



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

Case No. : WP(C)/138/2021

ABEMO LOTHAN @ ABEMO TSOPOE AND 5 ORS
DRIVER, STATE PLANNING MACHINERY,
PLANNING AND COORDINATION DEPARTMENT,
NAGALAND, KOHIMA

2: SHRI IMPOSENBA
DRIVER DISTRICT PLANNING MACHINERY
PEREN NAGALAND

3: SHRI SHUMBEMO @ SHUMBEMO OVUNG
DRIVER PLANNING AND COORDINATION DEPARTMENT
NAGALAND KOHIMA

4: SHRI IMTITEMSU
DRIVER STATE PLANNING AND COORDINATION DEPARTMENT
NAGALAND KOHIMA

5: SHRI TONGPANGMEREN
DRIVER DISTRICT PLANNING OFFICE
LONGLENG NAGALAND

6: SHRI TIAKABA
DRIVER DISTRICT PLANNING OFFICE
MOKOKCHUNG NAGALAN

VERSUS

THE STATE OF NAGALAND AND 2 ORS
REPRESENTED BY THE CHIEF SECRETARY TO THE
GOVERNMENT OF NAGALAND, KOHIMA

2: THE ADDL. CHIEF SECRETARY AND DEVELOPMENT
COMMISSIONER PLANNING AND COORDINATION DEPARTMENT
NAGALAND KOHIMA

3:SHRI WEZO CHIERO
DRIVER STATE PLANNING MACHINERY PLANNING AND
COORDINATION DEPARTMENT NAGALAND KOHIMA

Advocate for the Petitioner : TONGPOK PONGENER

Advocate for the Respondent : GOVT ADV NL

BEFORE
HON'BLE MR. JUSTICE KAKHETO SEMA

ORDER

Date : 31-10-2023

Heard Mr. Tongpok Pongener, the learned counsel for the petitioners, Mr. Moa Imchen, learned Sr. Government Advocate for the State respondents and Mr. Moa Jamir, learned counsel for the respondent No. 3.

2. The present writ petition has been filed seeking for a direction to quash and set aside the impugned order dated 29/07/2021 regularising the service of the respondent No.3 as Driver under the Planning & Co-ordination Department and to consider the case of the petitioners for regularisation in service by giving effect to the O.M dated 17/03/2015 which provides for regularisation and absorption of work-charge and casual employees and revision of pay/wages.

3. That the facts of the case in brief is that the petitioners are all serving as Drivers in the Planning & Co-ordination department in the pay scale of Rs. 5200-20200/- with Grade Pay of Rs. 1800/- per month. The petitioners were appointed to the post by orders dated 04/07/2002, 07/09/2005, 16/05/2006, 01/07/2008, 17/07/2008 & 13/01/2009 respectively, while the respondent No.3 was appointed on 31/03/2006. In the seniority list of fixed/scale pay drivers under the Planning & Co-ordination department, the name of the petitioners appears at Sl. No. 1, 2, 5, 10, 11 & 12 while the name of the respondent No.3 appears at Sl. No. 4. The petitioner No.1 & 2 are accordingly senior to the respondent No.3 and the petitioner No. 3, 4, 5 & 6 are junior to the respondent No.3. It is the case of the petitioners that the Office Memorandum dated

17/03/2015 and the Office Memorandum dated 22/09/2004 governs the regularisation in service of both the petitioners and the respondent No.3.

4. That by the impugned order dated 29/07/2021, the Department has regularised the service of the respondent No.3 in the Pay Matrix Level-3 (Rs. 18000-56,900)/- per month plus all other allowances as are admissible under the rules from time to time in Nagaland with immediate effect. The regularisation in service of the respondent No.3 has been made against retirement vacancy of Shri. Krishna Bahadur Chetri, Driver who retired from service on superannuation on 31/10/2019.

5. Mr. Tongpok Pongener, the learned counsel for the petitioners submits that the petitioner No.1 & 2 are senior in service to the respondent No.3 and therefore, the respondent No.3 could not have been considered for regularisation in service without first considering the case of the petitioner No. 1 & 2. It is also submitted that no advertisement has been issued by the State respondents for enabling the petitioners and other eligible candidates to apply for the post nor was the Office Memorandum dated 17/03/2015 followed while regularising the service of the respondent No.3 but the respondent No.3 was regularised in service by adopting pick and choose method.

6. Mr. Moa Imchen, the learned Sr. Government Advocate while making his submission has only relied to paragraph-6 of the affidavit-in-opposition filed by the State respondents. Paragraph-6 is reproduced below;

“6. That with regard to the statement made in paragraph-6, 7, 10, 11, 12, 13, 14 of the writ petition the deponent begs to state that W.P.(C) No. 17 of 2020 was disposed by this Hon’ble Court by judgment & order dated 08-03-2021 with a direction to consider the case of the petitioners in terms of O.M dated 17/03/2015. Subsequently Civil Review Petition No. 2 of 2021 was filed by the private respondent No. 3 & 4 of W.P.(C) No. 17 of 2020 which was disposed by this Hon’ble Court on 15/11/2021. As such during the pendency of the said review petition the case of Shri. Wezo Chiero (respondent No.3 in the present writ petition), was regularised by Office order dated 29/07/2021.

It is pertinent to state here that Shri Wezo Chiero respondent No. 3 in the present writ petition was never made a party in the earlier proceedings nor did he pursued in the litigation

as such his service was regularised.”

7. Mr. Moa Jamir, the learned counsel for the respondent No. 3 in his usual fairness submits that as the State respondents has failed to justify as to why the respondent No.3 was favoured for regularisation in service to the petitioners, the proper recourse would be to advertise the post in which the respondent No. 3 has been regularised giving equal opportunity to all eligible and qualified candidates to apply for the post.

8. Heard the learned counsel for the parties and perused the materials on record. From the submission made by the parties it is ascertained that the petitioners and the respondent No.3 are all serving as drivers in the Planning & Co-ordination department, the petitioner No.1 & 2 being appointed prior in point of time to the respondent No.3. By the order dated 29/07/2021 issued by the department, the respondent No.3 has however been regularised in service prior to the petitioner No. 1 & 2. On the pointed query as to why the petitioners was preferred for regularisation in service, the learned Sr. Government Advocate has only referred to and read out paragraph-6 of the affidavit-in-opposition. Paragraph-6 of the Government's affidavit nowhere explains as to why the respondent No.3 was favoured and regularise in service without affording equal opportunity to all the eligible candidates. Paragraph-6 of the Government affidavit, in the considered opinion of this Court has no relevance to the case at hand. It is therefore clear that the respondent No.3 was regularised in service without following any due process of law and in violation of the constitutional scheme as adumbrated in Article 14 and 16 of the Constitution of India. Since the respondent No.3 has been regularised in service without the post being advertised and without undergoing any selection process, the appointment and regularisation of the respondent No.3 as driver in the Planning & Co-ordination department cannot stand the scrutiny of law and is therefore liable to be quashed and set aside.

In the case of **State of Orissa and Another -versus- Mamata Mohanty**, reported in **(2011) 3 SCC 436**, the Hon'ble Apex Court while discussing the issue of appointment/employment without advertisement has held as follows;

“35: At one time this Court had been of the view that calling the names from Employment Exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, it came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television as merely calling the names from the Employment Exchange does not meet the requirement of the said Article of the Constitution. (Vide: Delhi Development Horticulture Employees’ Union v. Delhi Admn⁷, State of Haryana v. Piara Singh⁸, Excise Suptd. v. K.B.N. Visweshwara Rao⁹, Arun Tewari v. Zila Mansavi Shikshak Sangh¹⁰, Binod Kumar Gupta v. Ram Ashray Mahoto¹¹, National Fertilizers Ltd. v. Somvir Singh¹², Telecom District Manager v. Keshab Deb¹³, State of Bihar v. Upendra Narayan Singh¹⁴ and State of MP v. Mohd. Ibrahim¹⁵.)

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.”

9. The action of the State respondents regularising the service of the respondent No.3 is therefore in complete negation of the law laid down by the Hon’ble Supreme Court.

10. In the light of the discussion made above, the impugned order dated

29/07/2021 (Annexure-D to the writ petition) regularising the service of the respondent No.3 as Driver in the Planning & Co-ordination department is hereby quashed and set aside. The State respondents are directed to advertise the post of Driver held by the respondent No.3 within a period of 3(three) months from the date of passing of this order and to make appointment in accordance with law after giving equal opportunity to the petitioners, the respondent No.3 and all those who are eligible to be considered for appointment to the said post.

11. As regards the prayer of the petitioners for regularisation in service, the State respondents shall consider the same in the light of O.M dated 17/03/2015 and the O.M dated 22/09/2004.

12. Writ petition disposed. No cost.

Sd/-

JUDGE

Comparing Assistant