

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

**WRIT PETITION(C) NO. 230 (AP) 2013**

Shri Deepak Tayeng,  
Son of Shri Patuk Tayeng,  
Principal, Govt. H.S. School, Bomdila,  
PO & PS-Bomdila,  
District- West Kameng,  
Arunachal Pradesh

.....**Petitioner.**

**By Advocate:**  
**Mr. A. Apang.**  
**Mr. J. Bagra,**  
**Ms. A. Nani**  
**Ms. T. Medo**

**-Versus-**

1. The State of Arunachal Pradesh  
represented by Commissioner, Education,  
Govt. of Arunachal Pradesh,  
PO & PS-Itanagar, District-Papumpare,  
Arunachal Pradesh.
2. Shri Rincin Phuntsok,  
Deputy Director of School Education,  
Tawang District, PO & PS-Tawang,  
Arunachal Pradesh.
3. Shri Kata Ramgo,  
Deputy Director of School Education,  
East Kameng District, PO & PS-Seppa,  
Arunachal Pradesh
4. Shri Tai Tach  
Deputy Director of School Education,  
Kurung Kumey District, PO & PS-Koloriang,  
Arunachal Pradesh
5. Shri S.T.Zara,  
Deputy Director of School Education,  
Upper Subansiri District, PO & PS-Daporijo,  
Arunachal Pradesh.
6. Shri Yumlam Tana,,  
Deputy Director of School Education,  
Lower Subansiri District, PO & PS-Ziro  
Arunachal Pradesh.
7. Shri Tomi Doke,  
Deputy Director of School Education,  
West Siang District, PO & PS-Aalo  
Arunachal Pradesh.

8. Shri Taping Boko,  
Deputy Director of School Education,  
Dibang Valley District, PO & PS-Anini,  
Arunachal Pradesh
9. Shri Barom Siram,  
Deputy Director of School Education,  
Lohit District, PO & PS-Tezu  
Arunachal Pradesh
10. Shri Hartum Loyi,  
Deputy Director of School Education,  
Changlang District, PO & PS-Changlang,  
Arunachal Pradesh

.....Respondents.

**By Advocates:**  
Mr. Kardak Ete, Addl. AG.

**BEFORE  
THE HON'BLE MR. JUSTICE NISHITENDU CHAUDHURY**

Date of hearing : 26-06-2014

Date of Judgment & Order : 26-06-2014

**JUDGMENT & ORDER (CAV)**

The writ petitioner is aggrieved at the action of the official respondents appointing private respondent Nos. 2 to 10 as Deputy Director of School Education and refusing to extend same benefit to the petitioner. In this application under Article 226 of the Constitution of India, the petitioner has challenged the appointments of the private respondents as Deputy Director of School Education (hereinafter referred to as "DDSE") and also prayed that his case be considered for appointment to any of the vacant post of DDSE.

2. To decide the tenability of the prayer made in the writ petition, it is necessary to state the short facts involved in this case:

Petitioner is an M.A. He is also a B.Ed degree holder. He was appointed as Junior Teacher on 11-10-1991 and was promoted to the rank of Senior Teacher on 03-08-1993. Having worked as Senior

Teacher for about 6 years, he was promoted to the post of Vice-Principal on 22-03-1999 and since 23-04-2007, he has been holding the post of Principal of Govt. Higher Secondary School on promotion. At present, the petitioner is posted at Bomdila Govt. Higher Secondary School as its Principal. The case of the petitioner is that under Section 141 of the Arunachal Pradesh Education Act, 2010, a set of rules known as Arunachal Pradesh Education Rules, 2010 (hereinafter referred to as "Statutory rules") was framed for streamlining of cadre post, recruitment, classification and departmental promotion of posts of the Education Department. Rule 55(v) of the Rules deals with provision for promotion to the post of DDSE. In terms of this rule, post of DDSE is the promotional post from amongst the Principals of Govt. Higher Secondary Schools and promotion is made on merit-cum-seniority basis from amongst the Principals of Govt. Higher Secondary Schools, who have completed minimum 5 years of regular service in the grade and possessed at least 2<sup>nd</sup> class master degree with B.Ed. According to the petitioner, he has the qualifications for being promoted to the post of DDSE. He has completed more than 5 years in the rank of Principal of Govt. Higher Secondary School whereas the private respondents are not qualified in terms of the rules. They do not have minimum educational qualification of 2<sup>nd</sup> class master degree. They are merely graduates with B.Ed degree and under such circumstances, their appointment as DDSE by various orders including order dated 10-01-2013 is vitiated. With these averments, the petitioner has prayed for setting aside the promotion of the private respondents.

3. The respondent No.1 has filed affidavit and thereby has brought on record another set of rules governing appointment of the DDSE/Principal, Govt. Higher Secondary School. At annexure-III of the affidavit-in-opposition, a notification dated 21-01-2010 has been

annexed showing that under proviso to Article 309 of the Constitution, the Governor of Arunachal Pradesh made that set of rules known as Deputy Director of School Education/Principal, Higher Secondary School, Recruitment Rules, 2010. In schedule to this rule, entry-1 relates to the post of Deputy Director of School Education/Principal of Higher Secondary School. Both these posts have been shown to be of equivalent rank with scale of pay at PB Rs.15600-39100 with Grade Pay of Rs.7600. By this rules, it is projected that post of DDSE and that of Principal of Higher Secondary school are equivalent and so there is no question of promotion to the post of DDSE from that of Principal of a Higher Secondary School. It is claimed by the official respondents that it is the prerogative of the Government to make interchanging transfers between the Principals and the DDSEs from time to time. By annexing some of the notifications like 10-01-2013, it has been claimed that Government has been following the aforesaid Deputy Director of School Education/Principal, Higher Secondary School, Recruitment Rules, 2010 (hereinafter referred to as 'Article 309 Rules') and consequently there was no error in appointing the private respondents as DDSE.

4. I have heard Mr. A. Apang, learned counsel for the petitioner and Mr. Kardak Ete, learned Addl. Advocate General for the respondent No.1. None appears for the private respondent Nos. 2 to 10.

5. Learned counsel for the petitioner would argue that rules were framed under Section 141 of the Arunachal Pradesh Education Act, 2010 and thus being statutory rules, they are binding on the Government. Rule 55(v) of the 2010 rules unequivocally show that post of DDSE is promotional post from the posts of Principal of Higher

Secondary Schools. The scale of pay of both the posts may be similar but the status of DDSE is higher than that of a Principal of Higher Secondary School. A DDSE being head of the Education Department in a District has the power of control and superintendence over the Headmasters and Principals of the Secondary and Higher Secondary Schools within the District. That being the position there cannot be any iota of doubt to the proposition that DDSE is a higher post than that of a Principal of a Higher Secondary School. The same rule provides that a DDSE must possess at least 2<sup>nd</sup> class master degree with B.Ed. The petitioner has this eligibility criteria.

6. Rule 55(v) of the Statutory rules of 2010 further provides that on completion of 5 years of service as Principal of a Higher Secondary School, he becomes eligible for promotion to the post of DDSE on the basis of merit-cum-seniority if vacancy exists. It is the categorical submission of the learned counsel for the petitioner that even after appointment of private respondents as DDSE, till there are vacancies of DDSE in the State and thus, there is no difficulty in promoting the petitioner to any of these vacant posts of DDSE without even disturbing the private respondent Nos. 2 to 10. The learned counsel, however, submits that the private respondent Nos. 2 to 10 do not possess 2<sup>nd</sup> class master degree. They are merely graduates with B.Ed. and thus, they are not eligible for holding the promotional posts of DDSE in terms of the rule 55(v) of the 2010 rules.

7. The learned counsel would submit that statutory rules were published in the Official Gazette on 20-08-2010 and on such publication rules framed under proviso to Article 309 of the Constitution for recruitment of DDSE have become redundant. Even the Savings Clause under rule 71 of the 2010 rules framed under Section 141 of the

Arunachal Pradesh Education Act, 2010 indicates that any rule, order or the notification issued before commencement of the statutory rules of 2010, which are not expressly covered under the statutory rules of 2010 but covered under the Act shall continue to be in force as if they are made, done or taken under the corresponding provisions of this rules. It is, thus, clear from rule 71 that if anything is covered by a subsequent rule of 2010 framed under Section 141 of the Arunachal Pradesh Education Act, 2010, the statutory rule shall prevail and the earlier 309 rules shall stand obliterated. With these submissions, the learned counsel for the petitioner would pursue that post of DDSE is promotional post of Principal, Higher Secondary School and that the petitioner is eligible for the post of DDSE whereas the private respondents are not eligible for the same.

8. Mr. Kardak Ete, learned Addl. Advocate General, Arunachal Pradesh, fairly submits that the rules framed under proviso to Article 309 of the Constitution of India, are transitional in nature. Ultimately, it is the legislature of the State or the Union to make required cadre recruitment rules within their respective domain. Education being a State subject, Arunachal Pradesh has made Act and the Rules in this regard. Arunachal Pradesh Education Act, 2010 empowers framing of rules under Section 141 thereof to streamline, classify and provide for promotion, recruitment etc. of the posts of Education Department. Accordingly statutory rules as referred to above were made and published in the official gazette on 20-08-2010. But fact remains that despite framing of the rules, Government all along has maintained the inertia of motion by applying the earlier rules framed under proviso to Article 309 of the Constitution of India. It is for this reason for all these years, the posts of DDSE have been considered to be equivalent to the posts of Principals, Higher Secondary Schools in the State. Both

the posts carry same scale of pay and this is why in exercise of its administrative prerogative, Government has been transferring a DDSE to the post of Principal of a Higher Secondary School and on some occasions, Principals of Govt. Higher Secondary Schools are transferred to the posts of DDSE as a routine measure of transfer. Government never considered such transfer to be a case of promotion. It is for this reason neither the private respondent Nos. 2 to 10 were considered to have been promoted to the post of Principal of Higher Secondary School and the Government also did not treat it accordingly. Drawing attention of this Court to the notification dated 10-01-2013, as referred to above, the learned Addl. Advocate General has sought to buttress the proposition that Government has all along considered the post of DDSE to be equivalent to the post of Principal of a Higher Secondary School. However, the learned Addl. Advocate General has fairly placed reliance in the case of **A.B. Krishna and Others Vs. State of Karnataka and Others**, reported in (1998) 3 SCC 495 and showed that rules framed under proviso to Article 309 is transitional in nature to cater to the needs of the Government till rules are made by appropriate legislature. Once rules are framed by the legislature under the statute, the field is occupied and so rules under proviso to Article 309 of the Constitution cease to be in force. The learned Addl. Advocate General, however, argued that the appointments of private respondents are saved under rule 71 of the 2010 rules and hence they should be deemed to have been made duly under the statutory rules.

9. Article 309 occurs at Part-XIV of the Constitution. It provides that subject to the provisions of this Constitution, Act of the appropriate legislature may regulate the recruitment and condition of service of persons appointed to public service and post in connection with the affairs of the Union or any State. There is a proviso to this

Article, empowering the President in case of services under Union and the Governor in case of service under the State, to make rules regulating recruitment the conditions of service of persons appointed to such services and posts until provision in that behalf is made by or under an Act of the appropriate legislature. This proviso is engrafted in Article 309 only to cater to the need for limited period so as to enable the concerned State or Union to make rules for the intervening period. Clause 'until provision in that behalf is made by or under an Act of the appropriate legislature under this Article' makes the nature of such rules framed under the proviso clear.

10. Article 309 has endowed duty and responsibility on State and the Union legislature to make law so as to regulate the recruitment and conditions of service appointed under them. The real authority to make the law in this regard is the appropriate legislature. This, in case of services and posts under the State, it is the legislature of the State and in case of services and posts under the Union, it is the parliament, which is supposed to make the Act for the purpose. Law so as to regulate the recruitment and conditions may be by such an Act or under rules framed under such Act by the legislature. The substantive part of Article 309, thus, clearly indicates that it is for the appropriate legislature to enact laws for regulating the service conditions of the Government Servant. Till such law is made by the appropriate legislature, executive is empowered under the proviso to make temporary arrangement. The scheme, therefore, is that conditions of service should be regulated by the legislature and the executive law making under proviso to Article 309 should be resorted to and remain operative only till legislature have made such laws.

11. Irony is that despite such clear mandate in Article 309 of the Constitution, services under the State and the Union are being regulated by plethora of rules framed by executive under proviso to Article 309 of the Constitution or by pre-constitutional rules. The fundamental rules and subsidiary rules popularly known as FRSR is also a set of such executive law, which is supposed to have served purpose for a limited period but in practice, the same has been perpetuated for last 60 years after the Constitution has commenced.

12. The Hon'ble Supreme Court in case of **A. B. Krishna** (supra) has observed that nature of a set of rules under proviso to Article 309 is merely transitional and its force is spent and purpose served immediately upon law being made by the appropriate legislature. In the case in hand, under proviso to Article 309 of the Constitution, 2010 rules for recruitment of DDSE/Principals, Higher Secondary Schools in Arunachal Pradesh was made on 21-01-2010 when there were no rules holding the field. Although, the appropriate State Legislature made an Act under the name and style of Arunachal Pradesh Education Act, 2010 but the procedural aspects were left to be made under Section 141 of the Act. This was done by framing the statutory rules and publishing the same on 20-08-2010. Once the law is made by the State Legislature under the name and style of the Arunachal Pradesh Education Rules, 2010 which came into force on and since 20-08-2010 by publishing in the official Gazette, the earlier rules framed under proviso to Article 309 became automatically ineffective by operation of the **Doctrine of Occupied Field**. This means that the notification dated 21-01-2010 (Annexure-III to the affidavit-in-opposition filed by the respondent No.1) remained in force for limited period between 21-01-2010 till 19-08-2010 i.e., till the date when the statutory rules, namely, the Arunachal Pradesh Education Rules, 2010 came into force

w.e.f. 20-08-2010. The Government, therefore, can no longer follow the executive rule framed under proviso to Article 309 of the Constitution and issued vide notification dated 21-01-2010 and it is duty bound to abide by the statutory rules framed under Section 141 of the Arunachal Pradesh Education Act, 2010 and published on 20-08-2010.

13. Once it is held that notification dated 21-01-2010 has lost its force on 19-08-2010 and the field has been occupied by the statutory rules published w.e.f. 20-08-2010, henceforward posts of DDSE cannot be considered to be equivalent to the posts of Principal, Higher Secondary Schools of the State because of Rule 55(v) of the Statutory rules. Consequently, Government is duty bound to hold selection for the purpose of filling up of the vacant posts of DDSE in the State in compliance with the provisions of Rule 55(v) on merit-cum-seniority basis from amongst the Principals who have completed 5 years of continuous services as Principals of Higher Secondary Schools.

14. As has been held above, that the petitioner is eligible in terms of rule 55(v) of the statutory rules for being considered for promotion to any vacant post of DDSE. It is stated at the bar that there are existing vacancies of DDSE in the State. If that is so, the Govt. shall consider the case of the petitioner for promotion to any of those vacant posts of DDSE in accordance with law. The same shall be done as expeditiously as possible preferably within a period of six months from today. Till such selection is made under rule 55(v) of the statutory rules of 2010, no promotion to the vacant posts of DDSE shall be made as was done earlier in case of private respondent Nos. 2 to 10.

15. The writ petition is allowed. There shall be no order as to cost.

**JUDGE**