THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR, MIZORAM,TRIPURA & ARUNACHAL PRADESH)

W.A. No. 12(AP)/2010

Sri Obang Pankam & 3 others.

.....**APPELLANTS**

- VERSUS -

Dogo Tarak and others.

.....**RESPONDENTS**

For the Appellants	:	Mr. C. Baruah, Sr. Advocate. Mr. P. Sharma, Advocate
For the Respondents	:	Ms. G. Deka, Govt. Advocate, Mr. K. Dabi, Advocate
Date of hearing	:	03.04.2012
Date of judgment	:	**30.04.2012**

BEFORE
THE HON'BLE MR. JUSTICE IA ANSARI
THE HON'BLE MR. JUSTICE K. MERUNO

JUDGMENT AND ORDER

(Ansari, J).

In exercise of the power conferred by the proviso to Article 309 of the Constitution of India, Govt. of Arunachal Pradesh brought into force, with effect from 14.10.1999, certain amendments into the Assistant Inspector (Tax and Excise) Recruitment Rules, 1997, for certain posts, including the post of Assistant Inspector (Tax and Excise), the new Rules having been titled as Assistant Inspector (Tax and Excise) Recruitment Rules (Amendment), 1999, (in short, 'the 1999 Recruitment Rules) providing for, *inter alia,* recruitment to the posts of Assistant Inspector (Tax and Excise) by way of *promotion* to the extent of

10% of the sanctioned strength and the remaining 90% by *direct recruitment* on the basis of *written test* to be followed by *viva-voce* on the following subjects:

General Mathematics	=	100 marks
General English	=	100 marks
General Knowledge	=	100 marks
Viva Voce	=	50 marks
Total Marks	=	350

2. The 1999 Recruitment Rules also made it clear that 10% recruitment to the post of Assistant Inspector (Tax and Excise), by way of *promotion*, will be from amongst the UDCs of the Department having five years of regular service in the grade in the case of general candidates and 3 years of regular service in the case of APST candidates failing which by way of *transfer* on *deputation*.

3. The four appellants, in the present appeal, were, on 07.03.2007, appointed as Assistant Inspectors (Tax and Excise) Group-C in the Department of Tax and Excise, Govt. of Arunachal Pradesh, in the scale of Rs.4500-125-7000/- per month, making it clear that their appointments shall be purely on *officiating basis* and that the same would not confer on them any right to claim regular appointments and that the Government reserved the right to terminate their services without assigning any reason therefor. However, on the basis of the recommendation of the DPC made on 23.11.2007, the Government regularized, vide its order, dated 26.11.2007, the *officiating services* of the appellants herein by

granting one time relaxation of the qualification required by the 1999 Recruitment Rules.

4. The Government published an advertisement, on 07.03.2008, inviting applications for recruitment to the 25 posts of Assistant Sub-Inspector (Tax and Excise), 4 posts of UDC and 14 posts of LDC-cum-Computer Operator and, thereafter, conducted written examination, in this regard, on 08th and 09th of November, 2008. The writ petitioners applied for *direct recruitment* to the said posts of Assistant Inspector (Tax and Excise) and though they appeared in the interview, they could not qualify and challenged, with the help of a writ petition, made under Article 226, the regularization of the appointments of the present appellants, who were impleaded as private respondents in the said writ petition. The said writ petition came to be registered as WP(C) No.86(AP)/2010.

5. By the judgment and order, dated 22.12.2009, passed in WP(C) No.86(AP)/2009, whereby a learned Single Judge of this Court has allowed the writ petition by setting aside and quashing the order, dated 26.11.2007, whereby the *officiating promotions/appointments* of the present four appellants, (who were private respondents No.4 to 7 in the writ petition), were regularized. By the impugned judgment and order, the learned Single Judge has further directed the State respondents to initiate, within a period of four months, with effect from 04.01.2010, regular recruitment process as required by the 1999 Recruitment Rules to fill up the said four posts of Assistant

Inspector (Tax and Excise), which the appellants herein (i.e., the private respondent Nos.4 to 7 in the writ petition) had been occupying, giving, however, liberty to the writ petitioner as well as the private respondents in the writ petition, (i.e., the four appellants herein), to participate in the ensuing recruitment process if they are, otherwise, not disqualified or ineligible.

6. Since the learned Single Judge has allowed the writ petition, as indicated above, this appeal has been preferred, as already indicated above, by the four persons, who were private respondents in the said writ petition.

7. We have heard Mr. C. Baruah, learned Senior counsel, for the appellants, and Ms. G. Deka, learned Additional Senior Govt. Advocate, for the State respondents. We have also heard Mr. K. Dabi, learned counsel, for the writ petitioners-private respondents.

8. While considering the present appeal, it needs to be noted that as the writ petition was allowed with direction as indicated above, the State preferred an appeal, which gave rise to Writ Appeal No.315/2011. By judgment and order, dated 24.01.2012, a Division Bench of this Court has already dismissed the appeal on the ground that it lacks merit.

9. We are told at the Bar that a review petition has been preferred against the dismissal of the said appeal.

10. Considering the fact that when a similar appeal, as the case at hand, has already been dismissed, this appeal should not, ordinarily, be re-heard and, ordinarily, this appeal, too, shall be dismissed, we pointed out to Mr. C. Baruah, learned Senior

counsel, appearing on behalf of the appellants, that this appeal, in the light of the earlier decision of the Division Bench, shall not be, ordinarily, allowed, Mr. Baruah submits that the present appeal is different from the earlier one in the sense that the appellants herein have challenged the judgment and order under appeal on, amongst others, the ground that the writ petitioners lack *locus standi* inasmuch as they had already failed in a selection process, which had been initiated for *direct recruitment* to the posts of Assistant Inspector (Tax and Excise) and, having failed in the selection process, they could not have legally challenged the order of regularization of the present appellants.

11. It is, secondly, submitted by Mr. Baruah that the learned Court below has committed apparent error of not taking into account the fact that the writ petitioners were candidates for *direct recruitment*; whereas the present appellants, (who were private respondents in the writ petition), had been appointed against *promotional quota*. Since the judgment and order, under appeal, stands challenged on two specific grounds as advanced by Mr. Baruah, we have decided to dispose of the appeal on its own merit and we have, therefore, as mentioned above, heard this appeal.

12. While considering the present appeal, it needs to be noted, as already indicated above, that Assistant Inspector (Tax and Excise) Recruitment Rules, 1997, was amended, in the year 1999, with effect from 14.10.99, the amended rules being called Assistant Inspector (Tax and Excise) Recruitment Rules

(Amendment), 1999, (which is being referred to as 'the 1999 Recruitment Rules').

13. Before proceeding further, what also needs to be taken note of is the fact that the 1999 Recruitment Rules provide for appointment to the posts of Assistant Inspector (Tax and Excise) by both means, namely, by way of *promotion* as well as by way of *direct recruitment*, the *promotional quota* being 10% of the sanctioned strength and the *direct recruitment quota* being 90% of the sanctioned strength.

14. What is also imperative to bear in mind, as already indicated above, is that the provisions for *direct recruitment,* as embodied in 1999 Recruitment Rules, require holding of *written test* to be followed by *viva voce* on the subject of General Knowledge, General English and General Mathematics, each of these subjects carrying 100 marks, and the *written test* was to be followed by *viva voce* for 50 marks. Column 12 of the 1999 Recruitment Rules also made it clear that the *promotional quota* of 10% of the sanctioned strength of the post of Assistant Inspector (Tax and Excise) would be filled up from amongst the UDCs of the Department concerned having five years of regular service, in the grade, in the case of general candidates and three years of regular service, in the case of APST candidates, failing which by *transfer* on *deputation*. This apart, what is also abundantly clear is the fact that no promotion to the post of Assistant Inspector (Tax and Excise) can be given unless a person has been serving as UDC for the requisite period of time.

15. Thus, a bare reading of the 1999 Recruitment Rules shows that *promotion* has to be made from amongst the UDCs having requisite period of service or by way of *transfer* on *deputation*. There is no *third* mode of recruitment prescribed by the 1999 Rules.

16. The present appellants were, however, appointed, admittedly, as Assistant Inspector (Tax and Excise) on *officiating basis* without following any selection process. There appointments were, thus, *ex facie* on pick and choose basis and these appointments, though styled as *officiating promotions,* were, in fact and in substance, nothing, but *direct recruitment.* Being *direct recruitment* in nature, such appointments were wholly in denial of constitutional guarantee of public employment inasmuch as Article 16(1) of the Constitution of India, which is a facet of Article 14, makes it clear that there must be equality of opportunity in public employment meaning thereby that every person eligible for appointment shall be given an opportunity to participate in the selection process.

17. In the present case, the present appellants were, admittedly, picked up and chosen, directly, for appointment without resorting to even a semblance of selection process. This apart, their appointments were *officiating* in nature making it explicitly clear by their orders of appointments that these appointments would not confer, on the appointee, any right to claim regular appointment and that the Government reserved the right of terminating their services without assigning any reason therefor.

The appellants were, thus, directly recruited to the posts of Assistant Inspector (Tax and Excise) without following the scheme of *direct recruitment* as envisaged by the 1999 Recruitment Rules in the sense that neither any *written test* was held as provided in the 1999 Recruitment Rules nor was any *viva voce* held; whereas the 1999 Recruitment Rules provide for a combination of the two. Thus, in making the *officiating appointments* and also in regularizing the same, the 1999 Recruitment Rules were, as a whole, shelved or thrown into the wind.

18. In the backdrop of what have been indicated above, let us examine Mr. Baruah's contention that the learned Single Judge has fallen in error in not taking into account the fact that the present appellants had been appointed against *promotional quota*. Suffice it to point out, in this regard, that in order to be promoted to the post of Assistant Inspector (Tax and Excise), *promotion* had to be from amongst the UDCs of the Department concerned failing which by *transfer* on *deputation*.

19. In the case at hand, the appellants were, admittedly, not UDCs in the Department concerned. They could not have, therefore, been, under any circumstances, promoted to the posts of Assistant Inspector (Tax and Excise) and the only remedy, which the Government had, (if it were to fill up the posts, in question, on urgent basis), was to resort to appointments by way of *transfer* on *deputation*. Thus, for all intents and purposes, the appointments of the present appellants were, if we may reiterate, nothing, but *direct recruitment* and branding these *direct*

recruitments as *promotions* was nothing, but colourable exercise of power, which, when questioned, could not be justified by Mr. Baruah.

20. What crystallizes from the above discussion is that the present appellants were not qualified for *promotion*, because they were not UDCs in the Department concerned and if the Government were to make appointments urgently, the remedy of the Government lied in filling of the post, in question, by *transfer* on *deputation*..

21. In short, thus, there can be no escape from the conclusion that the *promotion*al appointments of the present appellants to the posts of Assistant Inspector (Tax and Excise) by way of regularization of their services was wholly illegal, the same being completely in violation of the relevant recruitment rules and in complete denial of the guarantee provided to every citizen under Article 14 read with Article 16(1) in the matter of public employment. The appointments of the present appellants, initial and final, were, we are constrained to hold, wholly arbitrary and carried no support of law.

22. Turning to the contention of Mr. C. Baruah, learned Senior counsel, appearing for the appellants, that the writ petitioners had no *locus standi* to challenge the appointments of the present appellants, because they had themselves failed in the selection process, suffice it to point out that the selection process, wherein the writ petitioners had failed, was quite distinct and different from the impugned process of purported *promotion*s of the present

appellants, these promotions having been made, if we may repeat, by throwing into the wind the 1999 Recruitment Rules and turning Nelson's eye to the constitutional guarantees given to every citizen in the domain of public employment.

23. While dealing with the present appeals, it may be mentioned, if we may borrow the language used in **Dr. M Laiphlang and others vs. State of Meghalaya and others, reported in 2004 (2) GLR 546,** that the concept of appointment, absorption and *promotion* in service, in relaxation of the recruitment rules, has undergone a prominent development. The present view is that there can be no relaxation of the basic and fundamental rules of recruitment.

24. Thus, the service jurisprudence, now, makes a distinction between *conditions of recruitment* and *conditions of service*. While *conditions of service* may be relaxed, *conditions of recruitment* cannot be relaxed subject, however, to the condition that if the recruitment rules, in themselves, provide for relaxation of the *conditions of recruitment*, the *conditions of recruitment* may be relaxed provided that such relaxation does not render the *conditions of recruitment*, as a whole, nugatory and/or *non est* in its entirety. Reference, in this regard, may be made to **Dr. M Laiphlang (supra),** wherein a Division Bench of this Court, relying upon a number of authorities, culled out the parameters of the law of relaxation in the following words:-

> *"25. While considering the above aspects of the matter, it needs to be pointed out, at the very outset, that the concept of appointment, absorption and/or promotion in service in relaxation of relevant*

recruitment rules has undergone a prominent development. ***The present view is that there can be no relaxation of the basic and fundamental rules of recruitment. Moreover, strict conformity with the recruitment rules is insisted both for direct recruits as well as promotees. (Ref. Suraj Prakash Gupta v. State of J&K*** *reported in (****2000) 7 SCC 561)****. Thus the service jurisprudence, now, clearly draws a distinction between the conditions of recruitment and conditions of service. In other words, in the realm of service jurisprudence, a distinction is, now, drawn between the conditions of recruitment and the conditions of service. While the conditions of service may be relaxed, conditions of recruitment cannot be relaxed.* ***In other words, the provisions for relaxation in general contained in recruitment rules cannot be resorted to for relaxing the conditions of recruitment****. The minimum period of qualifying service for promotion, which recruitment rules impose, is really a condition of recruitment and such a condition not being condition of service cannot generally be relaxed unless the Rules in themselves provide for otherwise (JC Yadav v. State of Haryana, reported in (1990) 2 SCC 189). A Division Bench of this Court have set the matter at rest in the case of Ananda Ram Baruah v. State of Assam, reported in 2003 (2) GLT 78, by observing and laying down as follows:*

> *"….The question, which call for determination by this Court is, whether the power to relax the Rule would go to the extent of relaxing conditions of recruitment also or it can be only to the extent of relaxing the conditions of service? Can a direct recruit for recruitment to the post of LDA avoid competitive examination? Can the Government exercise power of relaxation of Rule of recruitment requiring a direct recruit to appear in the competitive examination and such relaxation of the recruitment Rules is permissible.* ***In Keshab Chandra Joshi v. Union of India, reported in 1992 Suppl. SCC 272, the Apex Court has emphasized the need of strict compliance of the recruitment Rules for both direct recruits and promotees. It is held that there cannot be any relaxation of the basic or fundamental Rules of recruitment****. That was a case where the Rule permitting relaxation of conditions of service came for consideration and it was held by a three Judges Bench that the Rule did not permit relaxation of the*

recruitment Rules. ***In Syed Khalid Rizvi V. Union of India, 1993 Supp (3) SCC 575, the Apex Court observed "The condition precedent, therefore, is that there should be an appointment to the service in accordance with Rules and by operation of the Rules, undue hardship has been caused..... it is already held that the condition of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed****." Thus, according to the Apex Court there is distinction between the conditions of recruitment and conditions of service. Appointment has to be made in accordance with the recruitment Rules and, thereafter, there may a relaxation in the service condition.* ***Similarly, in State of Orissa v. Sukanti Mahapatra (1993) 2 SCC 486, it was held that though the power of relaxation stated in the Rule was in regard to "any of the provisions of the Rules", this did not permit relaxation of the Rule of direct recruitment without consulting the Commission and the entire ad-hoc service of a direct recruit could not be treated as regular service. In M.A.Haque (Dr.) v. Union of India (1993) 2 SCC 213 and in Jammu and Kashmir Public Service Commission v. Dr. Narinder Mohan, (1994) 2 SCC 630, it has been emphatically laid down that the Rule relating to recruitment could not be relaxed. The judgment in the matter of Suraj Prakash Gupta (supra) has also reiterated the principle laid down by the Apex Court that there cannot be any relaxation of the conditions of recruitment****. The conditions of recruitment and conditions of service are distinct. The Government has the power to relax conditions of service, whereas the conditions of recruitment cannot be relaxed even though the Rule intends to do so.*

26. ***We express out complete agreement with the position of law laid down in Ananda Ram Baruah (supra) subject to only one clarification that if the recruitment rules, in themselves, provide for relaxation of conditions of recruitment, the conditions of recruitment may be relaxed, provided that such relaxation does not make the conditions of recruitment nugatory and that interpretation of such provisions of relaxation contained in the recruitment rules must not be liberal, but very strict****."***

(Emphasis is added)

25. In the light of the law laid down in **Dr. M Laiphlang (supra),** one can safely hold that even if, in the light of the language used in the 1999 Recruitment Rules, the *conditions of recruitment*, contained in the 1999 Recruitment Rules, may be relaxed, but such relaxation cannot be to such an extent that the relaxation granted makes the whole provisions, as regards *direct recruitment* imbecile, purposeless and nugatory. In short, Rule 5 of the 1999 Recruitment Rules does not conceive of recruitment *de hors* the said Rules.

26. The decisions, referred to by the Division Bench, in **Dr. M Laiphlang** (supra), make it clear that even if recruitment rules contain the provisions for relaxation of the rules of recruitment, such relaxation cannot be to such an extent that it makes the whole scheme of recruitment meaningless nor can the provisions of relaxation be interpreted in such a manner that it enables the Government to throw away the rules of recruitment lock, stock and barrel, make the same non- existent as if the rules, as a whole, do not exist or as if the rules, in their entirety, stand suspended.

27. From what have been discussed above, it is abundantly clear that though the 1999 Recruitment Rules provide for relaxation of '*any rule*' and even if "any" Rule is interpreted to include the rules of recruitment, relaxation cannot be to such an extent that the

rules of recruitment are rendered facile. On this aspect of law, we may refer to **State of Orissa vs Sukanta Mahapatra,** reported in **(1993) 2 SCC 486**, wherein the Supreme Court has, taking note of its earlier decision, in **RN Nanjundappa vs T Thimmaid,** reported in **(1992) SCC 409**, clarified the law, on the subject, in the following words:-

> *"8. The Rules were made under the proviso to Article 309 for regulating the method of recruitment to the posts of Lower Division Assistants in the offices of the Heads of Departments. *** **Counsel for the regular recruits contend that what the Government has done in exercise of power under Rule 14 is to set at naught the entire body of the Rules as if they never existed. The power of relaxation, contend counsel, cannot be so used as to render the Rules non est**. In support of this contention strong reliance was placed on the following observations in the of **R. N. Nanjundappa v. T. Thimmiah**: (SCC pp.416-17,para 26)*
>
> ***"...If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."***
>
> ***In the present case also the appointments of the employees whose services are sought to be regularized were dehors the Rules. Rule 14 merely permits relaxation of any of the provisions of the Rules in public interest but not the total shelving of the rules. The orders do not say which rule or rules the Government considered necessary and expedient in public interest to relax. What has been done under the impugned orders is to regularize the illegal entry into***

service as if the Rules were not in existence. Besides the reason for so doing are not set out nor is it clear how such regularization can sub-serve public interest. Rule 14 has to be strictly construed and proper foundation must be laid for the exercise of power under that rule. The Rules have a limited role to play, namely, to regulate the method of recruitment, and Rule 14 enables the Government to relax any of the requirements of the Rules pertaining to recruitment. The language of Rule 14 in the context of the objective of the Rules does not permit total suspension of the Rules and recruitment dehors the Rules. In the present case the recruitments had taken place years back in total disregard of the Rules and now what is sought to be done is to regularize the illegal entry in exercise of power under Rule 14.Rule 14, we are afraid, does not confer such a blanket power; its scope is limited to relaxing any rule, e.g. eligibility criteria, or the like, but it cannot be understood to empower Government to throw the Rules overboard. If the rule is so construed it may not stand the rest of Article 14 of the Constitution. *The proviso to Rule 13 can come into play in the matter of fixation of seniority between candidates who have successfully cleared the examination and a candidate who cleared the examination after availing of the benefit of relaxation. We are, therefore, of the opinion that the Tribunal committed no error in understanding the purport of Rule 14.*

*** *** *** *** ***

10. Now even though the Tribunal came to the conclusion that Rule 14 did not permit regularization made under the impugned orders of January 3,1985 and February 14,1985, it, having regard to the long service put in by the employees named in the same two orders and on compassionate considerations, has supported the regularization under Article 162 of the Constitution. It has moulded the relief on such considerations. Since that part of the order has not been assailed and since the appellants cannot be worse off by appealing, we cannot interfere with that part of the order. It will, therefore, be worked out as directed by the Tribunal but we may clarify that it will not have the effect of disturbing the seniority of regular appointees who will rank senior to the irregular appointees under any interim orders contrary to the relief moulded by the

Tribunal shall be adjusted and brought in tune with the said relief. The benefit of this relief, to the extend relevant, will be given to irregular appointees covered under both the impugned orders of January 3,1985 and February 14,1985".

(Emphasis is added)

28. Applying the law, laid down in **Sukanti Mahapatra** (supra), to the factual matrix of the present case, one can, unhesitatingly, hold that the 1999 Recruitment Rules have been made, under the proviso to Article 309, for regulating the method of recruitment to, amongst others, the posts of Assistant Inspector (Tax and Excise) and Rule 5 of the relevant Rules provide for relaxation. Even if the power given, under Rule 5, to the Government can be interpreted to empower the Government to relax not only the *conditions of service*, but also the *conditions of recruitment*, the fact remains that what the Government has done, in the present case, in exercise of powers under Rule 5, is to virtually set at naught the entire body of the Rules as if the Rules never existed. The power of relaxation, as the decision in **R. N. Nanjundappa** (supra) reflects, does not empower appointments in defiance of the rules. As held in **R. N. Nanjundappa** (supra), if the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularized; ratification or regularization is possible of an act, which is within the power and province of the authority or where there has been some non-compliance with the procedure or the manner, which does not go to the root of the appointment; regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be

to introduce a new head of appointment in defiance of rules, for, it may have the effect of setting at naught the rules.

29. In the present case too, if the appointments of the present appellants were upheld, it would have been tantamount to allowing regularization of their appointments *de hors* the relevant Rules inasmuch as Rule 5, which embodies conditions of relaxation, merely permits relaxation of any of the provisions of the Rules, but not shelving of the Rules. Rule 5, in the light of the decision in **Sukanti Mahapatra** (supra), does not confer, on the Government, a blanket power to shelve the rules or throw the rules overboard and if Rule 5 is construed to mean shelving of the conditions of recruitment as a whole, it would not, as indicated in **Sukanti Mahapatra** (supra), withstand the test of Article 14 of the Constitution.

30. While summarizing, what have been discussed above, we may hold that for all intents and purposes, the appointments of the present appellants to the post of Assistant Inspector (Tax and Excise) were, though branded as appointments against *promotional quota*, were actually distorted version of making *direct recruitment* inasmuch as the purported promotions were made without the appellants being members of the feeder cadre; whereas such *promotions* could not have been made, under the relevant recruitment rules, without a person having served as a UDC for requisite period of service in the said Department. The appellants' *promotion*al *appointments* were nothing, as already indicated above, but *direct recruitments*, which were not only

violative of the relevant recruitment rules, but also violative of the constitutional guarantees provided under Article 14 read with Article 16(1).

31. Because of what have been discussed and pointed out above, we do not find any merit in this appeal. The appeal, therefore, fails and the same shall accordingly stand dismissed.

32. No order as to costs.

JUDGE **JUDGE**

njdutt