

IN THE GAUHATI HIGH COURT

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

ITANAGAR BENCH

WP(C) No. 462 (AP) 2015

Shri Mohammad Amjad,
S/o –Lt. Mohammad Bandhu,
R/o near SeshuNiketan, School,
PO/PS-Tezu, District-Lohit, A.P.
Mobile No.7085321597.

..... *Petitioner.*

By Advocate:
Mr. G. Tarak

-Versus-

- 1. State of Arunachal Pradesh**
(Represented by Chief Secretary),
Govt. of Arunachal Pradesh,
Itanagar.
- 2. Commissioner/Secretary,**
Tax and Excise, Govt. of Arunachal Pradesh,
Itanagar.
- 3. Deputy Commissioner (Tax and Excise, Legal),**
Govt. of Arunachal Pradesh,
Itanagar.
- 4. Shri Nyabom Tasar, S/o-Lt. Tonya Tasar,**
Permanent Resident of Liru Village,
PO/PS-Likabali, West Siang District,
Arunachal Pradesh.

..... *Respondents.*

By Advocates:
Mr. S. Tapin, Sr. Govt. Advocate.
Mr. M. Kato, for Resp. No.4.

BEFORE

THE HON'BLE MR. JUSTICE UJJAL BHUYAN

Dates of hearing: 26-09-2016 & 27-09-2016

Date of Judgment & Order: 28-09-2016

JUDGMENT & ORDER

Heard Mr. G. Tarak, learned counsel for the petitioner, Mr. S. Tapin, learned Senior Govt. Advocate, Arunachal Pradesh and Mr. M. Kato, learned counsel for respondent No.4.

2. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of order dated 21-09-2015 passed by the Commissioner-cum-Secretary (Tax & Excise), Govt. of Arunachal Pradesh appointing respondent No.4 as Assistant Inspector (Tax & Excise) in the Department of Tax and Excise with consequential termination of service of the petitioner. Further prayer made is for a direction to the respondents to restore the service of the petitioner as Assistant Inspector (Tax & Excise).

3. Facts of the case may be briefly noted.

4. An advertisement dated 06-03-2008 was published by the Commissioner/Secretary (Tax & Excise), Govt. of Arunachal Pradesh inviting applications to fill-up vacancies in various posts including the post of Assistant Inspector (Tax & Excise) with which this writ petition is concerned. Though educational qualifications as well as scheme of selection were mentioned in the advertisement, a detailed reference to the same is considered not necessary since those are not the issue in this writ petition. Be that as it may, petitioner being eligible and interested, responded to the said advertisement. It may be mentioned that petitioner was a general category candidate and did not belong to Arunachal Pradesh Scheduled Tribe (APST). After the written test was over, a list of candidates eligible for interview was short listed and was notified on 20-01-2009. Following the interview, a list of 24 successful candidates was published

with waiting list of 4 candidates. Petitioner had not only qualified in the written test but was also successful in the interview pursuant to which his name appeared in the list of successful candidates at serial no. 12. Name of respondent no.4 appeared in the waiting list at serial no.1.

5. Following the selection, petitioner was appointed to the post of Assistant Inspector (Tax & Excise) in the Department of Tax and Excise, Govt. of Arunachal Pradesh vide appointment letter dated 16-06-2010 issued by the departmental Commissioner.

6. 3 years after the appointment of the petitioner, the candidate at serial no.1 in the waiting list i.e. respondent no.4 filed a writ petition before this Court challenging the selection and appointment of the petitioner on the ground that being a non-APST candidate, he could not have been selected and consequently appointed in the quota earmarked for APST candidates. It was contended that as per the reservation policy applicable in the State of Arunachal Pradesh, 80% of the posts are earmarked for APST and 20% for open category. Number of posts being 24, the 80:20 ratio would work out to 20 and 4 posts respectively. It was pleaded on behalf of respondent no.4 that the 4 posts under the open category would be counted from the top i.e., the posts from 1 to 4. Rest of the posts were earmarked in APST. Petitioner's position in the merit list being 12, he came within the APST quota and being a non-APST candidate, could not have been selected within the quota earmarked for APST. Contending that selection of the petitioner within the APST quota of 80% had adversely affected the prospect of respondent no.4, the aforesaid writ petition was filed by respondent no.4 which was registered as WP(C) No. 186 (AP) 2013.

7. Notice in that case was issued on 12-06-2013 where-after an order was passed on 29-01-2014 whereby the case was admitted for final hearing with an interim direction that no further appointment should be made to the post of Assistant Inspector (Tax & Excise) without the leave of the Court. However, respondent No.4/Petitioner in WP(C) 186 (AP) 2013 was given liberty to file a fresh representation before the concerned authority to consider his case clarifying

that pendency of the petition would not be a bar for the respondents to consider the case of respondent no.4 in accordance with rule and law.

8. In the meanwhile, the departmental Secretary had issued show-cause notice dated 20-12-2010 to the petitioner stating that 80% posts were reserved for APST candidates and remaining 20% under open category. Any non-APST candidate could seek appointment under the 20% quota meant for un-reserved, which would mean that the non-APST candidates should come at the top first 4 position of the merit list. It was stated that since petitioner's position was 12 in the merit list, he was inadvertently appointed because his position came within the 80% quota reserved for APST candidates. Petitioner was asked to show-cause as to why his appointment should not be cancelled being in violation of the 80:20 ratio. Petitioner submitted his show-cause reply on 20-01-2011 denying the allegation made and requested the authority to allow him to continue his service.

9. On 20-03-2013, an order was passed by the Secretary-cum-Commissioner (Tax & Excise) to the effect that representation submitted by the respondent no.4 was disposed of by taking the view that since the matter was pending before the Court, no conclusive decision could be taken till a decision of the Court was given. It was stated that matter pertaining to appointment of petitioner against reserved quota would be taken up once the court finally disposed of the case.

10. This was in March, 2013. 2½ years later, the same authority i.e., the Commissioner-cum-Secretary (Tax & Excise) passed the impugned order dated 21-09-2015 appointing respondent No.4 as Assistant Inspector (Tax & Excise) and posting him in place of the petitioner with the clarification that consequent upon the appointment of respondent no.4, service of the petitioner stood terminated with immediate effect. It was stated that the aforesaid order had the approval of Hon'ble Minister (Tax & Excise).

11. Aggrieved, present writ petition has been filed.

12. Before proceeding further it may be useful to note that WP(C) No.186 (AP) 2013 instituted by respondent no.4 was dismissed on withdrawal on 25-01-2016 i.e., after passing of the impugned order dated 21-09-2015.

13. Both State as well as respondent no.4 have filed separate affidavits. Principal stand taken by the respondents is that vacancies in the post of Assistant Inspector (Tax & Excise) covered by the advertisement dated 06-03-2008 was 24. In the State of Arunachal Pradesh, as per existing reservation policy, 80% of the posts are earmarked for APST and remaining 20% for open category. 20% of 24 vacancies comes to 4. The first 4 vacancies would therefore comprise the 20% quota for open category. To be eligible for selection under 20% open category, a candidate must come within the first 4 position out of 24 vacancies, the remaining vacancies would come under the 80% quota for APST. Since petitioner's position in the merit list was 12, admittedly, petitioner comes within the 80% quota meant for APST. Therefore, his appointment was ab initio void. This position has been rectified by the impugned order. If the petitioner is not entitled to appointment under the APST quota, the first candidate in the waiting list would be entitled to appointment, which in this case is respondent no.4. Therefore, it is contended that there is no illegality or infirmity in the impugned order dated 21-09-2015.

14. Both Mr. Tapin, learned Sr. Govt. Advocate as well as Mr. Kato, learned counsel for respondent no.4 have made submissions on similar line. Reference has been made to a Full Bench decision of this Court in **State of Arunachal Pradesh Vs. Soilen Phukan, 2007(4) GLT 321**, which has clarified that 20% quota could not be understood to mean as being exclusively earmarked for non-APST candidates and that the same were available to be filled up by all candidates in the fray subject to their merit. In the present case, appointment of the petitioner, a non-APST candidate, was against the 80% quota for APST and therefore was void ab initio. In such a case question of granting opportunity of hearing to the petitioner would not arise as it would be a mere useless formality.

15. On the other hand, learned counsel for the petitioner submits that there is no rule or office memorandum of the Govt. of Arunachal Pradesh prescribing that the 20% quota meant for open category should be construed in such a manner that it would comprise the positions at the top of the merit list in order of merit. No where it was mentioned that in connection with the instant recruitment process the first 4 vacancies would be earmarked for open category. Therefore, it was not justified on the part of the respondents in raking up this issue after the recruitment process was over and thereafter terminate the services of the petitioner on the ground that his appointment was made against the 80% quota meant for APST. He also submits that 5 years after appointment of the petitioner, respondents could not have terminated his service in the manner in which it was done. He, however, fairly submits that if the authorities want to accommodate respondent no.4 without disturbing the service of the petitioner, he would have no objection but respondent no.4 cannot be appointed at the cost of the petitioner.

16. Submissions made by learned counsel for the parties have been considered.

17. This writ petition raises certain important issues which needs to be addressed. However, before doing that the undisputed facts as is discernible from the materials on record may first be noticed.

18. Firstly the advertisement dated 06-03-2008 did not disclose the number of vacancies in the post of Assistant Inspector (Tax & Excise) for which the recruitment process was undertaken. Though the advertisement was also silent regarding applicability of the reservation policy, having regard to the fact that in the State of Arunachal Pradesh, the general reservation policy provides for reservation in the ratio of 80:20 for APST and open category respectively, non-mentioning of the same in the advertisement, would not make any material difference.

19. Another admitted fact is that subsequently it came to light that there were 24 vacancies in the post of Assistant Inspector (Tax & Excise) covered by the advertisement dated 06-03-2008. Applying the 80:20 ratio, 20 vacancies were earmarked for APST and 4 vacancies earmarked for non-APST. The third undisputed fact is selection of the petitioner at serial no. 12 and his consequential appointment on 16-06-2010.

20. Having noticed the undisputed facts as above, the first important issue, which has surfaced needs to be addressed. As mentioned above, respondent no.4 had instituted WP(C) No. 186 (AP) 2013 challenging the legality and validity of selection and appointment of the present petitioner to the post of Assistant Inspector (Tax & Excise). In the meanwhile, though show cause notice was issued to the petitioner by the departmental Secretary as to why his appointment should not be cancelled as he was not placed in the top 4 position in the merit list earmarked for the 20% quota and his appointment being against the 80% quota earmarked for APST, to which petitioner had submitted show-cause reply, order was passed on 20-03-2013 not to take any decision in this regard since the matter was sub-judiced before the Court. The departmental Secretary-cum-Commissioner stated that the matter would be taken up once the Court case was over. This order was passed on 20-03-2013. Thereafter WP(C) No. 186 (AP) 2013 was admitted for final hearing on 29-01-2014 giving liberty to respondent no.4 to file a fresh representation before the respondent authority to consider his case in accordance with law but it was made clear that no further appointment should be made to the post of Assistant Inspector (Tax & Excise) without the leave of the Court.

21. From the order dated 29-01-2014, it is abundantly clear that the Court was in seisin of the matter regarding validity of petitioner's selection and appointment with a clear interim direction not to make any further appointment to the post of Assistant Inspector (Tax & Excise) without the leave of the Court. Thereafter, the impugned order dated 21-09-2015 came to be passed which is extracted herein below:

"In compliance of the order dated 29-01-2014 passed by Hon'ble Gauhati High Court in WP(C) No. 186 (AP) 2013 (Nyabom Tassar-Vs-State of Arunachal Pradesh & Others) and in compliance of the order of even no. dated 12th Sept', 2015, Shri Nyabom Tassar, S/o Lt. Tonya Tassar and resident of Liru Vilalge, P.O & P.S. Likabali, West Siang District, Arunachal Pradesh is appointed to the post of Assistant Inspector in the Department of Tax & Excise in the scale of pay PB-1 Rs.5200-20200 + GP of Rs. 2800 p.m. plus other allowances as admissible under rules of Govt. of Arunachal Pradesh with effect from the date of joining into the service in place of Shri Md. Amjad.

The other terms and conditions which are not specified herein shall be governed by the relevant rules and orders issued by the govt. of Arunachal Pradesh.

The expenditure is debitable to the budget Head of Account Code No.01 (Non-Plan Major Head-2039 State Excise. Sub Major Head-00. Minor Head-001 Direction & administration, Sub Head-02 District Establishment. Detailed Head-00. Object Head-01 Salaries (Demand No.54).

On being appointed as Assistant Inspector (T & E) Shri Nyabom Tassar is posted at BFC Dirak under the administrative control of Deputy Commissioner, Namsai District, Namsai.

Consequent upon the appointment of Shri Nyabom Tassar, as Assistant Inspector (T & E), the services of Shri Md. Amjad stands terminated with immediate effect.

This has the approval of Hon'ble Minister (Tax & Excise)."

22. A perusal of the impugned order would go to show that it was purportedly issued in compliance to the order of this Court dated 29-01-2014 as discussed above. Without any deliberation and without assigning any reasons, respondent no.4 was appointed and it was stated that consequent upon the appointment of respondent no.4, service of the petitioner stood terminated.

23. After this order was passed, WP(C) No. 186 (AP) 2013 was dismissed on withdrawal.

24. The above sequence of events makes a disturbing reading. Firstly, the departmental Commissioner-cum-Secretary had himself passed an order on 20-03-2013 stating that because of the pendency of the Court case, no decision on the appointment of the petitioner would be taken and that it would be taken up once the Court case was finally over. The same authority i.e., the Commissioner-cum-Secretary made a complete u-turn and passed the impugned order dated 29-01-2015 when WP© No. 186 (AP) 2013 was still pending for adjudication

before the Court. In the order dated 29-01-2014, this Court had granted liberty to the respondent no.4 to submit a fresh representation but taking a clue therefrom, the departmental Commissioner-cum-Secretary proceeded to pass the impugned order notwithstanding the fact that there was a clear restraint order of this Court dated 29-01-2014 to the effect that there would be no further appointment of Assistant Inspector (Tax & Excise) without the leave of the Court. When the Court had passed an interim order restraining the respondents to make further appointment to the post of Assistant Inspector (Tax & Excise) without the leave of the Court, it was not open to the Commissioner-cum-Secretary to have made the appointment of respondent no.4 without obtaining leave of the Court. To that extent, order dated 21-09-2015 is clearly in violation of the order of this Court, if not in violation of the own stand of the departmental Commissioner-cum-Secretary that decision on the claim of respondent no.4 should await adjudication of the Court. If that was not enough, WP(C) No. 186 (AP) 2013 was subsequently withdrawn by respondent no.4 after the impugned order was passed. In such circumstances, the impugned order is not only in violation of the order of this Court but virtually amounts to interference in the administration of justice by the Court. When the matter was sub-judiced before the Court with a clear restraint order, it was not open to the Commissioner-cum-Secretary to have passed the impugned order.

25. A Division Bench of this Court in **Akaddas Ali Vs. State of Assam, (2014) 4 GLR 3** has held that when the Court is in seisin of a matter, an administrative authority cannot start a parallel proceeding on the very same subject matter and record a finding. It would amount to interfering with the dispensation of justice by the Court.

26. On this ground itself, the impugned order dated 21-09-2015 is liable to be set aside. However, since the State Counsel vehemently argued that the core issue is as to whether petitioner was selected against the 80% quota meant for APST candidates, the said issue is also attended to. As already noticed above, there is no dispute that in the State of Arunachal Pradesh, the reservation policy

provides for 80% reservation for indigenous APST and 20% for open category. There was some confusion as to how the 20% open category was to be construed. As per one Division Bench judgment, it was exclusively meant for non-APST candidates whereas another Division Bench took the contrary view by holding that it would be open to all candidates, both APST as well as non-APST to compete in the 20% quota on the basis of merit. This controversy was settled by a Full Bench of this Court in **Soilen Phukan** (supra). In the said judgment, the Full Bench held that 20% of the posts could not be understood to have been exclusively earmarked for the non-APST candidates and that the same were available to be filled up by all the candidates in the fray subject to their merit. In the course of deliberation, the Full Bench also observed that a 100-point roster was prepared by the State of Arunachal Pradesh, which provides for every 5th point in the said roster as open post. If roster points 1,2,3 and 4 are earmarked for APST, roster point 5 is earmarked for non-APST. Thereafter, roster points 6,7,8 and 9 are earmarked for APST and roster point 10 for non-APST i.e. open category. This would continue till the 100-point roster is complete achieving the 80:20 ratio.

27. Mr. G. Tarak, learned counsel for the petitioner also laid stress on this point to contend that the roster points 5,10,15 and 20 out of the 24 vacancies, were earmarked for the open category, which would indicate that the first 4 candidates were not required to be selected under the open category. On the other hand, contention of the State is that since the open category is on the basis of merit, therefore, the first 4 position should be selected on the basis of merit to enable the claim to be made under the 20% open category. In this way even APST candidate can come in on merit as has happened in the present case.

28. The point raised on behalf of the State may have merit but I am afraid it was neither mentioned in the advertisement nor finds place in any notification or office memorandum of the State. It has only been put forward before the Court by way of interpretation. It was not notified to the candidates in the initial advertisement that 20% quota earmarked for open category would be confined to

the top position holders. This position has now been put forward after the selection process is over and after the appointment of the petitioner. This would amount to changing the rules of the game after commencement of the game, rather after conclusion of the game as in the instant case. If this stand of the State is accepted, it would amount to causing serious pre-judice to a candidate who was selected on merit and then appointed. Since his appointment petitioner had rendered about 5 years of service. As already mentioned above, there is no office memorandum/government notification or executive instruction specifically mentioning about this aspect of the matter. Therefore, it cannot be said by any stretch of imagination that selection and appointment of the petitioner was against the 80% quota earmarked for APST and therefore void ab initio. If that be so, the useless formality theory would not be attracted. Petitioner was appointed following a regular selection process and he had rendered service of 5 years as govt. servant. Therefore, he was entitled to the protection of Article 311 (2) of the Constitution of India. Failure to provide the protection under Article 311(2) of the Constitution to the petitioner has completely vitiated the impugned order. Moreover, the impugned order is totally silent as to why the respondent no.4 is appointed and why the appointment of the petitioner would stand terminated. There is thus clear violation of the principles of natural justice which has rendered the impugned decision null and void.

29. It is trite that an order issued by a public authority must be capable of standing on its own feet and cannot be improved by way of filing affidavit when it is put to challenge. The order impugned is barren and cannot stand judicial scrutiny.

30. For the aforesaid reasons, Court is of the unhesitant view that the impugned order dated 21-09-2015 is ex-facie illegal and cannot be sustained. The same is accordingly set aside and quashed. Consequently petitioner shall be reinstated in service forthwith with all consequential benefits. However, notwithstanding the above, it would be open to the respondent authorities to consider appointment of respondent no.4 as Assistant Inspector (Tax & Excise)

without disturbing the appointment of the petitioner, having regard to the peculiar facts and circumstances of the case.

31. Writ petition is accordingly allowed but without any order as to costs.

JUDGE

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