

IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)
ITANAGAR BENCH

WA 04 (AP) 2017

Nyabom Tasar,
S/o Late Tonya Tasar,
Permanent resident of Liru Village,
P.O/P.S.-Likabali,
West Siang District, Arunachal Pradesh.

.....**Appellant**

-Versus-

1. Mohamad Amjad,
S/o Late Mohammad Bandhu,
Resident of near Seshu Niketan School,
P.O/ P.S.-Tezu, Dist-Lohit, Arunachal Pradesh.
2. The State of Arunachal Pradesh,
Represented by the Chief Secretary,
Govt. of Arunachal Pradesh, Itanagar.
3. The Commissioner/ Secretary,
Tax & Excise Department,
Govt. of Arunachal Pradesh, Itanagar.
4. The Deputy Commissioner (Tax & Excise, Legal),
Govt. of Arunachal Pradesh, Itanagar.

.....**Respondents**

For the Petitioner	: Mr. P. K. Tiwari, Sr. Adv Mr. R. L. Thunghon.
For the State Respondents	: Mr. S. Tapin, Adv.
For the respondent No.1	: Mr. G. Tarak, Adv.
Date of hearing	: 12-09-2017
Date of judgment (Oral)	: 12-09-2017.

::BEFORE::

THE HON'BLE MR JUSTICE A. M. BUJOR BARUA
THE HON'BLE MR JUSTICE MIR ALFAZ ALI

(Bujur Barua, J)

JUDGMENT AND ORDER (ORAL)

Heard Mr. P. K. Tiwari, learned Sr. counsel assisted by Mr. R. L. Thunghon, learned counsel appearing for the appellant.

Also heard Mr. S. Tapin, learned Sr. Govt. Advocate appearing for the State respondent Nos. 2 to 4 and Mr. G. Tarak, learned counsel appearing for respondent No. 1.

2]. An advertisement, dated 06.03.2008, was issued by the Commissioner/ Secretary (Tax & Excise), Govt. of Arunachal Pradesh, Itanagar inviting applications for the post of Assistant Inspector (Tax & Excise). In the Advertisement, the number of posts were not indicated. Both the appellant as well as the respondent No. 1 along with others had participated in the selection process in the said Advertisement.

3]. Consequent thereof, a select list, dated 04.06.2010 was published containing the names of 24 candidates and it has been stated that number of posts available for the appointment was 24. In the select list, the respondent No. 1 figures at serial No. 12 in order of merit whereas the appellant finds place at waiting list No. 1. The respondent No. 1 is the only one non-APST candidate in the select list, whereas the appellant is an APST candidate. The respondent authorities having taken into consideration that there are 24 posts available had given appointment to all the 24 selected candidates whose names have appeared in the select list.

4]. Being aggrieved, the appellant preferred a representation, dated 11.10.2010 raising a grievance against the appointment given to the respondent No. 1. According to the appellant under the reservation policy, 80% of available vacant posts are reserved for APST and the balance 20% are un-reserved.

5]. According to the appellant, the first 4 (four) candidates in order of merit in the select list, dated 04.06.2010 gets appointed on merit against the 20% un-reserved posts, although they are otherwise APST candidates. As the total number of posts available are 24, therefore, 80% would comprise of 20 posts and 20% would comprise of 4 posts. It is the case of the appellant that the available un-reserved post in the facts and circumstances of the present case are to be filled up by the first 4 candidates on merit, although, they happen to be APST candidates. As the 4 un-reserved posts are being filled up by the 4 candidates on merit, no further posts is available in the category of un-reserved. Accordingly, the balance 20 posts are to be filled up by applying the policy of reservation from amongst selected APST candidates. The candidates at serial Nos. 5 to 11 and 13 to 20 being the selected APST

candidates are entitled to be appointed against the 20 posts reserved for APST. As there still remains one further reserved post for APST, the same should be filled up from the first amongst the waiting list candidates from the APST category.

6]. Upon receiving the representation, the respondent No. 1 was issued with a Show-Cause notice, dated 20.12.2010 and the respondent No. 1 submitted his reply on 21.01.2011. The stand taken by the respondent No. 1 in his reply was that since the number of Non-APST candidate does not exceed the available 20% of the vacancy, therefore, there was no illegality in the appointment given to the respondent No.1.

7]. As the appellant had in the meantime preferred a writ petition being WP (C) 39 (AP) 2011 assailing the appointment of the respondent No. 1, the State respondent had refused to take any decision on the representation submitted by the appellant. The aforesaid writ petition was disposed of directing the State respondents to consider and dispose of the representation of the appellant with a reasoned order within 30 days. As the representation submitted by the appellant is still not disposed of, the appellant preferred another writ petition being WP (C) 186 (AP) 2013. By order dated 29.01.2014, this Court had directed that the appellant may prefer a fresh representation before the concerned authority to consider his case. Accordingly, the appellant submitted a fresh representation and upon its consideration, the order dated 12.09.2015 was passed by the Chief Secretary to the Govt. of Arunachal Pradesh. As per the said order, it was provided that the reservation policy of the Govt. of Arunachal Pradesh be followed in its letter and spirit and accordingly, the appellant being an APST candidate whose name appears in the waiting list be appointed to the post of Assistant Inspector (Tax and Excise) against the reserved quota which was held by the respondent No. 1 since June 2010, by default. Consequently, another order dated 21.09.2015 was passed by the Commissioner-cum-Secretary (T & E), Govt. of Arunachal Pradesh, wherein it was provided that consequent upon appointment of the appellant to the post of Assistant Inspector in the Department of Tax and Excise, the service of respondent No. 1 stood

terminated with immediate effect. The aforesaid order of termination order has been assailed by the respondent No. 1 in WP (C) 462 (AP) 2015.

8]. The respondent No. 1 had raised a contention in the writ petition that there is no rule or office memorandum of the Govt. of Arunachal Pradesh prescribing that the 20% quota meant for the open category should be construed in such a manner that it would comprise of the positions at the top of the merit list. Further, in the advertisement also there has been no mention that the first 4 (four) vacancies would be earmarked for open category in order of merit and therefore, the respondents ought not to have taken up the issue after recruitment process was over and terminate the services of the respondent No.1 on the ground that the appointment was made against the 80% quota meant for APST candidates. Further, contention was also raised by the respondent No. 1 that after having served in the service for more than 5 years, the respondent authorities should not have terminated his service in the manner in which it was done.

9]. The State respondents on the other hand had contended that as per the law laid down by the full bench of this Court in the *State of Arunachal Pradesh-vs- Soilen Phukan*, reported in **2007 (4) GLT 321**, 80% of the posts are reserved for APST candidates in the State of Arunachal Pradesh which are to be interpreted to be a reserved category posts whereas balance 20% of the posts would have to be categorized as un-reserved post.

10]. The learned Single Judge in the judgment and order dated 28.09.2016 took a view that the said issues raised by the State respondents are neither mentioned in the advertisement nor finds place in any of the notification or office memorandum of the State and that it has been put forward before the Court only by way of an interpretation. Accordingly, the learned Single Judge took a view that the same would amount to changing of rules of the game after commencement of the game, therefore, it cannot be agreed upon. Accordingly, the order of appointment of the appellant dated 21.09.2015 was set aside.

11]. Being aggrieved, the present appeal has been preferred by the appellant. In the Writ Appeal, Mr. P. K. Tiwari, learned Sr. counsel had

contended that as per the law laid down by the Hon'ble Supreme Court in the Case of ***R. K. Sabharwal and Others-vs- State of Punjab and Others.***, reported in ***(1995) 2 SCC 745***, wherein, it has been held in Para-4 that the available vacancies for the un-reserved categories would be filled up according to merit and in the event any candidates from the reserved category also finds place in the merit list, such candidate would be appointed against the un-reserved vacancies in order of merit. Further, the law of reservation of giving preference to the reserved category candidates would be followed only against the reserved vacancies.

12]. Further reliance had also been made on the full bench decision of this Court in the ***State of Arunachal Pradesh-vs-Soilen Phukan***; reported in ***2007 (4) GLT 321***, wherein, it is provided that in the State of Arunachal Pradesh, as per the law of reservation, 80% of posts are reserved for APST and balance 20% are open for the non-APST candidates. Accordingly, it is the submission of the learned senior counsel that the balance 20% of un-reserved vacancy would have to be filled up by following the law laid down in the case of ***R. K. Sabharwal***, meaning thereby in the event if any APST candidates finds place in order of merit, the said APST candidates would be appointed against the 20% un-reserved vacancy and only the balance of APST candidates would be appointed against the reserved vacancy. Accordingly, it is the submission of learned senior counsel that the respondent No. 1 being placed at Serial No. 12 in order of merit does not find himself to be appointed against the 4 un-reserved vacancies inasmuch as, the first 4 candidates although, they are APST candidates are to be appointed as open category candidates.

13]. Mr. G. Tarak, learned counsel for respondent No. 1 on the other hand relies upon the decision in ***Vikas Pratap Singh and Others-vs-State of Chattisgarh and Others.***, reported in ***(2013) 14 SCC 494***, wherein, an observation has been made that where a wrongful or irregular appointment is made without any mistake on the part of the appointee and upon discovery of such error or irregularity the appointee is terminated, the Hon'ble Supreme Court had taken a sympathetic view in the light of various factors including

bona fide of the candidate in such appointment and length of service of the candidate after such appointment.

14]. In the premises of the aforesaid rival submissions of the appellant as well as the respondents, the consideration before this Court would be as to whether the appellant would be entitled for an appointment against the one of 80% reserved posts inasmuch as, the first 4 candidates in order of merit gets automatically selected against the un-reserved vacancies, although, they otherwise belong to the APST category. The law in this respect has been settled by the Hon'ble Supreme Court in *R. K. Sabharwal* case that in the event, a reserved category candidates finds place in the select list in order of merit, such reserved category has to be appointed on an un-reserved candidate, although, he may otherwise belong to a reserved category. Further, by taking into consideration of the law laid down by this Court in the case of *Soilen Phukan*, 20% posts of the available posts in the State of Arunachal Pradesh is for the open category and 80% post would be for the reserved category. When the aforesaid provision of law is applied to the select list at hand, the first 4 candidates in the select list would have to be appointed against the 4 un-reserved vacancies, although, such candidates otherwise belongs to APST categories. It being so, the balance 20 posts would now be available to be appointed from amongst the APST by applying the law of reservation. As from Serial Nos. 5 to 11 and 13 to 20 are candidates from APST, the 20 posts are to be filled up from the said candidates. But having done so, it is noticed that one post still remains vacant from the 20 posts for the reserved category. Accordingly, the next available candidate from the reserved category in the waiting list would have to be appointed against the said post. The aforesaid being the position of law, as applied to the facts of this case, the order dated 12.09.2015 of the Chief Secretary to the Govt. of Arunachal Pradesh, Itanagar and the order dated 21.09.2015 of the Commissioner-cum-Secretary (Tax & Excise) Department is found to be in conformity with the relevant provisions of law and therefore, no interference of the same is found to be justified. The reasoning given by the learned single judge that the said provisions of the law was neither mentioned in the Advertisement nor finds place in any of the

notification or office memorandum of the Govt. of Arunachal Pradesh, is also found to be unacceptable inasmuch as, under the law when an advertisement is issued for filling up of any vacant post it is to be understood that the recruitment process would be carried out in accordance with the prevailing law and no separate mention is required to be mention that the selection process would adhere to the concerned law.

13]. In such view of the matter, the reasoning of the learned Single Judge that would amount to changing the rules of the game after commencement of the game, therefore, is found to be unacceptable.

14]. With regard to the contention of Mr. G. Tarak, learned counsel for the respondent No. 1 that the respondent No. 1 having continued in service for more than 5 years without there being any fault of his and therefore, he needs a sympathetic consideration, cannot be a reason to otherwise, deprive the appellant from his legal right to be appointed as per the selection, as well as under the law of reservation. When the right of the petitioner for a sympathetic consideration is compared with the right of the appellant to be appointed on the basis of his performance in the selection process by applying the law of reservation, the legal right of the appellant will prevail over the respondent No.1. As the respondent No. 1 has worked for more than 5 years and also as his appointment was given without any contributing illegality on his part, it is provided that the respondent No. 1 may file a representation before the authorities for a sympathetic consideration of his case. The respondent No. 1 is also entitled to such a consideration as per the view taken by the Hon'ble Supreme Court in *Vikas Pratap Singh and Others* at Para-22, wherein, it is provided that where a wrongful or irregular appointment is made without any mistake on the part of the appointee and upon discovery of such error or irregularity the appointment is terminated, the Supreme Court had taken a sympathetic view in the light of various factors including bona fide of the candidate in such appointment and length of service of the candidate after such appointment. While giving such consideration, it is clarified that the same cannot dilute the legal right of the appellant to be appointed and the respondent authorities shall not disturb the appointment given to the appellant.

15]. The aforesaid consideration of the representation to be made by the respondent No. 1 within a period of 3 months.

With the aforesaid direction and observation, this appeal stands disposed of.

JUDGE

JUDGE

Talor