

GAHC030002592022



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

Case No. : WP(C)/69/2022

Sh Lalzarmawia
Kawnpui

VERSUS

The State of Mizoram r/b the Chief Secretary to the Govt. of Mizoram and 3 Ors.
Aizawl2:The Secretary
DP and AR
Govt. of Mizoram

3:The Secretary
Urban Development and poverty Alleviation Deptt.
Govt. of Mizoram

4:The Director
Urban Development and Poverty Alleviation Deptt.
Govt. of Mizora

Advocate for the Petitioner : Mr A.R. Malhotra
Mr. C. Tlanthianghlina
Mr. Juliana Lalhmangaihi

Advocate for the Respondent : Mrs. H Lalmalsawmi, (Addl.AG/GA Mizoram)

:::B E F O R E:::

HON'BLE MR. JUSTICE NELSON SAILO

J U D G M E N T & O R D E R

30.04.2024

Heard Mr. A.R. Malhotra, learned counsel for the petitioner and Mrs. H. Lalmalsawmi, learned Govt. Advocate who appears for all the respondents.

[2.] Brief facts of the case essential for disposal of the writ petition may be noticed at the outset. The petitioner was appointed as Junior Engineer under the Directorate of Urban Development & Poverty Alleviation Department (UD&PA) on contract basis at a fixed monthly remuneration with effect from 12.11.2009 up to 28.02.2010 upon being recommended by the duly constituted DPC which held its meeting on 13.10.2009. The service of the petitioner was extended from time to time and consequently, he was regularized in service on the recommendation of the Mizoram Public Service Commission (MPSC) with effect from the date of joining the post by Notification dated 20.12.2016. Upon completion of probationary period successfully, which was for two (2) years, the petitioner along with another person were confirmed in service with immediate effect. The petitioner is also at Sl.No. 1 of the final seniority list of Junior Engineer in the Pay Level 7 of the Pay Matrix

under the UD&PA Department.

[3.] The case of the petitioner is that the next promotion from the post of Junior Engineer is to the post of Assistant Engineer as per the Mizoram Urban Development & Poverty Alleviation Department (Group 'A' post) Recruitment Rules (Rules of 2012). As per the Rules of 2012, there are two (2) sanctioned post of Assistant Engineer and the method of recruitment is 50% by direct recruitment and remaining 50% by promotion, failing which, by deputation. The Rules of 2012 was amended by the Mizoram Urban Development & Poverty Alleviation Department (Group 'A' post) Recruitment (Amendment) Rules, 2015 (Amendment Rules of 2015). As per the said amendment, the sanctioned post has been increased to four (4) posts and the quota meant for direct recruitment is 75% and for promotion quota 25%, failing which, by deputation.

[4.] According to the petitioner, his contract service was regularized and therefore, he can count one third of the past service rendered on contract basis as permissible under the Mizoram Government Employees (Counting of Past Service) Rules, 2020 (Rules of 2020). Therefore, by adding up the services rendered on regular basis as well as the past service rendered on contract basis, the petitioner is eligible to be considered against the 25% quota earmarked for promotion to the post of Assistant Engineer. The proposal submitted by the UD&PA for considering the promotion of the petitioner was rejected by the Department of Personnel &

Administrative Reforms (DP&AR) vide I.D dated 01.02.2021. The proposal for relaxation of the Office Memorandum concerned to facilitate the consideration of the promotion of the petitioner to the post of Assistant Engineer was also regretted through the impugned ID No. A.12018/44/2020-P&AR(GSW) dated 15.11.2021. While rejecting the same, the UD&PA Department was advised to fill up the post by way of deputation as per the impugned ID No. A.12018/44/2020-P&AR(GSW) dated 20.10.2021. Aggrieved, the petitioner is before this Court.

[5.] This Court while issuing notice of motion on 29.06.2022 had passed the interim order to the effect that the ID dated 20.10.2021 advising the Department to fill up the vacancy by way of deputation should not be acted upon till final disposal of the case. The interim order remains in operation till date.

[6.] Mr. A.R. Malhotra, learned counsel for the petitioner submits that the Rules of 2012 and the amended Rules of 2015 have been framed by the Governor of Mizoram in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and the same provides amongst others the method of recruitment for the post of Assistant Engineer and the percentage of the post to be filled up by way of direct recruitment and by promotion. The percentage of post to be filled up is 75% by direct recruitment and 25% by way of promotion and failing which, by way of deputation. He submits that out of the four (4) posts of Assistant Engineer under the Department, three (3) posts have already been filled up by way

of direct recruitment and the remaining one (1) post which became vacant on 21.10.2020 on account of the promotion of the incumbent concerned to the next higher post of Executive Engineer, the petitioner is eligible to be considered for promotion against the said post. However, by relying upon the Office Memorandum dated 07.01.2020, the State respondents more particularly the DP&AR has regretted the proposal of the UD&PA Department for filling up the said post by promotion for want of available promotion quota. In other words, according to the DP&AR, since the vacancy occurred on 21.10.2020 after the issuance of the Office Memorandum dated 07.01.2020, the first three (3) vacancies are to be filled up by direct recruitment and thereafter, the one (1) post remaining should be filled up by way of promotion. Therefore, since the vacancy is meant for a direct recruit, the case of the petitioner cannot be considered for promotion. Likewise, in view of the stipulation of the Office Memorandum dated 07.01.2020, the Rules of 2012 and its amendment cannot be relaxed to bring the petitioner in the zone of consideration.

[7.] Mr. A.R. Malhotra submits that the Office Memorandum cannot be the basis for rejecting the case of the petitioner for his promotion in view of the fact that the Office Memorandum is only an executive instruction. He submits that it is a settled law that executive instructions cannot override the statutory provisions of law framed under the powers conferred by proviso to Article 309 of the Constitution of India. In this connection, the learned counsel relies upon the Judgment & Order

dated 28.07.2023 passed by this Court in *WP(C) No. 112/2022 (Zohmingthangi & 5 Ors. -Vs- State of Mizoram & 4 Ors.)* wherein, this Court while deciding the case has placed reliance upon the Apex Court decision rendered in *Ajay Kumar Das -Vs- State of Orissa & Ors. (2011) 11 SCC 136* and *Pune Municipal Corporation & Anr. -Vs- Harkchand Misirimal Solanki & Ors. (2014) 3 SCC 183*.

[8.] Referring to the said case, the learned counsel submits that in the given facts of that case, the four (4) anticipatory vacancy in the post of Deputy Superintendent of Police (Ministerial) was proposed to be filled 50% by way of Limited Departmental Examination (LDE) as per the roster maintained by the Department despite the fact that two (2) post had already been filled up earlier or they were occupied by candidates who were promoted through LDE. The respondents had relied upon the Office Memorandum dated 07.01.2020 which was again superseded by the Office Memorandum dated 09.08.2021 and that the latter Office Memorandum also provided for maintaining vacancy based roster.

[9.] The learned counsel submits that according to this Court, the provision of the recruitment rules could not have been overwritten by the Office Memorandum which was issued in the form of executive instructions and accordingly, the writ petition was allowed in favor of the petitioners. He submits that the said decision is squarely applicable to the instant case as well since the respondents have sought to implement the Office Memorandum issued in the form of executive instructions

over and above the Recruitment Rules of 2012 and its amendment. He therefore submits that the impugned action of the State respondents should be interfered with by this Court and they should be directed to consider the case of the petitioner for promotion to the post of Assistant Engineer without further delay.

[10.] The learned counsel also submits that in the meantime, the State respondents have come up with an Office Memorandum on 04.10.2023 by which the State Government has decided to temporarily suspend the maintenance of roster for identifying quotas of vacancies that occur up to September, 2023 as a one (1) time measure when two (2) or more methods of recruitment are provided in the relevant recruitment rules. This was in view of the delay in promotion for eligible candidates on account of a relatable delay in direct recruitment on account of Covid-19 pandemic. He submits that as it is admitted position that vacancy of the Assistant Engineer occurred on 21.10.2020, the case of the petitioner is squarely covered by this Office Memorandum as well. Therefore, even otherwise, the vacancy based roster adopted by the State Government through the Office Memorandum cannot be applied to the petitioner's case since it has been temporarily been suspended. He thus submits that the writ petition should be allowed, as prayed for.

[11.] Mrs. H. Lalmalsawmi, learned Govt. Advocate by referring to the affidavit-in-opposition filed by the respondent Nos. 1 to 4 on 18.08.2023 submits that the

Office Memorandum dated 07.01.2020 provides for maintenance of vacancy based roster and it has become effective from the date of issuance of the Office Memorandum. The vacancy in the instant case occurred on 21.10.2020 and therefore, the Office Memorandum is applicable to the case of the petitioner. Going by the Office Memorandum, the first three (3) vacancies are to be filled up by way of direct recruitment and it is only the 4th vacancy which can be filled up by way of promotion in terms of the Office Memorandum. Therefore, the proposal for considering the case for promotion has been rightly rejected by the DP&AR. The learned State Counsel further submits that the Office Memorandum has been issued for proper and effective implementation of the recruitment rules and not to supplant the same. In other words, she submits that if the rules are silent on a certain point, the State Government can always fill up the gap and supplement by way of administrative instructions which are not inconsistent with the statutory provisions framed.

[12.] She further submits that the action taken by the State Government cannot be termed to be an illegal action but in fact as per the relevant recruitment rules. The rules provides for three (3) modes of recruitment i.e., direct recruitment, promotion and deputation. Since as per the vacancy based roster, the post is to be filled up by way of direct recruitment and since the financial position of the State does not permit for adopting the said method, the remaining method of

recruitment i.e., by way of deputation has been advised to be adopted. As such, there is no illegality in the action of the State respondents. She therefore submits that under the given facts and circumstance, the petitioner cannot be said to have any legitimate grievance and the writ petition should be dismissed.

[13.] I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on record. The issue which requires to be considered is whether the one (1) post of Assistant Engineer which admittedly fell vacant on 21.10.2020 should be filled up by way of promotion or by direct recruitment or deputation. The Rules of 2012 and its amendment provides that three (3) modes of recruitment i.e., direct recruitment, promotion and by deputation. Column No. 11 of the Schedule to the Rules of 2012 and its amendment provides for the percentage of post to be filled up by various methods. 75% of the post is to be filled up by way of direct recruitment and the remaining 25% by way of promotion and failing which, by way of deputation. It is not in dispute that out of the four (4) sanctioned post, three (3) posts are being occupied by incumbents who have been directly appointed. It is against the remaining slot of one (1) post that the petitioner claims consideration of his promotion.

[14.] Following the representation submitted by the petitioner for consideration against the vacancy, the UD&PA Department submitted its proposal to the DP&AR but the same was turned down on the ground that as per the vacancy based

roster, prepared in terms of the Office Memorandum dated 07.01.2020, the vacancy is to be filled up by direct recruitment. Thereafter, the UD&PA Department submitted a proposal for relaxation of the Office Memorandum which however was again turned down by the same Department. What has to be seen in the Rules of 2012 and its amendment is that the method of recruitment is by taking the percentage of post to be filled up by two (2) methods i.e., 75% by direct recruitment and 25% by way of promotion. In other words, the same does not provide for a method for taking the percentage of the vacancy to be filled up.

[15.] The Rules of 2012 and its amendment were framed in exercise of the powers conferred upon the Governor of Mizoram by the proviso to Article 309 of the Constitution of India whereas, the Office Memorandum is only an administrative instruction. The Office Memorandum in view of what has already been stated cannot be said to be consistent with the statutory provisions framed. As submitted by the learned counsel for the petitioner, this Court in WP(C) No. 112/2022 by relying upon *Ajay Kumar Das* (supra) held that the rules framed under Article 309 of the Constitution of India cannot be overwritten by executive or administrative instructions and that the same is found to be squarely applicable to the instant case. The petitioner by having the benefit of the Rules of 2020 has the required number of years of service and his name was recommended by the UD&PA Department at the relevant time and now going by his date of

regularization i.e., 20.12.2016, the petitioner has the qualifying service to be considered for promotion to the post of Assistant Engineer even without counting his contract service as is permissible.

[16.] The learned counsel for the petitioner has also produced the Office Memorandum dated 04.10.2023 issued by the DP&AR (General Service Wing) wherein, the maintenance of roster for identifying the quotas for vacancies that occurred up to 20.09.2023 has been suspended as a one (1) time measure. It is seen that the Office Memorandum also covers the case of the instant writ petition since the vacancy occurred on 21.10.2020.

[17.] Thus, upon due consideration of the case in its entirety, I find merit in the writ petition and accordingly, the writ petition is disposed of with a direction to the respondent authorities concerned to consider the case of the petitioner for promotion to the post of Assistant Engineer under the UD&PA Department against the vacancy which occurred on 21.10.2020 along with other eligible candidates as expeditiously as possible and preferably within a period of three (3) months from the date of receipt of a certified copy of this Order. The impugned IDs dated 01.02.2021, 20.10.2021 and 15.11.2021 are accordingly hereby set aside. The interim order of this Court dated 29.06.2022 is also made absolute.

[18.] With the above observations and directions, the writ petition stands disposed of. No cost.

JUDGE

Comparing Assistant