25-07-2014

Acts Referred:

Constitution of India, 1950 — Article 16, 309
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2014) LabIC 4394

Hon'ble Judges : Abhay Manohar Sapre, C.J.; Nishitendu Chaudhury, J

Bench : Division Bench

Advocate : R.M. Choudhury and R. Baruah, Advocate for the Appellant; H. Mahanta, Govt. Advocate and B. Ahmed, S.C, Advocate for the Respondent

Judgement

Nishitendu Chaudhury, J.—Judgment and order dated 31.03.2014 passed by the Hon'ble single Judge in W.P.(C) No. 1489/2013 has been challenged in the present writ appeal. The case of the writ petitioner before the Hon'ble single Judge was that his father Late Sumendra Daimary was killed by extremists on 26.06.1989 leading to registration of Udalguri P.S. Case No. 126/1989 under Section 302/ 34 of the IPC. The State of Assam in the mean time framed a set of rules known as Assam Public Services (Appointment of Family Members of Persons killed by Extremists/Terrorists) Rules, 1992 (hereinafter referred to as "the 1992 Rules") thereby making provision for special consideration for victims of families affected by terrorist killing. "Affected candidate" has been defined in these Rules as a member of the family of a person who was killed in violent activities/in the hands of extremists during period from 01.01.1985 and possesses a certificate to that effect issued by the concerned Deputy Commissioner of the district in specified form. The definition of "affected candidate" under Rule 2(a) is followed by definition of "extremists" and "family" by Rule 2(c) and 2(d) respectively. Rule 2(c) defines extremists as ULFA and Bodo militants in Assam in general or any other non-specified extremists militant which may be declared by government as extremists militant for the purpose of

these Rules. Rule 2(d) defines "family" in an inclusive form. It provides that "family" includes parents, spouse, sons, daughters, brothers and sisters of the persons killed. Rule 3 of the Rules provides that in regard to recruitment to all the services and posts under the Government of Assam which is made through Commission or otherwise shall be within the scope of these Rules. Rule 4(i) provides that only one affected candidate from O.B.C. family who applies and is eligible under the normal Rules shall be given appointment to a Government job or jobs under State Government undertaking/Board. Rule 4(ii) further provides that before any appointment is made, the Deputy Commissioner of the District where the person was killed in violent activities shall ascertain as to whether any person has been appointed under sub-rule (i). Under Rule 5, Government is supposed to preserve a panel of such candidates out of all the applications obtained by Deputy Commissioner/Sub-Divisional Officers under various categories of posts depending on qualifications etc. and every Government Department/Public Section Undertaking/Board/Authority shall be required to make appointment from this panel till the same is exhausted. In Rule 6, however, such appointments have been made subject to reservations for SC/ST/OBC (including MOBC)/Ex-Service Men and Physically Handicapped persons.

2. It appears that by notification No. ABP. 121/92/PLV/136, the 1992 Rules were repealed and in that place a new set of guidelines were brought in force. According to these guidelines, preference to members of "affected families" certified as such by competent District authority should be given recruitment in Government and Semi-Government jobs. These measures which are replacements of the earlier 1992 Rules, are furnished below:

"1. Preference to Members of the affected families certified as such by competent District authority in recruitments to Govt. and semi Govt. jobs.

2. Preference to such certified persons in selection of beneficiaries under self-employment generation scheme of different departments and welfare and relied schemes of social welfare etc. departments.

3. Enhancement of the ex-gratia amount paid to the next of kin of a person killed in extremist violence to Rs. 3 lakhs (Three lakhs).

4. Alternative means of livelihood to families of earning victims of extremist violence to be determined by the district authorities after assessing the economic conditions of such family separately.

5. Free Education to children of the poor affected families till they become eligible to earn."

3. The petitioner claims to have filed application praying for appointment under the 1992 Rules in the year 1993 itself but he was not favoured with any appointment. It is the further case of the petitioner that even after issuance of notification on 22.06.2004, a number of similarly situated persons approached this Court praying for appointment under the rules wherein this Hon'ble Court

held that applications for appointment to Government Posts submitted prior to 22.06.2004 would survive even after coming into force of new policy in 2004. Because of such stand by the High Court in these matters, Government issued an Office Memorandum on 29.07.2013 providing that in compliance of the judgments of the High Court, Government in Personnel-B department already prepared a list of applicants who had submitted applications for jobs prior to 22.06.2004 and the list contains as many as 57 applicants. Apart from that, another list has been prepared containing 63 persons of families affected by extremist killing prior to 22.06.2004 where no prayer for appointment under the 1992 Rules, was made. By the said Office Memorandum Deputy Commissioners were directed to constitute a committee to oversee the genuineness of candidates. It is provided further that on receipt of the recommendations of the committee, the department would make arrangement for appointment of the recommended candidates. Even if any other application filed prior to 22.06.2004 is subsequently detected would be carefully examined by the Deputy Commissioner to determine its authenticity. In clause (5), it was further provided that if any application had been filed after 22.06.2004 and did not receive ex-gratia of Rs. 3,00,000/- (Rupees three lacs), they would be given appropriate ex-gratia payment as per aforesaid circular dated 22.06.2004. According to the writ petitioner, although he has not been favoured with the appointment either under the 1992 Rules or under subsequent guidelines and Office Memorandum, one Ranjan Daimary has been appointed in Grade-IV posts in the establishment of Deputy Commissioner at Darang. Petitioner states that on 21.02.2014 there was an advertisement to fill up 5 (five) posts of peon, 3 (three) posts of Chowkidar and 2 (two) posts of Mali wherein the respondent should consider his candidature either under the Rules or under the guidelines. With these averments of fact, writ petitioner prayed that he be appointed against any third grade post under respondent Nos. 4 and 5 as has been done in case of Ranjan Daimary.

4. The respondents filed affidavit-in-opposition before the Hon''ble single Judge disclosing that at the relevant point of time there was no vacancy and, therefore, the application was sent back to the Deputy Commissioner of Darang. The Hon''ble single Judge after hearing the parties and on perusal of all the documents and materials placed on record, disposed of the writ petition on 31.03.2014. The Hon''ble single Judge noted that writ petition was filed 24 years after death of petitioner's father in violent action by extremists. The Hon''ble single Judge did not find any explanation anywhere on record on the part of the writ petitioner showing as to what did he do in all these 24 years prior to filing of representation on 06.01.2012. According to the Hon''ble single Judge, all vacancies that may arise in an establishment cannot be filled up by appointment on compassionate basis or appointments in like nature like the one in hand. Appointment in public services and posts cannot be the sole means and method for giving relief to the victims of terrorist violence and this is why the subsequent guidelines including O.M. dated 29.07.2013 provides for alternative relief of ex-gratia payment to the extent of Rs. 3,00,000/- (Rupees three lacs). Considering

the facts and circumstances of the case including unexplained delay of more than 20 years, the Hon"ble single Judge was satisfied that the alternative relief contemplated under the Office Memorandum of giving ex-gratia relief to the tune of Rs. 3,00,000/- would be just and proper under the facts and circumstances of the case and accordingly direction was issued to the respondents to make payment of Rs. 3,00,000/- to the petitioner within the period of 4 months from the date of receipt of the certified copy of the order. It is this judgment dated 31.03.2014 which is the subject matter of the present writ appeal.

5. We have heard Mr. R.M. Chowdhury, learned counsel for the writ appellant and Mr. H.K. Mahanta, learned Government Advocate as well as Dr. B. Ahmed, learned Standing Counsel, Co-operative Societies, on behalf of the respondents. The documents annexed to the writ appeal including averments made in writ petition are taken into consideration.

6. It appears that Sumendra Daimary was killed by Bodo militants on 26.06.1989. The present petitioner being the son of Sumendra Daimary comes within the definition of affected candidate under the 1992 Rules. Accordingly, he staked claim to any of the vacant posts in Grade-III and Grade-IV under the Government of Assam but as there was no vacancy at the relevant time his application was returned to the Deputy Commissioner. The same position continued till 22.06.2004 when the 2003 Rules were repealed by the government and issued a circular providing alternative relief of granting ex-gratia to the tune of Rs. 3,00,000/- to the affected candidate by extremist's violence. This time petitioner does not appear to have made any prayer for getting relief under the Rules or the guidelines. Only after one Ranjan Daimary got appointment, petitioner became active and approached this Court. There is no doubt that petitioner is guilty of unexplained delay of long period running over more than 22 years. This writ petition has been filed after filing a representation in the year 2012 which obviously is a much belated exercise and writ court cannot shut its eyes to such negligent action of the writ petitioner. The basic purpose for giving services under any of the categories of compassionate claim including the category of the one in hand is to rescue affected family from sudden and undue exigency like untimely death of the sole bread earner of the family. It is a measure to provide state help so that a family does not have to perish for lack of adequate means of livelihood because of a sudden blow to the family. Even in case of appointment under compassionate ground due to death of an employee in harness, it is almost widely accepted principle that once a family is found to have survived the sudden shock due to death of sole bread earner of the family for reasonable time, in that event a compassionate appointment need not be given.

7. After all appointments to services and posts under the Union or the State have to be in conformity with the principle of equal opportunity to all eligible candidates by conforming to the mandate of Article 16 of the Constitution of India. To ensure such discipline, Article 309 and the proviso furnished thereunder

have been incorporated in the Constitution so that there is a well defined recruitment rules for services and posts under the Union or the State. Until the legislature makes a law, the appropriate Government is duty bound to make executive law under proviso to Article 309 of the Constitution. Thus, a joint reading of Article 16 with Article 309 of the Constitution requires that all appointments are to be made by conforming to the recruitment Rules holding the field giving opportunity to all eligible candidates. The scheme of compassionate appointment, therefore, cannot supplant the normal recruitment Rules of the State. Only a defined and distinct quota at best may be earmarked for compassionate appointments. Under normal scheme of compassionate appointment, a 5% of the vacancies of the State of Assam in each year has been earmarked for such appointment. There is no reason as to why such a quota should not be applicable even for the case of affected candidates by extremist's violence. The finding of the Hon''ble single Judge, therefore, that all vacancies under services and posts of the Government cannot be reserved for appointment under the 1992 Rules, cannot be faulted. The Hon''ble single Judge has issued direction for ex-gratia payment to the tune of Rs. 3,00,000/- as alternative relief to the writ petitioner and such a direction is not only just and proper but also in conformity with circular issued on 22.06.2004 as well as the O.M. dated 29.07.2013.

8. The writ appeal, therefore, is devoid of any merit. It is accordingly dismissed.