

IN THE GAUHATI HIGH COURT

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

ITANAGAR PERMANENT BENCH

WP(C) NO. 04 (AP) OF 2014

PETITIONER:

Miss Chanyam Lowang,
D/O Shri Wangngam Lowang,
Village Lathong, P.O/P.S, Khonsa,
District Tirap, Arunachal Pradesh.

By Advocates :

Ms. B Lego,
Ms. L Lombi.

RESPONDENTS :

1. The State of Arunachal Pradesh,
Represented by the Secretary, Health and Family Welfare,
Government of Arunachal Pradesh, Itanagar.
2. The Mission Director,
National Rural Health Mission, C-Sector, Naharlagun,
Government of Arunachal Pradesh, Itanagar.
3. Deputy Commissioner-cum-Chairman,
District Health Society, Khonsa,
District Tirap, Arunachal Pradesh.
4. District Medical Officer-cum-CEO, (Governing Body),
District Health Society, Khonsa,
District Tirap, Arunachal Pradesh.
5. Miss Minu Rida, (DCM),
C/O. DRCHO, Khonsa,
District Tirap, Arunachal Pradesh.

6. Shri Nani Mali (IAS),
Mission Director, NRHM,
Arunachal Pradesh, Naharlagun.
7. Shri Wanghaim Lowang,
Deputy Commissioner-cum-Chairman,
District Health Society,
Tirap District, Arunachal Pradesh.

By Advocate:

Ms. G Deka, Government Advocate, AP.
For Respondent Nos. 1 to 4.

Mr. D Boje,
For Respondent No. 5.

**BEFORE
HON'BLE MR. JUSTICE MANASH RANJAN PATHAK**

DATE OF JUDGMENT AND ORDER : 24th OF MARCH, 2017.

JUDGMENT AND ORDER

Heard Ms. Labi Lombi and Ms. Bissomoti Lego, learned counsels, appearing for the petitioner. Also heard Ms. Gita Deka, learned Additional Senior Government Advocate for the State respondent Nos. 1 to 4 and Mr. Domo Boje, learned counsel for the private respondent No. 5.

2] Aggrieved by the appointment of the respondent No. 5, as a District Community Mobilizer (DCM), under the District Medical Officer-cum-Vice Chairman, District Health Society, Tirap District, Khonsa by the Mission Director, National Rural Health Mission, Arunachal Pradesh (in short, 'NRHM'), that was made without following due process of law, i.e. without any advertisement and selection and just on the basis of recommendation of the Mission Director, NRHM, made by him vide letter dated 27-01-2012; the petitioner has preferred this writ petition praying for setting aside the

appointment of the respondent No. 5, dated 13-02-2012 as DCM under NRHM and for necessary direction to the State respondents to advertise the said post of DCM in the District Medical Officer-cum-Vice Chairman, District Health Society, Khonsa, District Tirap, Arunachal Pradesh. The petitioner also prayed that the said post of DCM under the NRHM in Tirap District should not be filled up, without due advertisement and selection.

3] The petitioner is an Arunachal Pradesh Scheduled Tribe candidate and permanent resident of Luthong of Khonsa, District Tirap, Arunachal Pradesh. She has done her Master Degree in Social Work (MSW, in short) from the Dibrugarh University, worked as a volunteer of 'Bosco Reach Out', a social action wing of Don Bosco Society of Northeast India and also worked with Seva Kendra Arunachal East, Miao. As there is dearth of Government posts for MSW Degree holder and she being an unemployed having Master Degree in Social Work, was specifically looking for the post and other avenues in the Health and Social Welfare Departments in the State.

4] As, she came to know from reliable source that a post of District Community Mobiliser (DCM), to develop District Accredited Social Health Activist (popularly known as ASHA) programme and other community processes Budget and work plan etc. in the District Resource Centre under NRHM at District Reproductive and Child Health Officer (DRCHO) at Khonsa, Tirap District, was lying vacant and that the requisite qualification for such post of DCM under the NRHM is Master Degree in Social Work or Master Degree in Sociology, with experience of 3 to 4 years in relevant field, the petitioner being fulfilled the said requisite criteria for the said post of DCM, she approached the District Medical Officer-cum-Vice Chairman, District Health Society, Tirap District, Khonsa; but on enquiry, she was informed that the said post has already been filled up by the official

respondents appointing the respondent No. 5, who do not possess the requisite qualification to hold the post of DCM, as required.

5] Through the RTI application dated 03-06-2013, the petitioner came to know from the District Medical Officer-cum-Chief Executive Officer, District Health Society, Tirap District, Khonsa, that the Mission Director, NRHM, Arunachal Pradesh, recommended the respondent No. 5, by name, to appoint her as the DCM, Tirap District, Khonsa and accordingly, the Deputy Commissioner of Tirap District, Khonsa, who is the Chairman of the District Health Society, approved her name and appointed her as DCM under the District Health Society, Tirap District at Khonsa. The petitioner through such RTI also came to know that as no interview was conducted for such appointment of respondent No. 5, therefore, no such advertisement was floated for the said post and that the requisite educational qualification for the post of DCM is Post-Graduate in any discipline, with preference to Master Degree in Social Works or Sociology with 3 to 4 years experience in the relevant field. Thereafter, the petitioner could collect the recommendation letter of the Mission Director, NRHM, dated 27-01-2012, issued in File No. SCOVA/2005/137 (Pt), forwarding respondent No. 5's application for the post of DCM, to the District Medical Officer-cum-Vice Chairman, District Health Society, Tirap District, Khonsa, Arunachal Pradesh, wherein the Mission Director wrote to the said District Medical Officer of Tirap District that as the post of DCM is lying vacant in the said district of Tirap at Khonsa following the transfer Ms. Olak Borng to West Siang District, Aalo; therefore, approval has been given to fill up the said vacant post of DCM of Tirap District at Khonsa at the District Level itself and by the said communication dated 27-01-2012, the Mission Director, NRHM, Arunachal Pradesh authorized the District Health Society of Tirap District, Khonsa, recommending the name of the respondent No. 5, for consideration and appointment under the NRHM and to recruit her in the

post of DCM in the said district, stating that she possesses the requisite qualification.

6] On the basis of said recommendation and authorization letter of the Mission Director, NRHM dated 27-01-2012, the Deputy Commissioner-cum-Chairman, District Health Society, Tirap District, Khonsa, vide order No. NRHM/ESTT/ACS/2011-12/NS-7, dated 13-02-2012, appointed the respondent No. 5 in the post of DCM on contractual basis under the NRHM on consolidated monthly salary of Rs. 16,000/- for the period up to 31-03-2012 and said appointment of the respondent No. 5 has been continuously extended from time to time. The petitioner further stated that the said respondent No. 5 is from Aalo of West Siang District, Arunachal Pradesh whereas the vacancy for the said post of DCM arose at Khonsa, Tirap District.

7] The petitioner through RTI also obtained a copy of the advertisement, issued by the Mission Director, NRHM, Arunachal Pradesh, on 19-10-2010, wherein the said Mission Director invited applications for filling up of a few post under Arunachal Pradesh State Health Society on contractual basis including the post of DCM, wherein it was specifically mentioned that the essential qualification for the said post is Master Degree of Social Work / Master Degree of Sociology with experience of 3-4 years in the relevant field with working knowledge of computer. By the said advertisement, dated 19-10-2010, the candidates were asked to appear in walk-in-interview in the office chamber of the Mission Director, NRHM, Arunachal Pradesh, on 15-11-2010 from 09.00 am onwards.

8] The petitioner accordingly submitted an application before the Deputy Commissioner-cum-Chairman, District Health Society, Khonsa, Tirap District stating that the appointment of the respondent No. 5 being illegal and in violation of all established laws and the Rules of appointment i.e. without the post being advertised and without there being any selection

held; and prayed for setting aside and quash the appointment of the respondent No. 5 and to advertise the said post of DCM immediately and to appoint the selected candidate after holding fair selection.

9] The State respondent Nos. 1 to 4 filed their affidavit in the matter and submitted that though the eligibility criteria for recruitment to the post of DCM is Master Degree of Social Work / Sociology and the requisite experience is of 3-4 years in relevant field with working knowledge of computer, though an advertisement was issued for the post of DCM on 19-10-2010 with such qualification, but as the sufficient response was not received to the said advertisement, the candidates for the said advertised posts were found short. Therefore, the Mission Director, NRHM, issued a corrigendum on 09-11-2010 stating that candidates having Master Degree in Anthropology with Specialization in Social Anthropology/Political Science/Economics/History and MBA will also be eligible to appear in the walk-in-interview to be held on 15-11-2010 for the post of State Community Mobilizer/District Community Mobilizer, as advertised on 19-10-2010, specifying that the other terms and conditions and eligibility criteria will remain same. It is also stated that the said corrigendum was published in number of dailies in the State of Arunachal Pradesh.

10] The State respondents also stated that after such corrigendum, a large number of candidates applied for the post of DCM and amongst them many of the candidates had Master Degrees in Anthropology/Political Science/Economics/History and also MBA. They also submitted that while giving approval and sanction for recruitment to the post of DCM at District Level to the District Medical Officer of the District Health Society, Tirap District, Khonsa, against the post of DCM, that was lying vacant because of transfer of the previous DCM from it, the authority concerned also forwarded the application of the respondent No. 5, who applied for the said post. The State respondents also stated that the said post of DCM at

Khonsa arose only in February, 2012, due to transfer of the erstwhile DCM from Khonsa to Aalo against a vacant post and they further submitted that had the petitioner applied for the post, her application would have also been forwarded by the Mission Director and since she did not apply for the post, her name could not be forwarded. The respondent reiterated that since November, 2010, Master Degree in any other discipline and MBA were considered to be the qualification for appointment as DCM under the NRHM. The State respondents, in their affidavit, clarified that as per the policy decision, the Mission Director, National Health Mission, Government of Arunachal Pradesh, by its communication, directed all the District Health Societies not to appoint and/or recruit any candidate on contractual basis without obtaining prior approval/sanction from the State Health Society and cautioned that if any such appointment is made, fund shall not be released.

11] The respondent No. 5, in her affidavit, stated that the Mission Director, NRHM, by his corrigendum dated 09-11-2010 modified the requisite qualification for the post of DCM, under the NRHM that includes MBA and she being an MBA degree holder, eligible to be appointed for the post DCM under NRHM, was accordingly appointed as DCM at Khonsa, Tirap District. She further submitted that her appointment as DCM is as per the guidelines issued by the State respondents and therefore, question of furnishing misleading information by them regarding the eligibility criteria for appointment to the post of DCM, does not arise and she stated that rather they furnished the correct information. It was also submitted by her that she was appointed as DCM at Tirap District, Khonsa, not only on the strength of recommendation of the Mission Director, NRHM, Arunachal Pradesh, but also after thorough scrutiny of her qualification and that since her appointment, on 13-02-2012, she has been serving dedicatedly in the said post of DCM, for the achievement of the policies and programme of the NRHM and she attended numbers of training programmes after her said

appointment as DCM. The respondent No. 5 further stated that as the requisite qualification of the DCM is not only restricted to Master Degree of Social Work or Sociology but also included Master Degree in Anthropology with Specialization in Social Anthropology/ Political Science/ Economics/ History and MBA, therefore, her appointment as DCM is not illegal, since she possessed the requisite qualification of Master Degree of Business Administration and that the appointment to the post of DCM under NRHM had been given to her on immediate and need based requirement in the district of Tirap, Khonsa, Arunachal Pradesh. She also admitted that after she was appointed as DCM at Khonsa, Tirap District, her service has been extended regularly from time to time and that she is still serving as DCM under the National Health Mission, Arunachal Pradesh.

12] From the advertisement dated 19-10-2010 it is seen that for the post of DCM, the requisite qualification is Master Degree in Social Work or Master Degree in Sociology with experience of 3-4 years in the relevant field with working knowledge of computer and 15-11-2010 was the date of walk-in-interview for the said posts in the office chamber of Mission Director, NRHM, Arunachal Pradesh. By the Corrigendum, dated 09-11-2010, the Mission Director, NRHM clarified that for the post of State Community Mobilizer as well as the District Community Mobiliser, candidates having Master Degree in Anthropology with Specialization in Social Anthropology/Political Science/Economics/History and MBA degree will also be eligible to appear in the Walk-in-Interview, which was to be held on 15-11-2010, but the other terms and conditions and the eligibility criteria remained same.

13] The State respondents annexed the list of 52 candidates, who appeared in the walk-in-interview on 15-11-2010 before the Mission Director, NRHM, for the post DCM under NRHM. But the name of the respondent No. 5 did not figure in the said list. From the perusal of the

educational qualification of the respondent No. 5, annexed to the writ petition and the affidavit of the respondent No. 5, it can be seen that she passed her Bachelor of Arts III years (pass course) Degree in the year 2009 from Rajiv Gandhi University, Itanagar; whereas she passed her MBA examination in the year 2011 from Sikkim Manipal University, Gangtok, that was held in the month of July, 2011 only. The requisite experience for the post of DCM was 3-4 years in the relevant field with working knowledge in computer and in the corrigendum dated 09-11-2010, issued by the Mission Director NRHM, Arunachal Pradesh, it was also specifically mentioned that the other terms and conditions and eligibility criteria will remain same.

14] Thought the respondent No. 5 has annexed a certificate that she has completed the diploma in office Automation during September 2008 to March 2009, but neither the respondent No. 5, nor the State respondents stated anything regarding her experience of 3-4 years in the relevant field as required for the post of DCM specified in the advertisement dated 19-10-2010 and reaffirmed in the Corrigendum, dated 09-11-2010. Moreover, the respondent No. 5 passed her graduation only in July, 2009 and cleared her MBA in July 2011; therefore, the said respondent cannot have experience of 3-4 years in the relevant field.

15] The State respondent clearly stated that the post of DCM in the District Health Society in Tirap District, Khonsa fell vacant only in February, 2012 due to transfer of the previous DCM to West Siang district and at the same time, the State respondents did not clarify as to how on 27-01-2012, the Mission Director NRHM, Arunachal Pradesh recommended the respondent No. 5 for the post of DCM, in Tirap District, Khonsa, on the basis of which, the Deputy Commissioner-cum-Chairman of District Health Society and District Reproductive and Child Health Officer, Tirap district, Khonsa, by his order dated 13-02-2012, appointed the respondent No. 5 as DCM in the District Health Society at Tirap District, Khonsa.

16] In the present case, the advertisement for the DCM under NRHM was made on 19-10-2010, the selection for the said post was held on 15-11-2010 and the submission of the State respondents that on the basis of said advertisement, the respondent No. 5 was appointed as DCM under the District Health Society, Tirap District, Khonsa for which the Mission Director, NRHM, issued the recommendation letter on 27-01-2012, pursuant to which the Deputy Commissioner-cum-Chairman, District Health Society, Tirap District, Khonsa by order dated 13-02-2012 appointed the said respondent No. 5, is not tenable since on the date of the interview, i.e. on 15-11-2010, the said respondent did not obtain her MBA degree, which she procured only in the year 2011, as the examination for said MBA was held only in July 2011. Moreover, as noted above and stated by the respondents themselves that the post of DCM in the District of Tirap fell vacant only in February, 2012, whereas the recommendation to fill up the said post by the respondent No. 5 was forwarded by the Mission Director, NRHM on 27th January, 2012 itself; pursuant to which, the Deputy Commissioner-cum-Chairman, District Health Society, Tirap District, Khonsa, by his order dated 13-02-2012, without any advertisement and selection, appointed the respondent No. 5 to the said post of DCM under the NRHM at Khonsa.

17] The Hon'ble Supreme Court in the case of *State of Orissa -Vs- Mamata Mohanty*, reported in (2011) 3 SCC 436 have held that –

"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 Admn. State of Haryana v. Piara Singh, Excise

Supdt. v. K.B.N. Visweshwara Rao, Arun Tewari v. Zila Mansavi Shikshak Sangh, Binod Kumar Gupta v. Ram Ashray Maholo, National Fertilizers Ltd. v. Somvir Singh, Telecom District Manager v. Keshab Deb, State of Bihar v. Upendra Narayan Singh and State of M.P. v. Mohd. Abraham.)

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.

37. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be nonest and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (Vide Upen Chandra Gogoi v. State of Assam, Mangal Prasad Tamoli v. Narvadeshwar Mishra and Ritesh Tewari v. State of U.P.)

38. The concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour.

59. The rule of law inhibits arbitrary action and also makes it liable to be invalidated. Every action of the State or its instrumentalities should not only be fair, legitimate and above board but should be without any affection or aversion. It should neither be suggestive of discrimination nor even give an impression of bias, favouritism and nepotism. Procedural fairness is an implied mandatory requirement to protect against arbitrary action where statute confers wide power coupled with wide discretion on an authority. If the procedure adopted by an authority offends the fundamental fairness or established ethos or shocks the conscience, the order stands vitiated. The decision-making process remains bad. [Vide Haji T.M. Hassan Rawther v. Kerala Financial Corpn, Rash Lal Yadav (Dr.) v. State of Bihar and Tata Cellular v. Union of Indi.] "

18] From the recommendation letter of the Mission Director, NRHM, the appointment order of the respondent No. 5 as DCM in Tirap District at

Khonsa and from the above it is clear that her appointment was given on the recommendation of the Mission Director, NRHM, Arunachal Pradesh and the respondents failed to show that any advertisement was issued giving opportunity to all eligible candidates to compete or any selection process was undertaken before appointment of the respondent No. 5 as DCM at Khonsa and respondent No. 5's appointment was clearly on favoritism.

19] For the reasons above, said appointment of the respondent No. 5 as DCM being without any advertisement and selection is in clear violation of the provisions of Articles 4 and 16 of the Constitution of India and the same being bad in law, is liable to be set aside and quashed. Accordingly, the appointment of the respondent No. 5 on the basis of the recommendation of the Mission Director, National Rural Health Mission, Arunachal Pradesh in File No. SCOVA/2005/137(Pt.), dated 27-01-2012 and the consequential order of the Deputy Commissioner-cum-Chairman, District Health Society, Tirap District, Khonsa, under No. NRHM/ESTT/ACS/2011-12/NS-7 dated 13-02-2012, appointing the said respondent No. 5 as District Community Mobilizer in the Office of District Health Society, Tirap District, Khonsa, is hereby set aside and quashed. As the said initial appointment of the respondent No. 5, as District Community Mobiliser under National Rural Health Mission, Arunachal Pradesh, is illegal and *void-ab-initio*, therefore any subsequent extension and/or regularisation or benefit of promotion etc. arising out of said appointment and given on the basis of said appointment, if any, is also set aside and quashed.

20] The State respondents herein are directed to fill up any such post of District Community Mobilizer and other posts under the National Rural Health Mission, Arunachal Pradesh including in the District Health Society, District Tirap, Khonsa, following due process and established principle of law, i.e. by way of proper advertisement and selection.

21] With the aforesaid observations and directions, this writ petition stands allowed.

JUDGE

Paul