

(2011) 02 GAU CK 0029

Gauhati High Court (Kohima Bench)

Case No: WA No. 21 (K) of 2010

Limatola

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision: Feb. 25, 2011

Citation: (2011) 5 GLR 512 : (2011) 2 GLT 554

Hon'ble Judges: K. Meruno, J; B.K. Sharma, J

Bench: Division Bench

Advocate: C.T. Jamir, Wati Jamir and Akum Jamir, for the Appellant; Lucy, GA and I. Longjem, for the Respondent

Final Decision: Allowed

Judgement

B.K. Sharma, J.

This appeal is directed against the judgment and order dated 15.09.2010 passed by the learned Single Judge in WP (C) 261 (K) of 2007, by which the writ petition filed by the present Appellant has been dismissed.

2. The facts are in a very narrow campus. The Petitioner, while serving as UDA was promoted and appointed as Accountant by order dated 23.04.2003. Her such promotion was preceded by the notification dated 21.03.2003, by which options were invited from amongst the serving UDAs for the aforesaid post of Accountant. In the notification, it was specified that silence would be treated as "not willing". The Appellant in response to the said notification, exercised her option for being considered for promotion and appointment as Accountant.

3. The trouble for the Appellant started after 4(four) years when the Deputy Commissioner, Mokokchung issued the notice dated 14.06.2007 asking the Appellant to show cause as to why her promotion to the post of Accountant should not be cancelled. For a ready reference, the said notice dated 14.06.2007 is quoted below:

GOVERNMENT OF NAGALAND
OFFICE OF THE DEPUTY COMMISSIONER
MOKOKCHUNG:NAGALAND

No.GE-1/2/89/84

Dated, Mokokchung, the 14th June" 07

NOTICE

It has been found that notification No. GE-11/1/ 2000/370 dated 21.03.03, issued to the Senior UDA's under the Establishment of Deputy Comissioner's Office, Mokukchung is not proper. This is due to the fact that the said notification was not served to all the Senior UDA's in the District and no written refusal letter was obtained from the serving Senior UDA's by this Office. It has also been found that as a follow up of the notification, Smti. Limatula has been promoted to the post of Accountant, Mangkolemba vide order No. GE-11/1/2000/32, dated 23.04.2003. This promotion was done overlooking the Seniority of some UDA's and hence appears to be irregular.

In view of this, Smti Limatula is given an opportunity to show cause as to why her promotion should not be annulled basing on the facts stated above within 10 days from the issue of this notice.

Sd/-14.06.07

(Abhishek Singh) IAS
Deputy Commissioner,
Mokukchung: Nagaland.

4. The aforesaid notice dated 14.06.2007 was followed by another notice dated 18.07.2007 asking all such serving Sr.UD As in the establishment of the Deputy Commissioner, Mokokchung, to submit in writing as to whether the aforesaid notification inviting option was served upon them or not.

5. In response to the aforesaid notice dated 14.06.2007, the Appellant submitted her reply, inter alia, stating that since she was promoted and appointed as Accountant in acceptance of her willingness, which she had submitted in response to the said notification, her such appointment should not be cancelled and that too, after 4 (four) years. On the other hand, in response to the 2nd notice dated 18.07.2007, some of the serving UD As intimated that the notice for exercising option was indeed served on them. After the aforesaid notices and subsequent response to the same, the Deputy Commissioner, Mokukchung passed the impugned order dated 23.08.2007, declaring the promotion of the Appellant as null and void. Being aggrieved, the Appellant filed the WP(C) No. 261 (K)/2007. In the writ petition, apart from the official Respondents, the Respondent No. 4, who was admittedly senior to the Appellant and was subsequently promoted as Accountant in 2005, was also arrayed as party Respondents.

6. The Respondents No. 5,6 and 7 who are also serving as UD As, got themselves impleaded in the writ petition. The official Respondents in their counter affidavit, justified the impugned order with the stand that out of 23 UD As, only few were appraised of the notification inviting options and thus, the authority thought it prudent to cancel the promotion of the Appellant, enabling all the senior UD As to-participate in the process of selection for promotion to the post of Accountant.

7. In the counter affidavit filed by the Respondent No. 4, the stand was altogether different. It was stated that she had responded to the notice inviting option stating that since the stage in the time scale of pay which she had reached, was higher than the pay scale of Accountant, the question of expressing willingness or unwillingness did not arise. It was further contended that since in response to her said reply to the option notice was not responded to, she was under the impression that her seniority in the cadre of UDA would not be affected. It will be pertinent to mention here that after the promotion of the Appellant as accountant, a seniority list of Head Assistant, Accountant, UD As in Mokukchung District administration, was published on 27.02.2007.

8. In the counter affidavit filed by the impleaded Respondents No. 5,6 and 7, the plea taken was that the option notification was not served on them and consequently they could not exercise their options. In paragraph-7 of the counter affidavit it was stated that when they came to know about the promotion of the Appellant, they lodged their complaint verbally.

9. In the reply affidavit filed by the Appellant against the affidavit-in-opposition filed by the official Respondents, the stand in the writ petition was reiterated. It was contended that the particular procedure having been followed and the Appellant having responded to the option notification, her promotion ought not to have been cancelled on the basis of a review notification by the subsequent Deputy Commissioner, upon assumption of office.

10. We have heard Mr. C.T. Jamir, learned senior counsel for the Appellant and Mr. I. Longjem, learned Counsel appearing for the Respondents No. 5,6 and 7. We have also heard Ms. Lucy, learned State Counsel, Nagaland appearing for the official Respondents. During the course of hearing, it was submitted that the Respondent No. 4 has in the mean time retired from service on attaining the age of superannuation. Ms. Lucy, learned State Counsel has produced the relevant records and we have perused the same.

11. The learned Single Judge has upheld the impugned order of cancellation of the promotion order of the Appellant on the ground that the aforesaid notification inviting willingness was not served on all the serving UD As, more particularly, the senior UD As and the same resultant in failure to consider the case of all the eligible incumbents.

12. The learned Single Judge has held that the appointing authority ought to have ensured that all the eligible UD As were notified of their rights to be considered against the post of Accountant. Thus, the learned Single Judge was of the opinion that the letter of willingness having not been circulated in the desired manner, the promotion of the Appellant was illegal.

13. On perusal of the records, what we find is that the plea of the Respondents No. 5, 6 and 7 in the counter affidavit filed in the writ petition that the option letter was not served on them is absolutely incorrect. In the record, we find a copy of the representation in the name of 21 UD As with clear signature of 12 UD As. In the said representation, there is no whisper about non-receipt of the option notice. What was contended is that, in the option letter, nothing was mentioned about losing seniority. It was stated that it was their impression that irrespective of exercising the option or not or remaining in the cadre of UDA, their seniority would not be affected and as such, many of the senior UD As refused the promotion. For a ready reference, the particular stand of the representationists is quoted below:

However, recent incident in the case of promotion to the post of Head Assistant Tuli, no option was served to the serving UDA but the seniormost UDA is promoted to the post of Head Assistant by stating that if he/she refuse the promotion, he/she will lose the seniority and will have no claim to the post of office superintendent. Which left all the senior UDA's in great confusion. In the year 2003 when Shri C. Rema, Accountant Mangkolemba retired, option was offered to all the serving UDA's. But nothing was mentioned in the option about losing seniority. The then E.A.C. (Estt.) has stated that seniority is irrelevant as such whoever refuse will not lose their seniority and whoever accept will not gain any seniority. As such many of the senior UDA's refused the promotion. Since all the UDA's are hoping for promotion to the post of office superintendent one day or the other. Some of the seniors asked for further directives in this regard. However, no directives were issued till today. Instead the juniormost UDA Smti. Limatula, who was promoted recently from LDA and not even completed two years of service in the rank of UDA, was promoted to the post of Accountant Mangkolemba without giving direction to the senior UDA's that if they refuse the promotion, they will be losing their seniority. All along we are made to believe that UDA's are senior to the Accountant and Sub-Divisional Head Assistant and once we accept promotion to Accountant and Sub-Divisional Head Assistant we have no claim for office Superintendent. If promotion to the post of Accountant and Head Assistant be treated as senior to UDA's then Smti Limatula will automatically become senior to all the undersigned senior UDA's. As such we request the authority to treat the promotion as null and void as stated above and restore our seniority to her and also issue clear cut directives in this matter to avoid future complications.

14. From the aforesaid stand of the serving UD As, who made the representation and that too at a belated stage will nullify the stand of the Respondents No. 5,6 and

7, as projected in their counter affidavit filed in the writ petition. Such a stand possibly was taken in view of the above mentioned notice dated 18.07.2007 issued by the Deputy Commissioner, Mokokchung, inviting objection from the serving UD As, as regards service of the option notice on them. That gave the handle to the serving UD As, who latter on thought mat by not exercising option, they had committed a mistake. Thereafter, in response to the said notice, some of the UD As, more particularly, the Respondents No. 5,6 and 7 took the stand that the option notice was not served on them. It will be pertinent to mention here that the Respondents No 5,6 and 7 duly signed the representation and thus, they cannot now disown the stand in the representation. Be it also stated here that no other UD As have made any grievance against the promotion and appointment of the Appellant as Accountant nor they got themselves impleaded in the writ proceeding.

15. On perusal of the entire records, what we find is mat the fact of the matter is that the aforesaid option letter was issued to all the District Headquarters inviting willingness from the serving UD As, in response to which the Respondents No. 4, 5,6 and 7 did not offer their willingness. The stand of the Respondent No. 4 has been noted above. Similar was the stand of the Respondents No. 5, 6 and 7 as reflected in the above quoted representation. Thus, it cannot be said that the said Respondents were not aware of the option notice but coming to the writ Court, they took altogether a different stand being armed with the aforesaid two notices issued by the Deputy Commis-sioner. Similarly other UD As were also aware of the said option notice. Thus, the ground on which the promotion order was cancelled after 4 years was non-existent.

16. As in case of statutory functionary whose action is to be judged on the grounds assigned in the order put to challenge and cannot be allowed to be supplemented by fresh reasons in the shape of affidavit or otherwise, the aggrieved party to the order also cannot be allowed to take altogether a different stand, (rather a false stand in the instant case) towards justifying the impugned order.

17. The learned Single Judge was solely guided by the projection made by the Respondents that the option notice was not served on the senior UD As. However, the records have revealed otherwise about which discussions have been made above. Mr. Jamir, learned Counsel for the Appellant has made another submission that the outer UD As did not offer their willingness because in case of appointment as Accountant in the particular office, they had to leave Head Quarters Office to serve in interior place. However, this aspect of the matter need not detain us in view of the above revelation.

18. Mr. I. Longjem, learned Counsel for the Respondents No. 5,6 and 7 has submitted that irrespective of the aforesaid revelation made, the authority was within its competence and jurisdiction to cancel the promotion order of the Appellant on detection of the mistake committed. In support of his such submission, he has placed reliance on two decisions of the Apex Court reported in [Bal Kishan Vs.](#)

Delhi Administration and Another, Union of India (UOI) and Another Vs. Narendra Singh. In both the decisions, the Apex Court dealing with the issue relating to correction of mistake, held that when somebody is promoted without considering the eligibility of others such mistakes can be rectified at the later stage. Both these decisions are of no help to the case of the Respondents No. 5,6 and 7. It is not the case of giving promotion to the Appellant by mistake but she earned the same by exercising option, pursuant to which her case was considered for selection and promotion/appointment.

19. Apart from the above, the private Respondents as well as the official Respondents never raised any objection to the promotion/ appointment of the Appellant as Accountant till the aforesaid two notices were issued in 2007 after a gap of long 4 (four) years since the Appellant was promoted in 2003. The plea of raising grievance orally is totally unacceptable having noticed the aforesaid stand in the representation. Nothing has been stated about the power of review of the Deputy Commissioner. Be that as it may, as has been held by the Apex Court in Ratan Chandra Sammanta and others Vs. Union of India and others, a writ is issued by the Court in favour of a person who has some right, and not for sake of roving enquiry leave scope for manoeuvring. Delay itself deprives a person of his remedy available in law. In the instant case, none of the senior most UDAs ever made any grievance alleging non-receipt of the option notice or even against the promotion/appointment of the Appellant as Accountant. It is only after the impugned order cancelling the promotion of the Appellant, the private Respondents took the false plea of non-receipt of the option notice in their counter affidavit.

20. For all the aforesaid reasons, we are inclined to set aside and quash the impugned judgment and order dated 15.09.2010, passed by the learned Single Judge in WP(C) 261 (K)/2007. Consequently, the writ appeal and writ petition filed by the Appellant-Petitioner stand allowed by setting aside the impugned order dated 23.08.2007. There shall be no order as to costs.

21. Before parting with the case record, we place\\on record the submission of Mr. I. Longjem, learned counsl for the Respondents No. 5,6 and 7 that if the promotion of the Appellant as Accountant is sustained, irrespective of such promotion, the case of the incumbents for promotion as Office Superintendent should be considered by the departmental authorities, as per the prevalent practice, in absence of any service rules. Although, we are not concerned with this aspect of the matter, however, needless to say that consideration for promotion as Office Superintendent will be considered by the Respondents in accordance with law and also having regard to the norms and practice being followed in the Department.