

GAHC020002142022



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

Case No. : WP(C)/81/2022

SHRI. BESUHSAI THULUO
NIGHT CHOWKIDAR (FIXED PAY CONTINGENCY),
DIRECTORATE OF SCIENCE AND TECHNOLOGY, KOHIMA
NAGALAND

VERSUS

THE STATE OF NAGALAND AND 4 ORS
THROUGH THE CHIEF SECRETARY TO THE GOVT. OF NAGALAND,
NAGALAND KOHIMA

2:THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF
NAGALAND
P AND AR DEPARTMENT
NAGALAND KOHIMA

3:THE PRINCIPAL SECRETARY TO THE GOVERNMENT OF
NAGALAND
DEPT. OF SCIENCE AND TECHNOLOGY
NAGALAND KOHIMA

4:THE DIRECTOR
SCIENCE AND TECHNOLOGY
NAGALAND KOHIMA

5:SMTI. TUWHU
MULTI TASKING STAFF (MTS)
DIRECTORATE OF SCIENCE AND TECHNOLOGY
NAGALAND KOHIMA

Advocate for the Petitioner : Mr. Imti Longchar,
Mr. Supongwati Walling

Mr. Kiroba Longchar,
Ms. Atsula Kips, Advs.

Advocate for the respondent No. 5. : Mr. Moa Jamir,
Mr. M. Solo, Advs.

Advocate for the Respondent :Ms. S. Mere, Sr. Govt. Adv.

**BEFORE
HON'BLE MR. JUSTICE KAKHETO SEMA**

JUDGMENT & ORDER (ORAL)

Date : 29-07-2024

Heard Mr. Imti Longchar, learned counsel for the petitioner, Ms. S. Mere, learned Sr. Government Advocate for the State respondents and Mr. Moa Jamir, learned counsel for the respondent No.5.

2. The present writ petition has been filed with the following prayer;

“In the premises, it is most respectfully prayed that your Lordship’s may graciously be pleased to admit this petition, issue a Rule calling upon the respondents to show cause as to why the respondent authority should not be directed to quash and set aside.

1. *Impugned Office Letter No. ST/3-2/2000(Pt-1)/13, dated 14/04/2022 written by the Under Secretary to the Government of Nagaland Science & Technology Department, giving administrative approval for appointment of private respondent Smti. Tuwhu to Group-D(MTS) in the Directorate of Science and Technology.*
2. *Impugned Office Order No.S&T-138/2021/963, dated 20/04/2022, passed by the Director, Science and Technology, Nagaland, Kohima appointing Smti. Tuwhu as Multi Tasking Staff (MTS) in the Directorate of Science and Technology, Nagaland, Kohima and joining report w.e.f 21/04/2022(FN) against the vacancy caused by Smti. Thosano Ovung’s retirement.*
3. *Grant scale of pay to the petitioner from initial appointment w.e.f. 01/04/2011 as per the direction of the Hon’ble Supreme Court Judgment, dated 26/10/2016, in the case State of Punjab & Ors, -vs- Jagjit Singh & Ors, 2017(1) GLT (SC) 47.*
4. *Direct the State respondents to consider and regularise/appoint the petitioner in Group-D Multi Tasking Staff.”*

3. The fact of the case in brief is that by the order dated 16/03/2011, issued by the Government of Nagaland, Directorate of Science and Technology, the petitioner was appointed as Night Chowkidar on a fixed pay for a period of three months w.e.f. 01/04/2011. The service of the petitioner has thereafter been extended from time to time and the petitioner is continuing in the post till date.

4. That a vacant post of Chowkidar (Grade-IV) arose in the department due to the retirement of the incumbent and consequent to which vide the P&AR department's O.M dated 07/12/2016 a Departmental Screening Committee was constituted to recommend appointment to the post. The Committee accordingly conducted the screening test in respect of the four applicants namely, Smti. Nuvozolo Khamo, the petitioner and two others and thereafter recommended Smti. Nuvozolo Khamo the senior most contingency paid employee for appointment to the said post. Consequent to the recommendation, the department issued the order dated 21/03/2017 appointing and regularising Smti. Nuvozolo Khamo as Chowkidar in the Directorate of Science and Technology, Nagaland, Kohima w.e.f. 01/03/2017.

5. The petitioner thereafter submitted the representation dated 24/03/2017 to the Director, Science and Technology, Nagaland, Kohima, seeking scale of pay. However, the representation submitted by the petitioner did not evoke any positive response from the department.

6. That in the meantime, on coming to learn that the incumbent Sweeper in the Directorate was retiring on 30/11/2021 on completion of 35 years of service, the petitioner submitted the representation dated 25/08/2021 and 03/02/2022 for appointment to the post of Sweeper stating therein that the petitioner is the senior most fixed pay employee in the establishment.

7. That the Director, Science and Technology, Nagaland, Kohima by the Office letter dated 10/03/2022 submitted the list of applicants to the Commissioner & Secretary, Science and Technology, for filling up of Group-D (MTS) post as follows;

Sl. No.	Name	Designation	Date of appointment	Remark
1	Shri. Besuhsai Thuluo	Night Chowkidar	16/03/2011	Directorate/Contingency
2	Shri. Vedusheyi Khamo	Driver	31/10/2012	Directorate/Contingency
3.	Smti. Vikheli Chishi	Sweeper	08/08/2013	NASTEC/Contingency
4	Smti. Meena Gurung	Sweeper	16/01/2018	Directorate/Contingency
5	Smti. Neinu Rhi	Mali	31/10/2011	Directorate/Contingency
6	Smti. Peletuonuo Alphonsa	-	-	Fresh
7	Smti. Tuwhu	-	-	Fresh
8	Miss Mezhuzonuo Dzuvichu	-	-	Fresh
9	Smti. Rhuvilu Lea	-	-	Fresh

8. That subsequent to the list of the applicant submitted by the department, the Government of Nagaland in the Science and Technology department, issued the letter No. ST/3-2/2000(Pt-1)/13 dated 14/04/2022 conveying the administrative approval for appointment of Smti. Tuwhu, the respondent No.5, one of the fresh candidate, as Sweeper, Group-D (MTS) in the Directorate of Science and Technology.

9. That against the letter dated 14/04/2022 issued by the Government, conveying the approval for appointment of the respondent No.5, the petitioner through his counsel submitted the legal notice dated 19/04/2022 to the State respondents not to act on the letter dated 14/04/2022 as well as to issue the appointment order in respect of the respondent No.5. The petitioner also filed W.P.(C) No. 69/2022 impugning the letter dated 14/04/2022. This Court by the order dated 22/04/2022 passed in W.P.(C) No. 69/2022 made the following observations;

“Considering the projection made by the petitioner, it is herein provided that approval given for appointment of the private respondent No. 5 will be subject to the outcome of the writ petition.”

10. That however, during the pendency of W.P.(C) No. 69/2022, the department issued the order dated 20/04/2022 appointing the respondent No.5 as Multi Tasking Staff (MTS) against the retirement vacancy of Smti. Thosano Ovung, Sweeper.

Accordingly, by the order dated 28/04/2022, W.P.(C) No. 69/2022 was allowed to be withdrawn with liberty to file afresh.

11. The present writ petition has accordingly been filed seeking for the relief/prayer as hereinabove stated.

12. Mr. Imti Longchar, the learned counsel for the petitioner, submits that, the petitioner in the instant case is the senior most contingency employee in the department and therefore, the Government should have taken recourse to the Office Memorandum dated 07/12/2016 which provides procedure for filling Grade-III & IV in the department, for appointment of the petitioner, as was earlier done for appointment and regularisation of the senior most contingency employee. Mr. Imti Longchar however submits that ignoring the case of the petitioner, the respondent No.5 who is a fresh candidate has been appointed to the post in question.

13. Mr. Imti Longchar further relying on the O.M dated 22/09/2004 which is the "Policy and Scheme for regularisation of service of work-charged employee" as well as the O.M dated 17/03/2015 which is the "Scheme for Regularisation and absorption of work-charged and Casual Employees and Revision of Pay/Wages" submits that under both the O.M, the petitioner is also eligible to be considered for appointment and regularisation to the vacant post of Sweeper (MTS) against which the respondent No.5 has been appointed.

14. Mr. Imti Longchar has also submitted that in terms of the law laid down by the Hon'ble Supreme Court in the case of **State of Punjab & Ors. -versus- Jagjit Singh & Ors.**, reported in **(2017) 1 GLT (SC) 47**, the petitioner is entitled to the scale of pay which is extended to the regular government employees.

15. Ms. S. Mere, the learned Sr. Government Advocate, on the other hand, submits that the administrative approval dated 14/04/2022 for appointment of the respondent No.5 to the vacant post of Sweeper, Group-D (MTS) was conveyed as per the procedure contained in Sl. No. 4 of the O.M dated 26/10/2017 which provide procedure for filling up of Non-gazetted post in the department.

16. The learned Sr. Government Advocate also referring to the O.M dated

22/09/2004 submits that as per Clause-(iii) & (iv) of the said O.M, the Government is maintaining the ratio of 50:50 for regularisation of work-charged employees i.e. 50% of all regular vacancies arising in a year will be reserved for regularisation of work-charged employees and the remaining 50% will be filled up as per the normal rules of recruitment. Ms. S. Mere accordingly submits that as the first resultant vacancy which occurred in the month of March 2017 was given to a contingency employee namely, Smti. Nuvozolo Khamo, the second resultant vacancy has to be filled up by a fresh candidate by applying the ratio of 50:50.

17. Ms. S. Mere has further referred to the O.M dated 17/03/2015 and submits that the scheme for regularisation under the said O.M is applicable only to the work-charged and casual employees in the various department who are enjoying scale pay and has completed 30(thirty) years of continuous service. The petitioner being a fixed pay contingency employee, the O.M dated 17/03/2017 has no application to the petitioner.

18. Mr. Moa Jamir, the learned counsel for the respondent No.5 while adopting the submission made by the learned Sr. Govt. Advocate submits that the O.M dated 22/09/2004 is exclusively for work-charged employees and the scheme for regularisation under the said O.M cannot be extended to contingency employees like the petitioner. On a pointed query made by this Court as to whether the respondent No.5 was appointed by advertising the post and inviting application from the eligible candidates, Mr. Moa Jamir in his usual fairness submits that no advertisement was floated by the respondent authorities for appointment to the post in question.

19. Heard the learned counsel for the parties.

20. The petitioner in support of his case has relied in the O.M dated 22/09/2004 as well as the O.M dated 17/03/2015 both issued by the Government of Nagaland, Personnel and Administrative Reforms Department (Administrative Reforms Branch). The O.M dated 22/09/2004 is the policy and scheme for regularisation of the service of the work-charged employees, while the O.M dated 17/03/2015 is the scheme for regularisation and absorption of work-charged and casual employees and revision of

pay/wages.

21. By the order dated 16/03/2011, the petitioner was appointed as a Night Chowkidar in the Directorate of Science and Technology, Kohima on a fixed pay of Rs. 3000/- per month. Thereafter, by the order dated 14/04/2021, the contingency service of the petitioner was extended for a period of one year. The appointment and the extension of service of the petitioner make it abundantly clear that the petitioner was neither appointed as a work-charged nor a casual employee but only on a fixed contingency basis. Therefore, neither the O.M dated 22/09/2004 nor the O.M dated 17/03/2015 can be pressed into service to support the appointment and regularisation of the service of the petitioner. Moreover, even assuming that both the Office Memorandum applies to the petitioner, the petitioner does not fulfil the criteria laid down in the said O.M and therefore not eligible to be considered for appointment and regularisation in service under any of the said O.M.

22. Mr. Imti Longchar, learned counsel for the petitioner further relying on the O.M dated 07/12/2016 submits that even on an earlier occasion a Screening Committee was constituted in terms of the said O.M and Smti. Nuvozolo Khamo, the senior most contingency employee was recommended by the Committee and consequently appointed/regularised in the resultant vacancy of Chowkidar. The O.M dated 07/12/2016 provides procedure for filling up of Grade-III & IV post in the departments. Mr. Imti Longchar accordingly submits that the petitioner who is the senior most fixed pay contingency employee in the department should be extended the same treatment and benefit and appointed to the post in which the respondent No.5 has been appointed by enforcing the O.M dated 07/12/2016. It is however seen that the O.M dated 26/10/2017 which also provides procedure for filling up of Non-gazetted post in the departments and has been relied by the State respondents to support the appointment of the respondent No.5, clearly shows that the O.M dated 07/12/2016 relied upon by the learned counsel for the petitioner has been superseded by the latter O.M dated 26/10/2017 issued by the Government. Therefore, the O.M dated 07/12/2016 cannot be enforced to consider the case of the petitioner.

23. Ms. S. Mere, the learned Sr. Govt. Advocate relying on the affidavit filed on

behalf of the State respondents submits that the administrative approval for appointment of the private respondent No.5 was conveyed by the government as per the procedure laid down in the O.M dated 26/10/2017, more particularly, the Sl. No.4 of the said O.M. and it was only thereafter that the order dated 20/04/2022 was issued by the department appointing the respondent No. 5 against the resultant vacancy of Sweeper(MTS).

24. The Sl. No. 4 of the O.M dated 26/10/2017 reads as follows;

“All direct recruitment vacancies in Grade-IV post in district offices of the departments shall be filled up by the indigenous inhabitants of the respective districts. In making recruitment to other Grade-IV posts in the Directorate and Secretariat level offices, the reservation policy for backward tribes shall be adhered to. All Grade-IV appointments shall be with the approval of the government“.

25. For the present case, the recruitment to Grade-IV post in the Directorate and Secretariat level offices is relevant. In making such recruitment the reservation policy of the government shall be adhered to and all Grade-IV appointments shall be made with the approval of the government. The power to make appointment to Grade-IV post in the Directorate is therefore vested with the government and it is in exercise of such power that the Government has appointed the respondent No.5 to the post of Sweeper (MTS).

26. From the letter dated 10/03/2022, it is seen that, the department had submitted the list of the applicants to the Government for filling up of Group-D post in the department. The name's of the petitioner, the private respondent No.5 along with seven others were forwarded to the government. From the list of the applicants submitted by the department, Smti. Tuwhu, the respondent No.5, who is one of the fresh candidate was appointed to the vacant Grade-D (MTS) post. The State respondents, however in their affidavit has nowhere stated as to what was the procedure adopted to single out the respondent No.5 for appointment to the said post ignoring the other prospective applicants nor has the learned Sr. Govt. Advocate been able to satisfy this Court as to the method adopted to appoint the respondent No.5. No doubt the government is empowered to make the appointment to the post but such

appointment has to be in accordance with the constitutional scheme more particularly by adhering to the provisions of Article-14 & 16 of the Constitution of India by advertising the post and giving equal opportunity to all eligible candidates to participate in the recruitment process. In the present case, it is clearly evident that the respondent No.5 was appointed without undergoing any selection process but by adopting a pick and choose method by the government although the list of applicants for the post was submitted by the department. Furthermore, it is also observed that no advertisement was published inviting eligible candidates to appear for the post in question. Arbitrariness and discrimination is therefore writ large in the appointment of the respondent No.5. The appointment of the respondent No.5 therefore in the considered opinion of this Court, cannot stand the scrutiny of law and is accordingly liable to be quashed and set aside.

27. The Constitution Bench of the Hon'ble Supreme Court of India in the case of **Secretary, State of Karnataka & Others -versus- Umadevi (3) & Others**, reported in **(2006) 4 SCC 1** has held that;

“43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee.....”

28. Furthermore, in the case of **State of Orissa & Another -versus- Mamata Mohanty**, reported in **(2011) 3 SCC 436**, the Hon'ble Supreme Court has inter-alia held that no person can be appointed even on temporary or adhoc basis without inviting application from all eligible candidates. In the said case, the Hon'ble Supreme Court while discussing 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, 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.....

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 of 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.”

29. In the light of the discussions made above, the letter dated 14/04/2022 (Annexure-10 to the writ petition) conveying the administrative approval of the government for appointment of the respondent No.5 to the post of Sweeper Group-D (MTS) in the Directorate of Science and Technology and the order dated 20/04/2022 (Annexure-13 to the writ petition) issued by the Directorate of Science and Technology, Nagaland, Kohima appointing the respondent No.5 to the post of Multi Tasking Staff (MTS)/Sweeper are both bad in law and accordingly quash and set aside.

30. The State respondents more particularly the respondent No. 2, 3 & 4 shall within a period of 90(ninety) days from the date of receipt of this judgment & order advertised the post of the Multi Tasking Staff (MTS)/Sweeper to which the respondent

No. 5 has been appointed by inviting applications from all eligible candidates including the petitioner and the respondent No.5 and thereafter, to make the appointment in accordance with law. Till such time, the post is advertised and the appointment is made, the respondent No.5 shall be allowed to continue in the post.

31. Insofar as the claim of the petitioner for the scale of pay is concerned, the petitioner has simply referred to the case of the State of Punjab -versus- Jagjit Singh & Ors.,(supra) without making any averments in the petition as to how the petitioner is entitled to the scale of pay nor has the petitioner been able to substantiate that he discharges the same nature of works, duties and responsibilities as that discharge by a similar employee getting the scale of pay. In the absence of such averments, the petitioner's claim for the scale of pay cannot be considered. The same is accordingly rejected.

32. Writ petition dismissed. No cost.

JUDGE

Comparing Assistant