

GAHC020003132018



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/171/2018

T. LONGSO KHIAMNIUMGAN
R/O TUENSANG TOWN, TUENSANG

VERSUS

THE STATE OF NAGALAND AND 53 ORS.
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVT. OF
N/L, KOHIMA

- 2) THE COMMISSIONER, N/L
KOHIMA
- 3) THE ASSISTANT COMMISSIONER, N/L
OFFICE OF THE COMMISSIONER, N/L, KOHIMA
- 4) THE DEPUTY COMMISSIONER, TUENSANG
OFFICE OF THE DEPUTY COMMISSIONER, TUENSANG
- 5) THE SUB-DIVISIONAL OFFICER(C), TUENSANG
TUENSANG
- 6) SADAR HEAD DOBASHI, TUENSANG
TUENSANG
- 7) SENIOR DOBASHI, TUENSANG
TUENSANG
- 8) EXTRA ASSISTANT COMMISSIONER, LONGKHIM
TUENSANG
- 9) HEAD DOBASHI, LONGKHIM
TUENSANG
- 10) SENIOR DOBASHI, LONGKHIM
LONGKHIM, TUENSANG
- 11) EXTRA ASSISTANT COMMISSIONER, SHAMATOR
SHAMATOR, TUENSANG

- 12) HEAD DOBASHI, SHAMATOR
SHAMATOR, TUENSANG
- 13) SENIOR DOBASHI, SHAMATOR
SHAMATOR, TUENSANG
- 14) EXTRA ASSISTANT COMMISSIONER, NOKLAK
NOKLAK, TUENSANG
- 15) HEAD DOBASHI, NOKLAK
NOKLAK, TUENSANG
- 16) SENIOR DOBASHI, NOKLAK
NOKLAK
- 17) M. BIRI CHANG
R/O TAKNYU VILLAGE, POSTED AT EAC OFFICE CHINGMEI
Advocate-P. B. PAUL
, HETOKA (R/13-33 & 35)
P. B. PAUL
- 18) T. PUTSOI
R/O SANGLOI VILLAGE, POSTED AT EAC OFFICE NOKHU
- 19) IMSUMANGYANG SANGTAM
R/O ALISOPUR VILLAGE, POSTED AT ADC OFFICE LONGKHIM
- 20) A. THRIMHO YIMCHUNGER
R/O LONGTOKER VILLAGE, POSTED EAC OFFICE, NOKHU
- 21) M. LONGSHEM
CHOKLANGAN VILLAGE, POSTED AT EAC OFFICE, NOKHU
- 22) M. MATBOU CHANG
R/O CHINGMEI VILLAGE, POSTED AT EAC OFFICE, CHINGMEI
- 23) A. HATHRONG YIMCHUNGER
R/O KIUTSUKIUR VILLAGE, POSTED AT EAC OFFICE SOTOKUR
- 24) Y. SEKYUCHEM SANGTAM
R/O SANGSOMONG VILLAGE, POSTED AT ADC OFFICE
LONGKHIM
- 25) T. TONGPANG CHANG
R/O HAKCHANG VILLAGE, POSTED AT EAC OFFICE,
SANGSANGNYU
- 26) K. THONGTHONG
LENGKONGER VILLAGE, POSTED AT EAC OFFICE, SOTOKUR
- 27) PESING
PESHU VILLAGE, POSTED AT EAC OFFICE PANSO
- 28) Y. THSAJUNGLI
R/O LONGKHIM VILLAGE, POSTED AT ADC OFFICE,
LONGKHIM
- 29) N. CHINGMAK
R/O BHUMPAK VILLAGE, POSTED AT EAC OFFICE, CHINGMEI

- 30) NAGAKUSOMBA
TUENSANG VILLAGE, POSTED AT TUENSANG HEADQUARTER
- 31) KIUKUM
R/O SOTOKUR VILLAGE, POSTED AT EAC OFFICE, MANGKO
- 32) LONGSHAM
R/O NOKHU VILLAGE, POSTED AT ADC OFFICE, NOKLAK
- 33) K. CHINGMAK
R/O YALI VILLAGE, POSTED AT TUENSANG HEADQUARTER
- 34) M. HAKU CHANG
R/O KESHAI VILLAGE, POSTED AT SANGSANGNYU
- 35) C. NGOUBANGSONBA
R/O LONGRA VILLAGE, POSTED AT EAC
OFFICE,NGOUNGCHUNG
- 36) MATHRI YIMCHUNGER
POSTED AT ADC OFFICE SHAMATOR
Advocate-H. ZHIMOMI
,PFOSEKHO PFOTTE (R/36-54)
- 37) N. PEHEI
POSTED AT ADC OFFICE, NOKLAK
- 38) C. TOCHI CHANG
POSTED AT TUENSANG HEADQUARTER
- 39) TALIMEREN SANGTAM
POSTED AT EAC OFFICE, CHARE
- 40) C. KHUMONG
POSTED AT ADC OFFICE, NOKLAK
- 41) Y. IMTICHUBA
POSTED AT EAC OFFICE NGOUNGCHUNG
- 42) HOTONGKYI SANGTAM
POSTED AT EAC OFFICE CHARE
- 43) SHITOPONG YIMCHUNGER
POSTED AT EAC OFFICE SOTOKUR
- 44) M.W. CHOLLEN CHANG
POSTED AT TUENSANG HEADQUARTER
- 45) T. CHETTEI
POSTED AT TUENSANG HEADQUARTER
- 46) KIOUSUMONG
POSTED AT ADC OFFICE SHAMATOR
- 47) B.SAYU CHANG
POSTED AT EAC OFFICE, SNAGSANGNYU
- 48) T. CHINGMAK
POSTED AT EAC OFFICE, NGOUNGCHUNG
- 49) T. PALU KHIAM

POSTED AT EAC OFFICE NOKHU
50) M. SHAHOTO YIMCHUNGER
POSTED AT EAC OFFICE MANGKO
51) I. Y. SOMBA CHANG
POSTED AT TUENSANG HEAQUARTER
52) W.M. MULLONG CHANG
POSTED AT TUENSANG HEADQUARTER
53) C. CHUBA CHANG
POSTED AT TUENSANG HEADQUARTER
54) KHINGHKHASE SANGTAM
POSTED AT ADC OFFICE LONGKHIM

Advocate for the Petitioner : I. KINNY

Advocate for the Respondent : GOVT ADV NL

BEFORE
HONBLE MR JUSTICE KARDAK ETE

JUDGMENT & ORDER (ORAL)

Date : 21-09-2023

Heard Mr. Taka Kichu, learned counsel for the petitioner and also heard Mr. V. Zhimomi, learned State counsel for the respondent nos. 1 to 16 and Mr. Pfosekho Pfotte, learned counsel for the respondent nos. 17 to 54.

2. By filing this petition, the petitioner has assailed the selection process dated 08.11.2016 for the post of DB Grade-II pursuant to the advertisement dated nil.07.2016 and the consequential Government approval dated 15.06.2017 for appointment of 38 DB Grade II as well as the appointment order 03.07.2017 whereby the 38 posts of DB Grade-II have been appointed on the ground that the appointments have been made in excess of the post advertised as in terms of the advertisement dated nil.07.2016, 37 posts of DB Grade-II were advertised, however, 38

nos. of DB Grade-II have been appointed by the State respondents and also prays for quashing of the entire selection process and for conduct of fresh selection process of the post of DB Grade-II.

3. The case projected by the petitioner is that the Deputy Commissioner, Tuensang issued the advertisement dated nil.07.2016 inviting application from the candidates belonging to indigenous inhabitants of Tuensang District for filling up of 37 DB Grade-II along with other Grade IV posts. Pursuant to the advertisement dated 01.07.2017, the Deputy Commissioner, Tuensang had constituted a Screening Committee dated 30.09.2016 for the District Headquarters and Sub-divisions to conduct the DLRB 2016 for the various posts as per the prevailing practices. The screening test was conducted on different dates at 4 different districts under Tuensang district. The petitioner is from Noklak Sub- Division and for the Noklak Sub Division Screening test was conducted on 20.10.2016.

4. The result of the screening test was declared on 24.10.2016 by the DLRB Tuensang. Since the petitioner was declared qualified for the screening test, a calling letter was issued for oral interview which was to be held on 08.11.2016. Accordingly, oral interview was conducted at the DC Office, Tuensang on 08.11.2016 and the result was declared on 15.06.2017. After the declaration of the result, the Office of the Commissioner, Nagaland conveyed the Government approval of DLRB 2016 for Tuensang District vide letter dated 15.06.2017 which consisted of 38 candidates (One post in excess of the advertisement) to be appointed as DB Grade-II, including the name of the 10 candidates on waiting list.

5. Pursuant to the approval order dated 15.06.2017, the Deputy

Commissioner appointed altogether 38 candidates in the post of DB Grade-II, i.e., 19 persons as fresh candidates and another 19 candidates by way of regularization.

6. Mr. Taka Kichu, learned counsel for the petitioner submits that since the total number of posts advertised were 37 DB Grade II whereas both selection and appointments are of 38 posts, which is in excess of one more post. Therefore, it is settled position of law that no appointment can be made in excess of the posts advertised, therefore, prays that the entire selection process may be set aside and a fresh advertisement may be issued so as to enable the petitioner and the other eligible candidates to participate in the process of selection afresh.

7. Mr. Taka Kichu, learned counsel for the petitioner has relied on the judgment of the Hon'ble Supreme Court in the case of **Secretary, A.P. Public Service Commission Vs. B. Swapna & Ors** reported in **(2005) 4 SCC 154** which is reproduced herein below:

"10. There are two principles in service laws which are indisputable. Firstly, there cannot be appointment beyond the advertised number and secondly norms of selection cannot be altered after the selection process has started.

13. The legal position so far as the case of existing vacancies, notified vacancies and future vacancies has been set out by this Court in several decisions. In Prem Singh and Ors. v. Haryana State Electricity Board and Ors. (1996 (4) SCC 319), in paragraphs 25 and 26 it was laid down as follows:

"25. From the above discussion of the case-law it becomes clear that the selection process by way of requisition and advertisement can be started for clear vacancies and also for anticipated vacancies but not for future vacancies. If the requisition and advertisement are for a certain number of posts only the State cannot make more appointments than the number of posts advertised, even though it might have prepared a select list of more candidates. The State can deviate from the advertisement and make appointments on posts falling vacant thereafter in exceptional circumstances only or in an emergent situation and that too by taking a policy decision in that behalf. Even when filling up of

more posts than advertised is challenged the court may not, while exercising its extraordinary jurisdiction, invalidate the excess appointments and may mould the relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. What relief should be granted in such cases would depend upon the facts and circumstances of each case.

26. In the present case, as against the 62 advertised posts the Board made appointments on 138 posts. The selection process was started for 62 clear vacancies and at that time anticipated vacancies were not taken into account. Therefore, strictly speaking, the Board was not justified in making more than 62 appointments pursuant to the advertisement published on 2-11-1991 and the selection process which followed thereafter. But as the Board could have taken into account not only the actual vacancies but also vacancies which were likely to arise because of retirement etc. by the time the selection process was completed it would not be just and equitable to invalidate all the appointments made on posts in excess of 62. However, the appointments which were made against future vacancies - in this case on posts which were newly created - must be regarded as invalid. As stated earlier, after the selection process had started 13 posts had become vacant because of retirement and 12 because of deaths. The vacancies which were likely to arise as a result of retirement could have been reasonably anticipated by the Board. The Board through oversight had not taken them into consideration while a requisition was made for filling up 62 posts. Even with respect to the appointments made against vacancies which arose because of deaths, a lenient view can be taken and on consideration of expediency and equity they need not be quashed. Therefore, in view of the special facts and circumstances of this case we do not think it proper to invalidate the appointments made on those 25 additional posts. But the appointments made by the Board on posts beyond 87 are held invalid. Though the High Court was right in the view it has taken, we modify its order to the aforesaid extent. These appeals are allowed accordingly. No order as to costs."

The view was recently re-iterated in State of Jammu and Kashmir and Ors. v. Sanjeev Kumar and Ors."

8. The case of **Prem Singh and Ors Vs. Haryana State Electricity Board and Ors** reported in **(1996) 4 SCC 319**, the Hon'ble Supreme Court has held as follows:

"12. In our opinion, there is no substance in the objection raised with respect to locus standi of the original writ petitioners. The candidates could not have anticipated when they appeared for the interview that the Selection Committee would recommend candidates and the Board would make appointments far in excess of the advertised posts. The

petitioner who was not eligible had a just grievance that due to appointments of candidates in excess of the posts advertised he was deprived of the right of consideration for appointment against the posts which would have become vacant after he acquired eligibility."

9. Mr. V. Zhimomi, learned State counsel for the respondents while relying on the affidavit filed on behalf of the State respondents fairly submits that admittedly one post which was not advertised has been filled up which was kept for compassionate appointment and against the said post, Mr. Y. Thsajungli Sangtam respondent no. 28, in this present writ petition has been appointed as DB Grade-II as a fresh candidate though the posts advertised for DB Special Grade-II DB were 37 posts.

10. Mr. V. Zhimomi, learned State counsel at the same time submits that the respondent no. 28 Shri. Y. Thsajungli Sangtam has participated in the DLRB interview pursuant to the advertisement dated nil.07.2016 for the post of DB Grade-II under Tuensang District. He further submits that though there is a mistake on the part of the State respondents in filling up the post in excess of nos. of posts advertised there is no illegality on the part of respondent authorities.

11. Mr. V. Zhimomi, learned State counsel while relying on the judgment of the Hon'ble Supreme Court in the case of **Pankjeshwar Sharma and Ors Vs State of Jammu and Kashmir and Ors** reported in(2021) 2 SCC 188 submits that even if in some cases appointment have been made wrongly that did not confer any right of appointment to petitioner as Article 14 of the constitution does not envisage negative equality, and if the state has committed the mistake it cannot be forced to perpetuate the said mistake

12. He further submits that since the Hon'ble Supreme Court in the case of **Gujarat State Deputy Engineers Association Vs. State of Gujarat** though

found the appointment in some cases not in accordance with the law, has refused to set aside such appointments in view of the length of service rendered by such appointees. In the present case the private respondents has been serving for more than 6 years. Therefore, he submits that though there is a mistake on the part of the State respondents, this Court may not interfere in the selection process and the private respondents may be allowed to continue in their service as per their selections and appointments.

13. Mr. Pfosekho Pfotte, learned counsel appearing for respondent nos. 17 to 54 submits that the petitioner has no locus standi to file this writ petition in as much as he has participated in the selection process pursuant to the advertisement dated nil.07.2016 and being unsuccessful after participation in the selection process, he cannot turn around and challenge the selection process as being bad and illegal.

14. I have considered the submissions made by the learned counsel for the parties and perused the materials available on record.

15. Having considered the case besides the other challenge, the issue that needs to be decided is as to whether there is an excess appointment over and above the posts advertised. It is not disputed that the advertisement date nil.07.2016 inter alia provides for a total of 37 posts of DB Grade-II to be filled up in the entire district of Tuensang. Accordingly, the selection process was conducted for 37 posts of DB Grade-II. It prescribes that all vacancies shall be filled up on 50:50 basis between the in-service, i.e., contingency/adhoc/contract/fixed etc and fresh candidates.

16. The Deputy Commissioner thereafter sent the select list for approval

by the government consisting of 19 selected fresh candidates and 19 candidates from in-service. Thereafter, the Government conveyed the approval vide order dated 15.06.2017 whereby altogether 38 candidates have been approved for appointment in the post of DB Grade-II.

17. Finally vide order dated 03.07.2017, the Deputy Commissioner has appointed the private respondents, in total 38 persons i.e., 19 from fresh candidates and 19 from in-service. On consideration of the above facts and the materials, there is no doubt that the respondent authorities has appointed 38 candidates which is more than the posts advertised i.e., 37 posts of DB Grade-II.

18. It is a settled position of law the filling up of vacancy over and above the number of vacancy advertised would be violative of fundamental rights guaranteed under Article 14 and 16 of the constitution of India and the select list could not claim appointment as a matter of right. A profitable reference can be made to the decisions of the Hon'ble Supreme Court in the case of **Mukul Saikia Vs. State of Assam** reported in **(2009) 1 SCC 386** which is reproduced herein below:

" 44. It is well settled law that filling up of the vacancies over and above the number of vacancies advertised would be violative of Articles 14 and 16 of the Constitution of India. Mere inclusion of the appellants in the select list of the direct appointees does not confer any right on them to be appointed against the vacancies reserved for promotees. "

19. And in **Rakhi Ray and Ors Vs. High Court of Delhi and Ors** reported in **(2010) 2 SCC 637**, the Hon'ble Supreme Court has observed as follows:

"7. It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of

notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. "

20. There would not be any disagreement to the observation made by the Hon'ble Supreme Court in the case of **Union Of India & Anr vs Kartick Chandra Mondal & Anr** that if something is being done or acted upon erroneously that cannot become the foundation for perpetuating further illegality. If an appointment is made illegally or irregularly, the same cannot be made the basis of further appointment and erroneous decision cannot be permitted to perpetuate further error detrimental to the general welfare of the public or a considerable section. However, in the present case, this Court has not been called upon to decide as there is an illegal appointment, the petitioner should be appointed, rather the issue that is to be decided is as to whether there is excess appointment over and above the post(s) advertised.

21. It is not disputed at the bar that the advertisement clearly provides for 37 posts of DB Grade-II and the appointments had been made for 38 candidates, both from fresh and in-service candidates, which clearly shows that there is an excess appointment of one post over and above the actual number of posts advertised.

22. In view of the above, since there is excess appointment of one post over and above the posts advertised of 37 DB Grade-II, this Court is of the view that the excess appointee cannot be allowed to continue as it will be against the law enunciated by the Hon'ble Supreme Court of India and it

is also in violation of Article 14 and 16 of the Constitution of India.

23. Having been concluded that there is an excess appointment over and above the post(s) advertised, the next issue would be who amongst the private respondents would not be entitled to continue in the service in the facts and circumstances of the present matter. The learned counsel for the petitioner has pointed out that the approval of the select list is in order of merit, therefore, the last candidate in the merit i.e., Shri. C. Ngoubangsonba (respondent No. 35 in the writ petition) has to be discontinued by setting aside his appointment.

24. Having considered the submission of the learned counsel for the private respondents on an objection on locus, this Court is of the view that since there is a clear violation of the law laid down by the Hon'ble Supreme Court as well as the violation of Article 14 and 16 of the Constitution of India, wherein admittedly the respondent authority has made excess appointment over and above the 37 posts of DB Grade-II, the question of locus raised by the learned counsel for the private respondents is only to be considered for rejection.

25. Regard being had to the submission of the learned State counsel relying on the judgment of the Hon'ble Supreme Court that since the respondents has been serving for the last 6 years they should be allowed to continue, this Court is of the view that, in view of the settled position of law that no excess appointment over and above the post(s) advertised is permissible, this Court is unable to accept such submission as in those cases relied on by the learned counsel for the State respondents, the Hon'ble Supreme Court has observed in exercise of the power under Article 142 of the Constitution of India.

26. Regard being had to the issues, which I have analyzed and concluded above and in view of the law laid down by the Hon'ble Apex Court, this Court is of the view that the selection and appointments of 38 candidates over and above the advertised post(s) deserves to be interfered with. No interference is called for to the entire selection and appointments but only the excess appointment over and above the 37 posts advertised.

27. Accordingly, the appointment of the person, namely Shri. C. Ngoubangsonba, respondent No. 35, appointed in excess to the post stands set aside and quashed. Liberty is granted to the respondent authority to fill up the post in accordance with law. It is made clear that this Court is not interfering with the selection process.

28. In the result, the writ petition is disposed of.

However, no order as to costs.

JUDGE

Comparing Assistant