

(1998) 09 GAU CK 0009

Gauhati High Court

Case No: Civil Rule No"s. 2233 and 2704 of 1997

Association of Inspector of Taxes
and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision: Sept. 25, 1998

Acts Referred:

- Assam Taxation Service Rules, 1995 - Rule 11, 18, 26, 5, 5(2)
- Constitution of India, 1950 - Article 226, 309

Citation: (1998) 4 GLT 43

Hon'ble Judges: A.K. Patnaik, J

Bench: Single Bench

Advocate: R. Gogoi, for the Appellant; B. Goswami, Jr. G.A., for the Respondent

Judgement

A.K. Patnaik, J.

These two writ petitions under Article 226 of the Constitution relate to recruitment to the posts of Superintendent of Taxes under the Government of Assam and are being disposed of by this common judgment as they raise common questions of fact and law.

2. The brief facts of Civil Rule No. 2233/97 are that on 26th January, 1995 the Assam Public Service Commission invited applications for inter alia the posts of Superintendent of Taxes and in the said advertisement stated that the actual number of vacancies will be notified in due course as and when received from the Government. The three Petitioners applied and were selected by the Assam Public Service Commission after taking the combined competitive (main) examination in August, 1995 and were placed in SI. Nos. . 6. 7 and 9 respectively in the merit list dated 18.4.97 of 9 candidates for the post of Superintendent of Taxes. Out of the 9 candidates named in the said merit list, 5 candidates have already been appointed to the post of Superintendent of Taxes, but the remaining 4 candidates in the said

merit list including the 3 Petitioners have not been appointed to the said post of Superintendent of Taxes. The Petitioners have therefore prayed for a direction on the State Respondents to appoint them to the post of Superintendent of Taxes on the basis of the recommendation of the Assam Public Service Commission in the merit list dated 18.4.97.

3. In Civil Rule No. 2704/97, the facts briefly are that the Petitioner No. 1 is an Association of Inspectors and the Petitioner No. 2 is the General Secretary of the said Association. There case is that under the Assam Taxation Service Rules, 1995 (for short the 1995 Rules) framed by the Government of Assam in exercise of powers under the proviso to Article 309 of the Constitution, recruitment against two third of the cadre strength of Superintendent of Taxes is to be made by promotion from amongst the cadre of Inspector of Taxes. Accordingly, out of the total cadre strength of 131 posts of Superintendent of Taxes, 87 posts are required to be filled up by promotion from amongst the cadre of Inspectors and 44 posts were to be filled up by direct recruitment. But as en 1.2.96 as against the 118 posts of Superintendent of Taxes which have been filled up, only 56 posts are held by promotees from the cadre of Inspector of Taxes and 62 posts are held by direct recruitment. The representatives of the Petitioners association met the Commissioner and Secretary (Finance) Govt. of Assam on 2.2.96 and requested him to implement the aforesaid provision in the 1995 Rules and the Finance Commissioner assured that the back-log quota for promotion as per the said rules will be cleared in the subsequent years preferably in 1997, but the State Government did not act as per the said assurance. The Petitioners submitted a Memorandum dated 29.5.97 before the Commissioner and Secretary to the Govt. of Assam stating therein that as per the 1995 Rules 18 more posts of Superintendent of Taxes are required to be filled up by promotion and requesting him not to make any direct recruitment to the post of Superintendent of Taxes till 18 posts of superintendent of taxes are filled up by promotion from amongst the cadre of Inspectors of Taxes. Notwithstanding the said Memorandum, some of the private Respondents were appointed as Superintendent of Taxes by way of direct recruitment on the basis of the recommendations of the Assam Public Service Commission contained in the merit list dated 18.4.97. The Petitioners have prayed for quashing the appointments of said private Respondents. They have also prayed for a direction on the State Respondents not to appoint the other private Respondents as Superintendent of Taxes by way of direct recruitment on the basis of the said recommendations of the Assam Public Service Commission in the merit list dated 18.4.97.

4. Mr. J.M. Choudhury assisted by Mrs. A. Hazarika, learned Counsel for the Petitioners in Civil Rule No. 2233/97 submitted that the State Government is now desirous of appointing the three Petitioners to the post of Superintendent of Taxes on the basis of their position in the merit list dated 18.4.97, but are unable to do so on account of the interim order passed by this Court on 21.5.97 in the said Civil Rule to the effect that the 3 vacant posts of Superintendent of Taxes will not be filled up

without the leave of the Court. He further submitted that the advertisement for the posts of Superintendent of Taxes pursuant to which the Petitioners have been selected was issued in January, 1995 where as the 1995 Rule providing that two third of the strength of the cadre of Superintendent of Taxes shall be made by promotion from the cadre of Inspectors of Taxes came into force only on 25th July 95. Hence the 1995 Rules will not be applicable to the selection initiated in January, 1995. Alternatively, he contended that even if the 1995 Rules were applicable to some of the posts now proposed to be filled up by the Government by way of direct recruitment, under Rule 26 of the said Rules Government had the power to dispense with or relax the requirement of any rule. According to Mr. Choudhury, therefore, the requirement of Rule 5(1)(v) of the 1995 Rules providing that recruitment against two third of the strength of the cadre of Superintendent of Taxes will be by way of promotion from the cadre of Superintendent of Taxes can be dispensed with or relaxed by the Government. He cited the decision of the Supreme Court in the case of [State of Rajasthan Vs. R. Dayal and Others](#), for the proposition that the posts which fell vacant prior to the amendment of the rules are to be filled up by the unamended rules. He also relied on the decision of the Supreme Court in the case of [Sandeep Kumar Sharma Vs. State of Punjab and others](#), in which relaxation of the provisions of the recruitment rule has been held to be permissible in special circumstances. The learned Government Advocate relied on the averments in the affidavit in opposition filed on behalf of the State Government and produced the records.

5. Mr. R. Gogoi, learned Counsel for the Petitioners in Civil Rule No. 2704/97, contended that even if it is held that the 1995 Rules were applicable to the posts which have been vacant after the said rules come into force in July, 1995, it would be clear from the letter dated 22.8.95 of the Govt. of Assam, Department of Personnel to the Secretary of the Assam Public Service Commission and the Annexures thereto that upto 31.12.95 only 4 posts of Superintendent of Taxes could be filled up by direct recruitment. Yet out of the merit list dated 18.4.97 recommended by the Assam Public Service Commission, 5 posts of Superintendent of Taxes have been filled up by Respondent Nos. 3,4,5,6 and 7. According to Mr. Gogoi, therefore, there has been one appointment to the post of Superintendent of Taxes by way of direct recruitment in excess of the vacancies notified by the Govt. of Assam, Department of Personnel in his letter dated 22.8.95 to the Secretary of the Assam Public Service Commission and that the appointment of more number of candidates by way of direct recruitment to the post of Superintendent of Taxes will be contrary to the provision of Rule 5(i)(v) of the 1995 Rules. He cited the judgment of the Supreme Court in the case of [State of Madhya Pradesh and others Vs. A.K. Rajoriya and another](#), in support of his submission that the said Rule 5(1)(v) of the 1995 Rules is not just a provision for maintenance of a proportion between the promotees and the direct recruits in the post of Superintendent of Taxes but is a provision for filling up of vacancies for the post of Superintendent of Taxes. He vehemently contended

that this is not a fit case in which the Govt. can relax the provisions of Rule 5(v) of the 1995 Rules and appoint 5 more persons to the said posts by way of direct recruitment.

6. Mr. N. Dutta, learned Counsel for the Respondent Nos. 3 and 5 in Civil Rule No. 2704/97 contended that the appointments of the said Respondents had been validly made pursuant to the advertisement in January, 1995 in accordance with the Assam Taxation and Service Rules, 1962 (for short the 1962 Rules). He submitted that since the selection process was initiated to the posts to which the said Respondents were appointed when the 1995 Rules had not come into force, the 1995 Rules were not applicable to the appointments of Respondent Nos. 3 and 5. He submitted that assuming that the 1995 Rules were applicable to the appointments of Respondent Nos. 3 and 5, the Government had powers under Rule 26 of the said Rules to relax the requirement of any rule and in the circumstances the appointments of Respondent Nos. 3 and 5 should be treated as appointments in relaxation of Rule 5(i)(v) of the Assam Taxation Service Rules, 1995.

7. The first question which needs to be decided is whether on the basis of the merit list dated 18.4.97 recommended by the Assam Public Service Commission any direction can be given to the State Respondents to appoint the three Petitioners in Civil Rule No. 2233/97. It is true that it has been held by the Supreme Court in the case of *State of Rajasthan v. R. Dayal and Ors.* (supra) cited by Mr. Choudhury, learned Counsel for the Petitioners, that vacancies which occurred prior to amendment of the rules would be governed by the original rule and not by the amended rule and therefore in case there are some vacancies which have arisen prior to the commencement of the 1995 Rules in July 95 such vacancies are to be filled up in accordance with the 1962 Rules. But in the case of [N.T. Bevin Katti, etc., Vs. Karnataka public Service Commission and others](#), the Supreme Court clarified in para 11 of the said judgment that a candidate making application for a post pursuant to an advertisement prior to amendment of the rules does not acquire any vested right of selection but acquires a vested right for being considered for selection in accordance with the rules as they existed on the date of advertisement. Hence the Petitioners who had applied for selection pursuant to the advertisement in January, 1995 were entitled to be considered in accordance with the 1962 Rules but did not have the right to be selected and appointed in accordance with the said rules. Further, in case any vacancy arose after the commencement of the 1995 Rules in July '95, the Government may have the powers under Rule 26 of the said rules to relax any provision of rule including Rule 5(i)(v) of the said rules providing for filling up of two third of the cadre of Superintendent of Taxes by promotion from Inspectors of taxes, but no direction can be given to the State Government to relax the provisions of the said rules and appoint the Petitioners. It is however, for the State Government to consider appointing the three Petitioners in accordance with the relevant rules and if necessary to relax the rules for such purpose if such relaxation was permissible under law in the facts and circumstances of the case.

8. The next question is whether the appointments of some of the private Respondents in Civil Rule No, 2704/97 can be quashed by the Court in view of the provisions of Rule 5(i)(v) of the Assam Taxation Service Rules, 1995. In the case of State of Madhya Pradesh v. A.K. Rajoriya (supra) cited by Mr. Gogoi, learned Counsel for the Petitioners in Civil Rule No. 2704/97, the Supreme Court made a distinction between a provision in the recruitment rules for filling up a vacancy and a provision for maintenance of proportion between the direct recruits and promotees in a particular cadre and held that where the language of the rules indicate that it made a provision for filling up a vacancy and not for maintenance of proportion between the direct recruit and promotees in the cadre, no appointment can be made to the vacancies contrary to the said provision, but where the provisions of the rules relate to only maintenance of proportion between the direct recruit and promotees in a cadre, such proportion is to be maintained by the appointing authorities as far as practicable, and any appointment of either of a direct recruit or a promotee contrary to the said provision cannot be held to be illegal. In the said decision, the Supreme Court referred to the case of [Bishan Sarup Gupta Vs. Union of India \(UOI\) and Others](#), in which the provision of rules was held to be a provision relating to filling up of a vacancy and to the case of [The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others](#), in which the provision was also held to be a provision for appointment. The Court will therefore have to be decided in the present case as to whether the relevant provisions of the 1995 Rules are provisions for filling up the vacancies and appointment or are provisions for maintaining the proportion between the direct recruits and promotees in the cadre strength. Rule 5 of the 1995 Rules is extracted herein below:

Rule 5: Recruitment to the Service shall be made in the manner prescribed hereinafter:

(1) By promotion:

(i) Recruitment to the cadre of Additional Commissioner of Taxes shall be made by promotion from the cadre of Joint Commissioner of Taxes only.

(ii) Recruitment to the cadre of Joint Commissioner of Taxes shall be made by promotion from the cadre of Deputy Commissioner of Taxes only.

(iii) Recruitment to the cadre of Deputy Commissioner of Taxes shall be made by promotion from the cadre of Senior Superintendent of Taxes only.

(iv) Recruitment to the cadre of senior Superintendent of Taxes shall be made by promotion from the cadre of Superintendent of Taxes only.

(v) Recruitment against two third of the strength of the cadre of Superintendent of Taxes shall be made by promotion from the cadre of Inspector of Taxes in accordance with Rule 11.

(vi) Recruitment against one fourth of the cadre strength of Inspector of Taxes shall be made by promotion from ministerial staff of office of the Commissioner of Taxes and other apex offices of the Commissioner of taxes in accordance with Rule 11.

(2) By direct recruitment:

(i) Recruitment against one third of the cadre strength of Superintendent of Taxes shall be made by direct recruitment in accordance with Rule 6.

(ii) Recruitment against three fourth of the cadre strength of Inspector of Taxes shall be made by direct recruitment in accordance with Rule 6.

Rule 5(i)(v) provides that recruitment against two third of the strength in the cadre of Superintendent of Taxes shall be made by promotion from amongst the cadre of Inspector of Taxes and Rule 5(2)(i) provides that recruitment against one third of the cadre strength of Superintendent of Taxes shall be made by direct recruit. The aforesaid provisions in the recruitment rules, therefore, are not just provisions for maintenance of proportion between the promotees and direct recruits in the cadre strength of Superintendent of Taxes but are also provisions for recruitment into the vacancies in the post of Superintendent of Taxes and the present case falls in the category of *B.S. Gupta v. Union of India and Direct Recruits Class II Engineering Officers' Association v. State of Maharashtra (supra)*. In view of the said rules 5(i)(v) and 5(2)(i) no recruitment can be made by way of direct recruitment to the post of Superintendent of Taxes in excess of one third of the cadre strength of Superintendent of Taxes.

9. But in the decision of the Supreme Court in *Direct Recruits Class II of the [The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others](#)*, the Supreme Court held that where the rules permit the authorities to relax the provisions relating to the quota between the direct recruits and promotees, ordinarily a presumption should be raised that there was some relaxation when there is deviation from the quota rule. It appears from the copy of the letter dated 14th May 97 of the Commissioner and Secretary to the Govt. of Assam, Finance Department to the Joint Secretary to the Govt. of Assam, Personnel Department annexed to the affidavit-in-opposition in Civil Rule No. 2233/97 that the department had decided to fill up 5 vacancies in the cadre of Superintendent of Taxes through direct recruitment out of the vacancies meant for promotees to maintain parity between the promotees and direct recruits even though the Government was fully aware that the posts will have to be filled up by promotees under the 1995 Rules. The said 5 vacancies have been filled up by Respondent Nos. 3, 4, 5, 6 and 7 in Civil Rule No. 2704/97. Hence the appointments of said Respondents even if contrary to the provisions of Rule 5(i)(v) and 5(2)(i) of the 1995 Rules are in relaxation of the said rules in exercise of the powers of the Government under Rule 26 of the 1995 rules, and considering the entirety of the facts and circumstances it is difficult to hold that the said relaxation was not just and

equitable and was not done for the purpose of removing hardship to the Respondent Nos. 3, 4, 5, 6 and 7 and was ultra vires the said Rule 26 of the 1995 Rules.

10. The last question which remains for consideration is whether an order can be passed by this Court in Civil Rule No. 2704/97 directing the State Respondents not to appoint Respondent Nos. 8, 9, 10 and 11 to the post of Superintendent of Taxes by way of direct recruitment in view of the provisions of the said Rules 5(i)(v) and 5(2)(i) of the 1995 Rules. Since the State Government has the power under Rule 26 of the 1995 rules to relax any provision of the rules and the State Government has not yet exercised the said power, it will not be appropriate for this Court to express any opinion on whether or not such relaxation is permissible in the case of Respondent Nos. 8, 9, 10 and 11 under Rule 26 of the 1995 rules and pass any order directing the State Government not to recruit the said private Respondents to the post of Superintendent of Taxes.

11. The two Civil Rules are disposed of in terms of the observations in this judgment and the interim orders passed therein are vacated. Considering the facts and circumstances of the case, however, the parties shall bear their own costs.