

GAHC020006862021



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

Case No. : WP(C)/356/2021

MISS MENUOZONUO
D/O LATE KEDUOVITUO DZUVICHU, R/O LOWER L KHEL, KOHIMA
VILLAGE, KOHIMA, NAGALAND

VERSUS

THE STATE OF NAGALAND AND ANR
REPRESENTED BY THE CHIEF SECRETARY, GOVERNMENT OF
NAGALAND, NAGALAND, KOHIMA

2:THE HOME COMMISSIONER TO THE GOVERNMENT OF
NAGALAND

HOME DEPARTMENT
NAGALAND
KOHIM

Advocate for the Petitioner : L LIKHASE SANGTAM

Advocate for the Respondent : GOVT ADV NL

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

Date of Hearing : 26.03.2024.

Delivery of Judgment & order : 08.04.2024.

JUDGMENT & ORDER (CAV)

Heard Mr. L.L. Sangtam, learned counsel for the petitioner and Ms. S. Chang, learned Junior Government Advocate, Nagaland for the State respondents.

2. In this petition, under Article 226 of the Constitution of India, the petitioner, namely, Miss. Menuozonuo, has prayed for quashing and set aside the impugned order No. SAB-5/34/2012, dated 12.05.2016, and to direct the State respondents to reinstate the petitioner in her service.

3. It is to be noted here that the petitioner was appointed to the post of Peon, vide order No. SAB-5/34/2012, dated 13.05.2015, as per Scheme of Compassionate Appointment, on regular basis, under the establishment of Home Department (SAB), Nagaland Civil Secretariat, Nagaland, Kohima, in revised Pay Band of Rs. 4,400 – 17,200/- with Grade Pay of Rs. 400/- P.M. plus all other allowances as admissible under the Rules, from time to time, with effect from 01.06.2015. Thereafter, vide impugned order, No. SAB-5/34/2012, dated 12.05.2016, the appointment of the petitioner was cancelled by the respondent authorities.

4. The background facts, leading to filing of the present petition are adumbrated herein below:-

“The father of the petitioner, namely, Late Keduovituo Dzuvichu was serving under the establishment of Home Department (SAB), Nagaland Civil Secretariat, Nagaland, Kohima, on regular basis and while he was serving as Chowkidar in the said establishment, he suffered demise on 18.04.2014. After the demise of her father, the petitioner had applied for any of the Grade-IV post on

compassionate ground in the said establishment, as per the scheme dated 17.09.2015, framed by the State respondents. Thereafter, vide order No. SAB-5/34/2012, dated 13.05.2015, the petitioner along with 7 others were appointed, consequent upon re-designation of 11 posts of Personal Peon created by Department's Letter, bearing No. SAB-5/131/84 (Pt), dated 12.05.1986, to that of Office Peon order No. SAB-5/34/2012, dated 12.03.2016, on regular basis, under the said establishment, in revised Pay Band of Rs. 4,400 – 17,200/- with Grade Pay of Rs. 400/- P.M. plus all other allowances as admissible under the Rules from time to time with effect from 01.06.2015, (Annexure -D). Thereafter, while the petitioner was in service, the State respondents, vide impugned order No. SAB-5/34/2012, dated 12.05.2016, had cancelled the appointment of the petitioner along with 10 others, on the ground that the appointment order was issued without the approval of the Government (Annexure – E). Thereafter, the petitioner has submitted a representation, dated 25.04.2017, for reinstatement to her earlier post. Then after cancellation of her appointment, vide order No. SAB-5/34/2012, dated 28.11.2017, 24 others were appointed consequent upon re-designation of 26 posts of Personal Peon, created vide Department's Order bearing No. C.P.C./136/55/66, dated 24.09.1965, under the said establishment, with the same pay band, with effect from 15.11.2017. But, the representation filed by her has not been acted upon, instead her place is indicated at Sl. No. 34 of the list of pending application on compassionate ground as on 31.03.2018, (Annexure – H) and out of the 8 employees whose appointments

were cancelled, vide order dated 12.05.2015, 5 of them were reinstated by the respondent No. 2, vide order No. SAB-5/56/REG-APPT/2017, dated 02.09.2019, leaving behind the petitioner and 2 others illegally and on extraneous consideration (Annexure – I). But, the case of the petitioner was not considered by the respondents. Accordingly, a legal notice dated 19.03.2021, was issued to the respondent No. 2, as the cancellation of the appointment of the petitioner on the ground that they were appointed without approval of the Government is just a lame excuse, so as to accommodate the fresh candidate in the said post, but the same failed to evoke any response from the respondent No. 2 till date.” Being aggrieved, the petitioner has approached this Court by filing the present petition.

5. The respondent Nos. 1 & 2 have filed their affidavit-in-opposition, denying the averments made in the petition. It is stated that there is no record of being the petitioner appointed on compassionate ground on 12.03.2015, and that the appointment of the petitioner along with 10 others were cancelled on 12.05.2016, as they were appointed without any approval of the Government. It is also stated that from the appointment order dated 13.05.2015, it is apparent that her appointment was not done under the consideration of compassionate case and as per her application dated 31.03.2018, she was placed at Sl. No. 34 of the list, maintained by the department for compassionate appointment. It is further stated that 24 numbers of Office Peon were appointed vide order No. SAB-5/34/2012, dated 28.11.2017, on being recommended by the Departmental Screening Committee, with concurrence of the P & AR Department and Finance Department and as such, no illegality was committed by the respondents.

6. The petitioner has filed affidavit-in-reply to the in the affidavit-in-opposition filed by the respondent Nos. 1 & 2, and denied the averments made therein. It is stated that the appointment of 24 numbers of Office Peon were made on 28.11.2017, in violation of Office Memorandum dated 17.09.2015.

7. Mr. Sangtam, learned counsel for the petitioner submits that the appointing authority of the petitioner and the cancellation authority of the appointment of the petitioner was one and the same and that while cancelling the appointment of the petitioner no notice was issued to her and no opportunity of being heard was also afforded to her. Mr. Sangtam further submits that the ground stated for cancelling the appointment of the petitioner is not at all tenable in the eye of law and that after cancellation of the appointment order of the petitioner, 24 candidates were appointed to the said posts and out of 24 candidates, 5 candidates were re-appointed on 02.07.2019, on pick and choose basis. Mr. Sangtam also submits that the cancellation of appointment order of the petitioner is in contravention of the principle of natural justice, as no opportunity of being heard was afforded to the her and therefore, it is contended to allow the petition.

8. On the other hand, Ms. Chang, learned Junior Government Advocate, Nagaland appearing for the State respondents submits that the impugned order No. SAB-5/34/2012, dated 12.05.2016, by which the petitioner was petitioner, stand cancelled on the ground of being appointed without approval of P & AR Department and in support of her submission Ms. Chang has produced one Office Memorandum of the department of Personnel & Administrative Reforms Department, dated

26.09.2022, No. AR-5/ASSO/98/(VOL-1), which mandates obtaining of prior clearance of P & AR Department and Finance Department on a case to case basis, for recruitment to the posts of Group-D, which are outside the purview of NPSC and NSSB. Ms. Chang further submits that since the appointment was made on compassionate ground and since it was not made without approval of the Government, there is no merit in this petition and therefore, it is contended to dismiss the same.

9. Having heard the submissions of learned counsel for both the parties, I have carefully gone through the petition as well as the documents placed on record and also perused the Office Memorandum of the department of Personnel & Administrative Reforms Department, dated 26.09.2022, No. AR-5/ASSO/98/(VOL-1).

10. It is not in dispute that the petitioner was appointed to the post of Office Peon, vide order dated 13.05.2015, pursuant to an application filed by her for compassionate appointment, on the ground of demise of her father, who was serving under the establishment of Home Department (SAB), Nagaland Civil Secretariat, Nagaland, Kohima, on regular basis, as Chowkidar. It is also not in dispute that the appointment of the petitioner, made vide order dated 12.03.2015, **(Annexure - D)** was cancelled vide order dated 12.05.2016, **(Annexure - E)**. It appears from the order dated 12.05.2016, that while issuing the appointment order to the petitioner along with 10 others, neither any clearance of the P & AR Department nor the concurrence of the Finance Department were obtained and as such, the appointment of 11 persons was found to be made without following the P & AR guideline and the requisite procedures and as such, the re-designation order and the subsequent appointment

order of the 11 persons are found to null and void and therefore, the same was cancelled with immediate effect.

11. Indisputably, while cancelling the appointment order of the petitioner, dated 12.05.2016, after more than a year, of her service no notice of cancellation of appointment was issued and no opportunity of being heard was afforded to the petitioner. Further, it appears that the petitioner was appointed on regular basis, under the establishment of Home Department (SAB), Nagaland Civil Secretariat, Nagaland, Kohima, as Office Peon, in revised Pay Band of Rs. 4,400 – 17,200/- with Grade Pay of Rs. 400/- P.M. plus all other allowances as per admissible under Rules from time to time with effect from 01.06.2015.

12. Now, what is left to be seen by this Court is whether the service of a person, appointed on regular basis in a scale of pay, and that too after rendering of service for more than one year, can be cancelled without affording any opportunity of being heard and without issuing any notice?

13. This issue has elaborately been dealt with by Hon'ble Supreme Court in the case of **Delhi Transport Corporation vs. DTC Mazdoor Congress** reported in **1991(1) SCC (Supp) 600**, wherein it has been held as under.

"303. Article 19(1)(g) empowers every citizen the right to avocation or profession etc. which includes right to be continued in employment under the State unless the tenure is validly terminated consistent with the scheme enshrined in the fundamental rights of the Constitution. Therefore, if any procedure is provided for deprivation of the right to employment or right to the continued employment till the age of superannuation as is a source to right to livelihood, such a procedure must be just, fair and reasonable. This Court in *Fertilizer Corporation Kamgar Union (Regd.), Sindri v. Union of India* [(1981) 1 SCC 568, 575-76 held that Article 19(1)(g) confers a broad and general right which is available to all persons to do

works of any particular kind and of their choice. Therefore, whenever there is arbitrariness in State action — whether it be of the legislature or of the executive or of an authority under Article 12, Articles 14 and 21 spring into action and strikes down such an action. The concept of reasonableness and non-arbitrariness pervades the entire constitutional spectrum and is a golden thread which runs through the whole fabric of the Constitution. Therefore, the provision of the statute, the regulation or the rule which empowers an employer to terminate the services of an employee whose service is of an indefinite period till he attains the age of superannuation, by serving a notice or pay in lieu thereof must be conformable to the mandates of Articles 14, 19(1) (g) and 21 of the Constitution. Otherwise per se it would be void. In *Moti Ram Deka case* [(1964) 5 SCR 683 :], Gajendragadkar, J. (as he then was) after invalidating the Rules 149(3) and 148(3) under Article 311(2) which are in pari materia with Regulation 9(b) of the Regulations also considered their validity in the light of Article 14 and held thus: (SCR p. 731)

“Therefore, we are satisfied that the challenge to the validity of the impugned Rules on the ground that they contravene Article 14 must also succeed.”

This was on the test of reasonable classification as the principle then was applied. Subba Rao, J. (as he then was) in a separate but concurring judgment, apart from invalidating the rule under Article 311(2) also held that the rule infringed Article 14 as well, though there is no elaborate discussion in that regard. But, Das Gupta, J. considered elaborately on this aspect and held: (SCR p. 770)

“Applying the principle laid down in the above case to the present Rule, I find on the scrutiny of the Rule that it does not lay down any principle or policy for guiding the exercise of discretion by the authority who will terminate the service in the matter of selection or classification. Arbitrary and uncontrolled power is left in the authority to select at its will any person against whom action will be taken. The rule, thus enables the authority concerned to discriminate between two railway servants to both of whom Rule 148(3) equally applied by taking action in one case and not taking it in the other. In the absence of any guiding principle in the exercise of the discretion by the authority the Rule has therefore to be struck down as contravening the requirements of Article 14 of the Constitution.”

14. It has also been held in paragraph No. 316 as under:-

"316. Thus, it could be held that Article 14 read with Article 16(1) accords right to equality or an equal treatment consistent with the principles of natural justice. Any law made or action taken by the employer, corporate statutory or instrumentality under Article 12 must act fairly, justly and reasonably. Right to fair treatment is an essential inbuilt of natural justice. Exercise of unbridled and uncanalised discretionary power impinges upon the right of the citizen; vesting of discretion is no wrong provided it is exercised purposively judiciously and without prejudice. Wider the discretion, the greater the chances of abuse. Absolute discretion is destructive of freedom than of man's other inventions. Absolute discretion marks the beginning of the end of the liberty. The conferment of absolute power to dismiss a permanent employee is antithesis to justness or fair treatment. The exercise of discretionary power wide off the mark would breed arbitrary, unreasonable or unfair actions and would not be consistent with reason and justice. The provisions of a statute, regulations or rules that empower an employer or the management to dismiss, remove or reduce in rank of an employee, must be consistent with just, reasonable and fair procedure. It would, further, be held that right to public employment which includes right to continued public employment till the employee is superannuated as per rules or compulsorily retired or duly terminated in accordance with the procedure established by law is an integral part of right to livelihood which in turn is an integral facet of right to life assured by Article 21 of the Constitution. Any procedure prescribed to deprive such a right to livelihood or continued employment must be just, fair and reasonable procedure. In other words an employee in a public employment also must not be arbitrarily, unjustly and unreasonably be deprived of his/her livelihood which is ensured in continued employment till it is terminated in accordance with just, fair and reasonable procedure. Otherwise any law or rule in violation thereof is void."

15. In the case in hand, as stated earlier, the petitioner was appointed on regular basis on 12.03.2015, vide **Annexure – D**. Her appointment was cancelled after more than a year, by an order dated 12.05.2016, vide **Annexure – E**. Nothing has been mentioned in the **Annexure-E** as to under which provision of law or Rules, the appointment of the petitioner was cancelled. What is indicated there in **Annexure-E** is that the

appointment of 11 persons (including the petitioner) was found to be made without following the P & AR guidelines and the requisite procedures and as such, the re-designation order and the subsequent appointment order of the 11 persons were found to be null and void.

16. Even if her appointment was found be made without following the P & AR guidelines and the requisite procedures and as such, her appointment order, with 10 others, were found to null and void then also the respondents ought to have given an opportunity of being heard to the petitioner. As no opportunity was given to her by the respondents being an instrumentality under Article 12 of the Constitution of India, it cannot be said that the respondents had acted fairly, justly and reasonably. As held in the case of **DTC Mazdoor Congress** (supra) right to fair treatment is an essential inbuilt of natural justice as embodied in Article 14 read with Article 16(1), which accords right to equality or an equal treatment. This appears to be denied in the case of the petitioner.

17. It is now well settled that every citizen has the right to avocation or profession etc. and the same includes right to be continued in employment under the State, unless the tenure is validly terminated, consistent with the scheme enshrined in the fundamental rights of the Constitution. The petitioner herein this case was appointed to regular post and she rendered service for more than one year. Therefore, deprivation of her right to the continued employment till the age of superannuation as is a source to right to livelihood, the procedure of deprivation of such right must be just, fair and reasonable. And as the procedure of deprivation of such right of the petitioner herein this case appears to be not just, fair and reasonable, as no opportunity of being heard was

afforded to her, the same violates her right to livelihood as guaranteed by Article 19(1)(g) of the Constitution of India.

18. It is also well settled that right to public employment also includes right to continued public employment till the employee is superannuated as per rules or compulsorily retired or duly terminated in accordance with the procedure established by law is an integral part of right to livelihood which in turn is an integral facet of right to life assured by Article 21 of the Constitution. And when there is arbitrariness in the action of a state instrumentality, Articles 14 and 21 springs into action and strikes down such an action.

19. Though Ms. Chang, learned Junior Government Advocate, Nagaland, appearing for the State respondents, has produced one Office Memorandum of the Personnel & Administrative Reforms Department, dated 26.09.2022, No. AR-5/ASSO/98/(VOL-1), which mandated that appointment of Group – D post, which are outside the purview of NPSC and NSSB, will require prior clearance of P & AR Department and Finance Department on a case to case basis, yet, Ms. Chang has failed to show that the said Office Memorandum came into force with retrospective effect. It is to be noted here that the petitioner was appointed in the year 2015 and her appointment was cancelled in the year 2016. And neither the affidavit-in-opposition nor the Office Memorandum produced before this Court by Ms. Chang, is clear about the requirement of prior approval of P & AR Department and Finance Department. She has also failed to produce any Office Memorandum or any Circular which was in force at the relevant point of time, mandating prior approval of P & AR Department and Finance Department.

20. Under the aforementioned facts and circumstances, this Court finds that the order No. SAB-5/34/2012, dated 12.05.2016, Annexure – E, failed to withstand the legal scrutiny for being passed with complying the principles of natural justice and as such, the same requires interference of this Court and accordingly, the same stands interfered with.

21. In the result, I find sufficient merit in this petition and accordingly, the same stands **allowed**. The impugned order No. SAB-5/34/2012, dated 12.05.2016, Annexure – E, being passed in gross violation of the principle of natural justice, stands set aside and quashed. The petitioner shall be re-instated to her post, forthwith.

22. Now, coming to the next question as to whether the petitioner will be entitled to the full back wages after her re-instatement. While dealing with this issue in the case of **Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya**, reported in **(2013) 10 SCC 324**, and also taking note of all its earlier decisions, Hon'ble Supreme Court has held as under:-

"38. The propositions, which can be culled out from the aforementioned judgments are:-

38.1. In cases of wrongful termination of service, reinstatement with continuity of service and back wages is the normal rule.

38.2. The aforesaid rule is subject to the rider that while deciding the issue of back wages, the adjudicating authority or the court may take into consideration the length of service of the employee/workman, the nature of misconduct, if any, found proved against the employee/workman, the financial condition of the employer and similar other factors.

38.3. Ordinarily, an employee or workman whose services are

terminated and who is desirous of getting back wages is required to either plead or at least make a statement before the adjudicating authority or the court of first instance that he/she was not gainfully employed or was employed on lesser wages. If the employer wants to avoid payment of full back wages, then it has to plead and also lead cogent evidence to prove that the employee/workman was gainfully employed and was getting wages equal to the wages he/she was drawing prior to the termination of service. This is so because it is settled law that the burden of proof of the existence of a particular fact lies on the person who makes a positive averment about its existence. It is always easier to prove a positive fact than to prove a negative fact. Therefore, once the employee shows that he was not employed, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments.

38.4. The cases in which the Labour Court/Industrial Tribunal exercises power under Section 11-A of the Industrial Disputes Act, 1947 and finds that even though the enquiry held against the employee/workman is consistent with the rules of natural justice and/or certified standing orders, if any, but holds that the punishment was disproportionate to the misconduct found proved, then it will have the discretion not to award full back wages. However, if the Labour Court/Industrial Tribunal finds that the employee or workman is not at all guilty of any misconduct or that the employer had foisted a false charge, then there will be ample justification for award of full back wages.

38.5. The cases in which the competent court or tribunal finds that the employer has acted in gross violation of the statutory provisions and/or the principles of natural justice or is guilty of victimising the employee or workman, then the court or tribunal concerned will be

fully justified in directing payment of full back wages. In such cases, the superior courts should not exercise power under Article 226 or 136 of the Constitution and interfere with the award passed by the Labour Court, etc. merely because there is a possibility of forming a different opinion on the entitlement of the employee/workman to get full back wages or the employer's obligation to pay the same. The courts must always keep in view that in the cases of wrongful/illegal termination of service, the wrongdoer is the employer and the sufferer is the employee/workman and there is no justification to give a premium to the employer of his wrongdoings by relieving him of the burden to pay to the employee/workman his dues in the form of full back wages.

38.6. In a number of cases, the superior courts have interfered with the award of the primary adjudicatory authority on the premise that finalisation of litigation has taken long time ignoring that in majority of cases the parties are not responsible for such delays. Lack of infrastructure and manpower is the principal cause for delay in the disposal of cases. For this the litigants cannot be blamed or penalised. It would amount to grave injustice to an employee or workman if he is denied back wages simply because there is long lapse of time between the termination of his service and finality given to the order of reinstatement. The courts should bear in mind that in most of these cases, the employer is in an advantageous position vis-à-vis the employee or workman. He can avail the services of best legal brain for prolonging the agony of the sufferer i.e. the employee or workman, who can ill-afford the luxury of spending money on a lawyer with certain amount of fame. Therefore, in such cases it would be prudent to adopt the course suggested in *Hindustan Tin Works (P) Ltd. v. Employees* (1979) 2 SCC 80.

38.7. The observation made in *J.K. Synthetics Ltd. v. K.P. Agrawal* (2007) 2 SCC 433 that on reinstatement the

employee/workman cannot claim continuity of service as of right is contrary to the ratio of the judgments of three-Judge Benches [*Hindustan Tin Works (P) Ltd. v. Employees*, (1979) 2 SCC 80, [*Surendra Kumar Verma v. Central Govt. Industrial Tribunal-cum-Labour Court*, (1980) 4 SCC 443 referred to hereinabove and cannot be treated as good law. This part of the judgment is also against the very concept of reinstatement of an employee/workman.

23. Now, advertent to the facts and circumstances of the case in hand, I find that this court has already arrived at a finding that the respondents had acted in gross violation of the principles of natural justice. And applying the law, laid down in the case of **Deepali Gundu Surwase** (supra), as discussed herein above, it can safely be concluded that the petitioner is entitled to full back wages.

24. However, such a prayer, having not been made in the present petition, this court is not persuaded to pass any direction in this regard and left this issue to be decided by the respondent No.2, with in a period of three months from today, in the light of the law laid down by Hon'ble Supreme Court in the case of **Deepali Gundu Surwase** (supra) discussed herein above. The petitioner shall obtain a certified copy of this judgment and order and place the same before the respondents, and within a period of three months from the date of receipt of certified copy, the respondents shall carry out the entire exercise as indicated above.

25. The parties have to bear their own costs.

Sd/-
JUDGE

Comparing Assistant