GAHC020000012015

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

Case No. : WP(C) 184/2015

1:ZUCHANBENI EZUNG
LONGSA VILLAGE,WOKHA

VERSUS

1:STATE OF NAGALAND AND 4 ORS
KOHIMA

2:THE COMMISSIONER AND SECRETARY
HEALTH AND FAMILY WELFARE DEPT. KOHIMA
N/L
KOHIMA

3:THE PRINCIPAL DIRECTOR
HEALTH AND FAMILY WELFARE
N/L
KOHIMA.
KOHIMA

4:THE ADDL. DIRECTOR AND HEAD OF DEPT. OF HEALTH SERVICEN/L
KOHIMA.
KOHIMA

5:THE CHIEF MEDICAL OFFICER
CMO OFFICE
WOKHA
N/L.
WOKH

Advocate for the Petitioner : N K LUIKHAM

Advocate for the Respondent : GOVT ADV NL

BEFORE
HON'BLE MR. JUSTICE SONGKHUPCHUNG SERTO

ORDER

Date : 25-04-2022

JUDGMENT & ORDER (ORAL)

Heard Mr. N.K. Luikham, learned counsel appearing for the petitioner, and also heard Mr. V. Vero, learned Government Advocate appearing for the State respondents.

2. The facts and circumstances leading to the filing of this Writ Petition, which are undisputed are as follows: Somewhere in 1959, the Government Civil Hospital at Wokha was established on the land owned by 11 (eleven) persons, one of whom was the father-in-law of the petitioner. Since no compensation or any benefit was given *in lieu* of their lands, a deed of agreement was signed between the land-owners and the representatives of the State respondents, particularly the Health and Family Welfare Department on 12.08.1994, wherein it was agreed that for the period of 34 (thirty four) years, i.e., from the date the land of the petitioners was taken away for construction of the hospital till December 1993, the land-owners will receive a lumpsum amount of Rs. 1,60,000/- (Rupees One Lakh Sixty Thousand) as rental charge and they would also be offered appointment to Grade-IV posts. Following the agreement, the petitioner was appointed as Peon by the Additional Director & HOD, Health Services, *vide* Order No. DHS-3/107/MA/WKA/79-83/6113-21, dated 03.10.2005 on contingency basis for a period of six months with a fixed pay of Rs. 1,500/- (Rupees One Thousand Five Hundred) per month. Thereafter, by

another order issued by the Chief Medical Officer, Wokha, the contingency service of the petitioner was regularized *vide* Order No. CMO/WOK/Estt-1/5/2007-08/1487-91 dated 11.04.2007. From thereon, the petitioner started enjoying the pay and allowances of a regular employee and continued till her service was terminated *vide* Order No. DHFW-3/117/Gd-IV/General/2010(Pt) dated 29.04.2015, with retrospective effect from 30.04.2012 on the ground that as per the Vigilance and Anti-Corruption Police Department Final Report, she was appointed without any sanctioned post. Pursuant to this Order, the petitioner was not only dismissed from service but was denied her monthly salary from May 2012 till May 2015 though she was in service as per the letter dated 25.02.2016 of the Chief Medical Officer addressed to the Principal Director, Health & Family Welfare, Nagaland *vide* Memo No. CMO/WOK/WSTT-1/5/2015-16/1843. Aggrieved by the termination of her service and also non-payment of her monthly salary for the period mentioned above, the petitioner is here before this Court challenging the termination/dismissal Order dated 29.04.2015 issued by the Principal Director, Health & Family Welfare and non-payment of her salary for the period mentioned above.

3. It has been submitted by Mr. N.K. Luikham, that the appointment of the petitioner was *in lieu* of the land donated by her father-in-law and in pursuance of the agreement signed between the 11 (eleven) land-owners including her father-in-law and the appointment order and regularization order were issued by competent authorities, therefore, the service of the petitioner could not have been terminated. The learned counsel further submitted that accepting for a moment that there was no sanctioned post at the time the petitioner was

appointed, but the fact that the respondents appointed as many as 28 (twenty-eight) Grade-IV staffs between the year 2012-2016 which is evident from the RTI reply of the Zonal Leprosy Officer, Wokha, Nagaland, shows that the respondents could have considered appointing the petitioner to any of those 28 posts if they had a will to do so. The fact that they did not do so amounts to not only violation of the agreement signed between their representatives and the land-owners but lack of commitment on their part to keep the promise they made. Therefore, a direction or order to appoint the petitioner to any vacant Grade-IV post or to create a post personal to the petitioner, in case there is no vacancy, is required.

4. Mr. Luikham, in support of his submissions referred to the judgment of this Court passed in the case of **Smti. Rongsenlemla Ao V. State of Nagaland & 4 Ors.**, reported in **WP(C)/226(K)/2015**, the relevant paragraphs being paragraphs 7 to 10. This was particularly referred to in support of the submission made that the CMO is a competent authority to regularize the service of the petitioner. The second judgment referred to by the learned counsel was the one passed in the case of **Jaharul Islam Borbhuiya V. State of Assam & Ors.** reported in **2008 (2)GLT 773.** The relevant paragraph is para 6. This was referred to in support of the submission that the respondents have an obligation or duty to appoint the petitioner *in lieu* of the land donated by her family and the agreement signed. The relevant paragraphs of the judgment are reproduced here below one after the other.

7. *The learned counsel also submitted that the claim of the respondents that the petitioner was appointed by the CMO not empowered to issue such appointment order and without approval of the Government, is not based on facts but only a ploy to deviate the course of justice. To substantiate this the learned counsel referred to a document issued by Secretary, Medical and Public Health of Nagaland, in which amendment of the Delegation of Financial Cognate Power Rules, 1964, is shown to have been made to the effect that district level officers of various departments were given the power to issue appointment order of Class IV Staffs. The learned counsel also referred to appointment orders of 43 Grade-IV employees, out of which at least seven appointment orders of Grade-IV employees were issued by the CMO, Mokokchung district. After referring to such appointment orders the learned counsel submitted that the petitioner cannot be singled out and treated differently from others who are similarly situated.*

8. *Ms. V. Chishi, learned Government Advocate, submitted on behalf of the State respondent Nos. 1 to 4, that CMO has no power to issue such appointment orders and, moreover, the appointment of the petitioner was issued without obtaining the approval of the Government, therefore, the same was null and void.*

9. *Mr. N. Mozhui, learned counsel who appeared on behalf of respondent No. 5, submitted that CMO and Civil Surgeon are two different posts and while Civil Surgeon was given the power of issuing appointment order of Grade-IV employees, CMO was not given such power, therefore, the appointment of the petitioner was not a valid appointment. The learned counsel further submitted that the CMO should have forwarded the case of the petitioner to the Directorate who would have done the needful for issuance of a valid appointment order for the petitioner. But, the CMO instead of doing that directly issued the appointment order. As such, the appointment order of the petitioner was not valid in law.*

10. *Admittedly, the reason for suspension of the petitioner and the enquiry that followed was to find out, whether the petitioner was a genuine land owner and, as to whether she was appointed against a sanctioned post or not. It is also admitted by all that the petitioner was found to have been a genuine land owner and was appointed against sanctioned post. As such, there was no more reason for her dismissal and therefore, she should not have been dismissed.*

Further, the words of the dismissal order make it crystal clear that the same was issued on the ground that the petitioner was appointed without a

sanctioned post. Therefore, to say now that she was dismissed because she was appointed by the CMO without following the due process would amount to adding or substituting a new ground of dismissal which was not there in the dismissal order. This cannot be allowed. Because, a Government servant can only be dismissed after holding proper enquiry that too after giving sufficient opportunity of being heard. To dismiss a Government servant on a ground which is proved to have been non-existent or not proven, and thereafter, to tell him that he has been dismissed on a ground totally different from the one mentioned in the order itself would amount to punishing him without giving him the opportunity of being heard and also shifting of the goal while the game is on. And to allow such order and plea to subsist would be in violation of Principles of Natural Justice, rights guaranteed under Part-III and Article 311 of the Constitution of India. Therefore, the same cannot be allowed to stand.

Furthermore, there is no denying of the plea of the petitioner that CMO is the head of the Medical Department in the district and that amendment to Delegation of Financial Cognate Power Rules, 1964, was made, and by that the power to appoint Grade-IV employees was conferred to district level officers. There is also no denying on the claim of the petitioner that at least seven appointment orders of Grade-IV employees were issued by the CMO, Mokokchung at that time and that their appointments have never been questioned. All these shows that CMO was also empowered to issue appointment orders of Grade-IV employees in the district. Otherwise, also to question the appointment of a Grade-IV employee after a lapse of six years that too issued by its own officer was a little too late in the day.

2008 (2)GLT 773

6. *Upon hearing the learned counsel for the parties and on a consideration of the averments on oath as well as the documents appended to the petition, this case stands disposed with a direction to the Commissioner & Secretary to the Government of Assam, Panchayat & Rural Development Department, Assam, Dispur and the Director of Panchayat & Rural Development Department, Assam, Guwahati to cause immediate steps to be taken to examine the petitioner's case for appointment in terms of the decision taken for appointment of sons/daughters/near relatives of the land donors as above and if on verification, the petitioner is found to be eligible for such appointment, the aforementioned authorities would do the needful to redress his grievance. It is made clear that, this Court has not interfered with the order dated 21.03.2001 and it would be up to the respondents to take necessary steps to accommodate the petitioner suitably if he is found entitled to be appointed in the facts and circumstances of the case. As the petitioner waits in expectation for appointment, the exercise as above should be completed within a period of two (2) months from the date of receipt of the certified copy of this order. No costs."*

5. Mr. V. Vero, learned Government Advocate by referring to the written instruction received by him in the letter dated 12.02.2021 of the Principal Director, Health & Family Welfare, Government of Nagaland, briefly submitted that the case of the petitioner for appointment on land-ownership could be considered as and when vacancy arises in the said establishment.

6. Considered the submissions of the learned counsel representing the parties. There is no dispute on the claim of the petitioner that her father-in-law and 10 others had donated land for the establishment of Wokha Civil Hospital and there was an agreement to give them employment to any Grade-IV posts. There is also no dispute on the fact that the petitioner was first appointed as contingent Grade-IV and thereafter her service was regularized by a competent authority. The only problem which arose appears to be that the petitioner was appointed without a sanctioned post. Further, there is no dispute on the fact that the petitioner was made to serve as a Peon till the month of May 2015 after the order terminating her service was issued on 29.04.2015 which was given retrospective effect from 30.04.2012. From all these it is clear that it was not for any fault of the petitioner that she was appointed to the post of Grade-IV without sanctioned post. To put it differently, she was entitled to be appointed to a sanctioned post as per the agreement, but the fact that she was appointed to a post which did not exist is none of her fault but of the respondents. Therefore, the respondents cannot go back on their agreement and take shelter under the plea of non-availability of posts for a time *infinitum*. The hospital was established somewhere in 1958, so it has been more than 60 years that the petitioner's family has been

made to wait. Therefore, they cannot be made to wait any longer. If they are not given any appointment now, the agreement would become meaningless. An agreement and its fulfillment time has to be reasonable. Therefore, the respondents are hereby directed to appoint the petitioner to any Grade-IV post within a period of six months, but if there is no vacancy a post should be created personal to her and issue the necessary appointment order. Further, since it has been admitted by the CMO of the district that she was in service between the period, May 2012 to May 2015, she should be given the salary that she was given during the time she was in service. Not doing so would amount to forced labor which is not permissible under the law. As such the payment of the salary should also be made within the same period as mentioned above.

With the above observations and directions, the Writ Petition stands disposed off.

Sd/-
JUDGE

Comparing Assistant