

IN THE GAUHATI HIGH COURT

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

Case No: **W.A. 07 (AP)/2013**

IN

WP(C) 24 (AP)/2010

Shri Tensin Gombu Khrieme & others Appellants

-Versus-

The State of Arunachal Pradesh & others Respondents

BEFORE ::

HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI

HON'BLE MR. JUSTICE PRASANTA KUMAR DEKA

For the Appellants : Mr. N. Ratan

For the Respondent (4, 5, 9 & 12) : Mr. T. Pertin

&

For the Respondent (1, 2 & 3) : Mr. D. Soki

Date of Hearing : 10. 02. 2017

Date of delivery of

Judgment and Order : 12/02/2017

JUDGMENT AND ORDER (CAV)

(PRASANTA KUMAR DEKA, J)

Heard Mr. N. Ratan, learned counsel appearing on behalf of the petitioners/appellants. Also heard Mr. T. Pertin, learned Senior Counsel appearing on behalf of the respondent Nos. 4, 5, 9 & 12 and also Mr. D. Soki, learned State counsel appearing on behalf of the respondent Nos. 1, 2 & 3.

1. The present writ appeal is filed by the writ petitioners in W.P.(C) No. 24 (AP)/2010, whose claim for seniority over the private respondents No. 4 to 13 was dismissed vide judgment and order dated 08.03.2013.
2. The petitioners/appellants as per their petition are holding the post of Accounts Officer/Treasury Officer under the Directorate of Accounts & Treasuries, Government of Arunachal Pradesh. Initially they were substantively appointed as Inspecting Auditor/Sub-Treasury Officer through a selection process. They were promoted to the post of Accounts Officer/Treasury Officer on ad hoc basis in regular vacancies during the period between 20.04.1990 and 28.09.1994. During the year 1992 to 1996, some of the private respondents were appointed to the post of Accounts Officer/Treasury Officer through Limited Departmental Competitive Examination (LDCE) and some others through direct recruitment. The petitioners/appellants completed their regular service of 3 (three) years in the feeder cadre. However, due to in-action of the State respondents, the Departmental Promotion Committee (DPC) was not constituted to consider the cases of the petitioners/appellants for regular promotion during those years. In the year 1996 only, the DPC was convened and the DPC recommended regularization of the ad hoc promotion of the petitioners/appellants with effect from 20.05.1996 i.e the date of DPC. The petitioners/appellants were accordingly placed below the private respondents in the provisional seniority list of Accounts Officer/Treasury Officer. On consideration of the representations of

the petitioners/appellants, their seniority over the private respondents were restored. But in the final gradation list published in the year 2009, the petitioners/appellants were placed below the private respondents in the seniority list.

3. Being aggrieved, the petitioners/appellants preferred the writ petition praying for restoration of the seniority on the ground that the State respondents acted illegally in not constituting the DPC soon after they became eligible for promotion for the post of Accounts Officer/Treasury Officer and as such, they were entitled to have their seniority counted from the date they completed the regular service of 3 years as required under the rules in the feeder cadre. However, the learned Single Judge rejected the challenge to the prospective promotion and denial of retrospective promotion to the post of Accounts Officer/Treasury Officer and accordingly, this writ appeal against the dismissal of the writ petition has been preferred.
4. The private respondents filed their affidavit-in-opposition denying the claim made in the writ petition by the petitioners/appellants. It is their contention that in terms of the The Arunachal Pradesh (Accounts Officer/Treasury Officer) Recruitment Rules, 1984, superseded vide notification No. DA/FIN/B/24/76 (ptd) dated 14.05.1993 by the Accounts Officer/Treasury Officer (Group B) Recruitment Rules, 1993 (herein after referred to as 1984/1993 Rules) LDCE was conducted by the Arunachal Pradesh Public Service Commission (APPSC) on various dates ranging from the year 1990 to 1994, the private respondents appeared in the said LDCE and also applied for direct recruitment and

having qualified in the said examination, the private respondents were appointed to the post of Accounts Officer/Treasury Officer on various dates. It was also contended that there was a specific clause in the appointment letters of the petitioners/appellants that their ad hoc appointment would not confer them any right to claim regular appointment in the post of Accounts Officer/Treasury Officer. The 1984/1993 Rules prescribes filling up the post of Accounts Officer/Treasury Officer through 3 modes and the mode of regularization is not one of the prescribed modes of recruitment. The regularization of the ad hoc service of the petitioners/appellants are de-hors the 1984 Rules. The petitioners/appellants having opted for ad hoc promotion and having chosen not to appear in the LDCE cannot seek regularization from the date of their ad hoc promotion. Finally, it was contended that as the services of the petitioners/appellants were regularized from 20.05.1996 by the DPC, therefore, the 1998 provisional seniority list could not be faulted.

5. The petitioners/appellants through their additional affidavit during the pendency of the writ petition submitted that DPC could not ignore the initial ad hoc service rendered by the petitioners and the minutes of the decision of the DPC was liable to be set aside and quashed and accordingly, a direction was sought for to the respondent authorities to consider their promotion and/or to regularize the petitioners/appellants with effect from their date of ad hoc promotion or date of their eligibility.

6. The State respondents No. 1 to 3 in their affidavit-in-opposition submitted that the petitioners/appellants were promoted as Accounts Officer/Treasury Officer on ad hoc basis as a stop-gap arrangement even before completion of qualifying service period to attain eligibility for promotion to the cadre from the feeder cadres of Inspecting Auditor/Sub-Treasury Officer. It is also stated the final gradation list of Accounts Officer/ Treasury Officer was finally published on 23.11.2009. Under such circumstances the question of correction of seniority position of the petitioners/appellants does not arise at all. Denying that the petitioners/appellants had to run from pillar to post for redressal of the grievances, the State respondents submit that the delay in holding the DPC as raised by the petitioners/appellants was due to the administrative reasons and it was the prerogative of the State to see as to whether any post is to be filled up or kept vacant.
7. The learned Single Judge dismissed the writ petition and while dismissing it was observed that the appointment of Accounts Officer/Treasury Officer is governed by the 1984 Rules and the subsequent rules of the year 1993 contemplates 4 modes of recruitment i.e. (i) Direct Recruitment, (ii) by promotion, (iii) vide deputation transfer, (iv) LDCE, but none of the petitioners/appellants were inducted by any of the prescribed modes in the 1984/1993. They were appointed on ad hoc basis as apparent from the promotion orders. On the other hand, the private respondents No. 5, 9 and 12 were directly recruited as Accounts Officer/Treasury Officer on 07.08.1992, 03.06.1994 and 17.01.1995, respectively and the

remaining private respondents were inducted in the cadre through LDCE on different dates starting from 28.01.1992 to 18.01.1996. It was also taken into consideration by the learned Single Judge that the DPC on 16.05.1996, after considering the cases of the ad hoc appointees, recommended for regular promotion wherein, it was specifically directed that the inter-se seniority in the cadre should be fixed after their appointment on regular basis. Accordingly, as per the DPC recommendation which was made on 20.05.1996, the services of the petitioners were regularized with effect from the said date vide order dated 26.06.1996. With regard to the responsibility of the respondent State for holding of DPC at early interval for consideration of promotion to the cadre of Accounts Officer/Treasury Officer, the learned Single Judge came to the finding that there is no such requirement for the DPC to seat every year or at any given interval as per the 1984 Rules. Finally it was concluded that as the appointment of the petitioners/appellants were not by any of the 4 modes prescribed by the 1984/1993 Rules, as such their appointment were de-hors the rules. Accordingly, the issue was decided against the petitioners and the writ petition was dismissed.

8. The learned counsel of the appellants submits that the initial ad hoc appointment of the appellants in the post of Accounts Officer/Treasury Officer being on promotion, the finding of the learned Single Judge that the initial ad hoc promotion of the appellants to the post of the Accounts Officer/Treasury Officer were de-hors the Recruitment Rules is wrong. It is submitted that as the

initial appointment to the feeder cadre of the appellants being according to one of the prescribed modes in the Recruitment Rules as such the subsequent regularization in the promoted post ought to have been made with retrospective effect, at least, from the respective dates of the appellants becoming eligible for such promotion upon completion of the requisite length of service required in the feeder cadre as per the 1984/1993 Rules. Mr. Ratan, learned counsel for the appellants also submits that it is the failure on the part of the respondent State to hold the DPC for which the appellants had to suffer and for such failure on the part of the respondent State, the petitioners/appellants cannot be allowed to suffer by way of losing their inter-se seniority to subsequent entrants in the post of Accounts Officer/Treasury officer. Thus the learned counsel for the petitioners/appellants submits that the findings of the learned Single Judge are to be interfered.

9. Mr. N. Ratan, learned counsel for the petitioners/appellants relies the following decision in order to buttress his arguments:-

(A) ***L. Chandra Kishore Singh –Vs- State of Manipur and others reported in (1999) 8 SCC 287 para 15.*** In this case, the Hon'ble Apex Court held that the probationary or officiating appointment which are followed by a confirmation, unless contrary rules are shown the service as referred as officiating appointment cannot be ignored for reckoning the length of continuous officiating service in determining place in the seniority list.

- (B) ***Direct Recruit class-II Engineering Officers Association –Vs-State of Maharashtra and others reported in (1990) 2 SCC 715.*** In this case, the Constitutional Bench of the Hon'ble Apex Court held in para 47 (B) that if the initial appointment is not made by following the procedure laid down by Rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the Rules, the period of officiating service will be counted.
- (C) ***State of W.B and Others –Vs- Aghore Nath Dey and others reported in (1993) 3 SCC 371.*** Relying upon the said decision Mr. Ratan submits that the Conclusion-(B) of the Constitution Bench of the Apex Court in the case of Direct Recruit Class II –Vs- State of Maharashtra reported in (1990) 2 SCC 715 (supra) was added to cover different kind of situation wherein the appointments are otherwise regular except for the deficiency for certain procedural requirements laid down by the rules.
- (D) ***P.N. Premachandran-Vs-State of Kerala and Others – Vs- State of Kerala and others reported in (2004) 1 SCC 245.*** In the said case owing to administrative lapse the Departmental Promotion Committee did not hold a sitting from 1964 to 1980 and as such the State of Kerala took a conscious decision to the effect that those who have been acting in a higher post for a long time although on a temporary basis, but

were qualified at the time when they were so promoted and found to be eligible by the DPC at a later date should be promoted with retrospective effect. The said action was accepted by the Hon'ble Apex Court. Mr. Ratan, accordingly submits that the ratio of this decision fits in the facts and circumstances of the case of the present petitioners/appellants.

(E) Finally *in S. Sumnyan and others –Vs- Limi Niri and others* reported in (2010) 6 SCC 791, The Hon'ble Apex Court discussed with regard to the appointees as Assistant Engineers and held that the same cannot be held to be dehors the rules as the appointment letters issued to the appointees mentioned that they would be governed by the service rules and also they would be regularized according to the rules on the recommendation of a selection board constituted by the Government and in the said context the Apex Court held that regularization of the service of a person whose initial appointment although not in accordance with the prescribed procedure but later on, regularised by a authority having power and jurisdiction to do so would always relate back to the date of their initial appointment.

10. Mr. D. Soki, the learned counsel for the respondent State submits that the seniority gradation list is consequential to the recommendation of the DPC. As apparent from the writ petition the petitioners/appellants had never challenged the DPC recommendation and instead had

challenged the inter-se gradation list. Mr. Soki submits that as apparent from the appointment/promotion order of the petitioners/appellants admittedly the same was on ad hoc basis however, the same was subject to the clearance by the DPC. The said DPC vide its meeting on 16.05.1996 recommended the petitioners/appellants to be fit for promotion as per the meeting held on the 16.05.1996. On the basis of the meeting of the DPC the APPSC communicated the same to the respondent State wherein, it was specifically mentioned that the regular appointment of the petitioners/appellants would take effect from the date Commission's proceedings are communicated. The respondent State had accepted the said recommendation inasmuch as the APPSC communicated the proceedings of the DPC meeting held on 16.05.1996 under reference No. PSC-D/18/91 dated 20.05.1996. The respondent State accepted the said recommendation and accordingly regularized the petitioners/appellants with effect from 20.05.1996. Finally, on the basis of the said recommendation of the DPC, final gradation list impugned in the writ petition was published under Memo No. DA/FAS/E/7/87 dated Itanagar 23.11.2009.

11. Mr. D. Soki submits that the date of regularization was fixed by the DPC and until and unless the said resolution which was communicated to the respondent State is challenged and modified, the placement of the petitioners/appellants in the seniority list cannot be set aside. Under such circumstances the writ petition itself is defective and no relief could be granted to the petitioners/appellants. Mr. D. Soki, relies

Edukanti Kistamma (DEAD) Through LRS. and others-Vs- S. Venkatareddy (DEAD) Through LRS. and others reported in ***(2010) 1 SCC 756*** wherein, it was held that challenge to consequential order without challenging the basic order/statutory provision on the basis of which the order has been passed cannot be entertained and it is the legal obligation on the part of the parties to challenge the basic order and only if the same is found to be wrong consequential order may be examined. So, Mr. Soki submits that the present writ petition of the appellants is not at all maintainable.

12. Mr. Soki further submits that considering the facts and circumstances of the present appeal, referring to the Direct Recruits case (Supra), the proposition A is applicable inasmuch as it has been held that once incumbent is appointed to a post according to the rule, his seniority to be accounted from the date of his appointment and not according to date of his confirmation. The corollary of the said proposition A as held by the Constitution Bench of the Apex Court is that where the initial the appointment is only ad hoc and not according to rules and made as a stop gap arrangement the officiation in such post cannot be taken into account for considering the seniority. Mr. Soki further relies ***V.P. Shrivastava and others -Vs- State of M.P. and Others*** reported in ***(1996) 7 SCC 759*** wherein, it was held that in the case referred thereto initial appointment of the respondents on promotion not having been made following the procedure laid down by the Recruitment Rules of 1965 and even though they were continuing in the post uninterruptedly but the Public Service

Commission having not approved their appointments Proposition B of Direct Recruits case (supra) would have no application. And finally, the Hon'ble Apex Court applying Proposition A referred above, held that the direct recruits must be held senior to the respondent ad hoc promotees.

13. Mr. Soki in support of his argument opposing the claim of the petitioners/appellants further relied ***K. Madalaimuthu and another –Vs- State of T.N. and others (2006) 6 SCC 558*** wherein, the Hon'ble Apex Court in para 24 held that a person who was appointed temporarily to discharge the functions in a particular post without recourse to the recruitment rules cannot be said to be in service till such time as his appointment was regularized. It further held that it is only from the date on which his services are regularized that such appointee could count his seniority in the cadre. Thus, Mr. Soki relying the ratio laid down in the aforesaid decisions by the Apex Court submits that the same is applicable in the present case and accordingly this Writ Appeal be dismissed.

14. Mr. T. Pertin, learned Senior Counsel appearing on behalf of the private respondents submits that the petitioners/appellants have no case at all inasmuch as admittedly their appointment was not done as per the terms of the Recruitment Rules and referring the Direct Recruitment Case (supra), Mr. Pertin submits that a person appointed to a post according to the rules would be entitled to get his seniority reckoned from the date of his appointment and not from the date of his confirmation. Mr. Pertin submits that the private/respondents were

duly appointed to the post of Accounts Officer/Treasury Officer by following the prescribed rules in 1984. There is no dispute at all with regard to the said fact of the appointment of the said private respondents in the bar. Accordingly, the proposition A in the aforesaid Direct Recruits case of the Constitutional Bench of the Apex Court would govern the seniority of the private respondents over the petitioners/appellants owing to the nature of appointment to the post Accounts Officer/Treasury Officer. Mr. Pertin has relied upon ***Union of India –Versus- Dharam Pal and Others reported in (2009) 4 SCC 170.*** In the said decision the Hon'ble Apex Court held that an employee appointed to a post according to rules would be entitled to his seniority from the date of his appointment and not from his confirmation. It was also held in the said decision that where the initial appointment is only ad hoc and not according to rules, the period of officiation in such post cannot be taken into account for consideration of their seniority referring to para-28 of the said decision and submits that the ratio is applicable in the present case in hand.

15. Mr. Pertin submits that in a situation similar to the present case in hand, the Hon'ble Apex Court accepted the ratio laid down in ***Suraj Prakash Gupta –Vs- State of J&K reported in (2000) 7 SCC 561*** wherein it was held that there was no hesitancy in coming to the conclusion that merely because the suitability test had not been held at regular intervals an employee promoted on ad hoc basis can claim that it is a regular promotion after due process of selection. So, Mr.

Pertin submits that the appeal has no merit and judgment and order passed by the learned Single Judge needs no interference by this Court.

16. Mr. Pertin further submits that as submitted by Mr. Soki, the petitioners/appellants had failed to challenge the DPC recommendation and date of regularization fixed by the APPSC and under such circumstances the writ petition is not at all maintainable inasmuch as without setting aside the communication of the DPC, the consequential relief of placement of the petitioners/appellants cannot be gone into. On that count also the writ petition ought to have been dismissed.

17. Considered the submissions of the learned counsels. Also considered the findings of the learned Single Judge on the basis of which the writ petition of the petitioners/appellants was dismissed. Regarding the responsibility of the respondent State for constitution of the DPC at yearly interval to consider promotion to the cadre of Accounts Officer/Treasury Officer, the learned Single Judge opined that so far the facts and circumstances of the present case in hand are concerned, there is no such requirement for the DPC to sit every year or at given interval inasmuch as the 1984/1993 Rules does not prescribe holding of the DPC at yearly interval. On the basis of the said findings, the petitioners/appellants had raised the ground that it was for non-constitution of the DPC that the petitioners/appellants cannot be allowed to suffer.

18. It is an admitted position that the petitioners/appellants were promoted on ad hoc basis and their promotion/appointment to such post was subject to the approval of the DPC and otherwise they cannot claim any right over the said post. Some Petitioners/appellants had not completed the required length of service period in the feeder post to become eligible for promotion and even then they were promoted on ad hoc basis de-hors the rules and some of them though had the length of service completed in the feeder cadre were also appointed on ad hoc basis. The respondent State in its affidavit has clearly mentioned that as the petitioners/appellants were not eligible for promotion so respondent State had no requirement for holding the DPC as the same is the prerogative on the part of the respondent State. Against the said stand of the respondent State, the learned Single Judge entered into the Recruitment Rules in order to examine the necessity for holding DPC at yearly interval. But the Recruitment Rules is totally silent in that aspect of the matter. Though such rule of holding the DPC at yearly intervals are not prescribed in the 1984/1993 Rules but in order to protect the seniority, the same provides the mode to the petitioners/appellants in the form of competing the LDCE but the petitioners/appellants on their own volition did not appear in the said LDCE though the same were held regularly.

In ***R.K. Trivedi and others –Vs- Union of India and others reported in (1998) 9 SCC 58***, it was held by the Apex Court in a case wherein appointments were made on ad hoc basis

with the condition that the appointees would have no right to claim for even regularization, the directed essential mode under the statutory Rules which was required to be followed could not be given a go by. Applying the said ratio this Court also comes to the conclusion that under no circumstances the prescribed mode stipulated by the Recruitment Rules be given a go by and regularize the appellants from the date of promotion.

19. The present case in hand is that the private respondents were appointed to the post of Accounts Officer/Treasury Officer duly following the Rules prescribed by the Recruitment Rules. On the other hand, the petitioners/appellants were appointed on ad hoc basis with a condition that the said appointment would not confer any right to the post of Accounts Officer/Treasury Officer and the appointment is subject to confirmation of the DPC.

20. The ratio of the decisions relied by Mr. N. Ratan, learned counsel for the petitioners/appellants cannot strengthen the case of the petitioners/appellants. The 1984/1993 Rules itself prescribed the modes of entry to the post of Accounts Officer/Treasury Officer and the length of service in the feeder cadre also prescribed. It is also not disputed that the petitioners/appellants were appointed on ad hoc basis and that too as a stop gap arrangement and the appointment letters specifically mentioned that the said ad hoc appointment would not confer on the petitioners/appellants any right to claim the post of Accounts Officer/Treasury Officer. The appointment letters of the petitioners/appellants specifically stipulated certain conditions and

such conditions would govern their respective appointments to the post and beyond that, on the basis of the said appointment letters they cannot claim to be appointed duly as per the Recruitment Rules. Accordingly the officiation of the petitioners/appellants in the post of Accounts Officer/Treasury Officer cannot be taken into account for consideration of the seniority more so, when their appointments are de hors the Recruitment Rules. Accordingly, there is no error in the findings of the learned Single Judge while dismissing the writ petition of the petitioners/appellants.

21. We are of the opinion that the petitioners/appellants, without challenging the recommendations of the DPC with regard to the date of regularization of the petitioners/appellants, cannot challenge the respective placement of all the private respondents in the final gradation list. Even if it is presumed that the petitioner/appellants had taken a specific plea in the additional affidavit thereby challenging the recommendation of the DPC, then also we are of the opinion that there is no illegality in the recommendation of the DPC. Accordingly, there is no merit in the writ appeal and the same is dismissed.

JUDGE

JUDGE

B. DEY