

Surender Kumar Das and ors. Vs. State of Assam and ors.

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Court : Guwahati

Decided On : Sep-06-2000

Judge : Birjesh Kumar, C.J. and A.K. Patnaik, J.

Acts : Assam Animal Husbandry/Veterinary and Dairying Service Rules, 1988 - Rules 7(3), 11(5) and 27; [Constitution of India](#) - Article 309; Assam Animal Husbandry, Veterinary and Dairying Service (Amendment) Rules, 1997 - Rule 1(2); Rajasthan Agricultural Marketing Service Rules, 1986

Appeal No. : Writ Appeal No. 129 of 1998 Civil Rule No. 5672 of 1997

Appellant : Surender Kumar Das and ors.

Respondent : State of Assam and ors.

Advocate for Def. : Mr. A.M. Buzarbaruah, Mr. K.H. Choudhury, Ms. A. Hazarika and Ms. D. Das, Advs.

Advocate for Pet/Ap. : Mr. B.K. Sharma, Mr. M.K. Choudhury and Mr. P.K. Tewari, Advs.

Disposition : Appeal dismissed

Judgement :

A.K. Patnaik, J.

1. This is an appeal against the judgment and order dated 20.5.1998 of the learned Single Judge in Civil Rule No. 5672/1997 dismissing the writ petition filed by the appellants.

2. The facts relevant for the purpose of disposal of this writ appeal are that the appellants No. 1,2 and 4 are working as Subject Matter Specialist in the Department of Dairy Development, Government of Assam and the appellant No. 3 is working as Assistant Director in the said Department. In exercise of powers conferred under the proviso to Article 309 of the [Constitution of India](#), the Governor of Assam has framed the Assam Animal Husbandry, Veterinary and Dairying Service Rules, 1988, (for short, 'the 1988 Rules'), which regulate the recruitment and conditions of service of members of the Assam Animal Husbandry, Veterinary and Dairying Service. Sub-rule (5) of rule 11 of the 1988 Rules provided that 25% of the vacancies available in a year would be filled up by direct recruitment in all the promoted cadre posts. By advertisement No. 6/97 dated 14.11.1997, the Assam Public Service Commission, (for short, 'The APSC'), invited

applications for two posts of Deputy Director and one post of Assistant Director in the Dairy Development. In the said advertisement, it was stated, inter alia, that the last date for submission of application forms to the office of the APSC was 4.12.1997. In the said advertisement, it was further stated that candidates for the posts of Deputy Director and Assistant Director must have the basic degree or diploma in Dairy Technology and post-graduate degree or diploma or specialisation in Dairy Technology. Regarding experience, it was stated in the advertisement that candidates for the posts of Deputy Director should have minimum 8 years of service under Dairy Development Department, Assam, out of which 4 years should be in the administrative post, and candidates for the post of Assistant Director should have minimum 6 years experience under Dairy Development Department, out of which 3 years should be in the administrative post. The advertisement further stipulated that for the aforesaid two posts of Deputy Director and one post of Assistant Director, the age of the candidates should not be less than 35 years and more than 45 years as on 1.1.1997. The appellants having already crossed the age of 45 years as on 1.1.1997 could not

apply for the aforesaid posts whereas the respondents No. 4 to 8 who were less than 45 years as on 1.1.1997 applied for the aforesaid posts. By notification dated 11.12.1997, the 1988 Rules were amended by the Assam Animal Husbandry, Veterinary and Dairying Service (Amendment) Rules, 1997, (for short, 'the 1997 Amendment Rules'). The 1997 Amendment Rules, inter, alia deleted the aforesaid sub-rule (5) of rule 11 of the 1988 Rules, Sub-rule (2) of rule 1 of the 1997 Amendment Rules provided that the said 1997 Amendment Rules would come into force on the date of their publication in the Official Gazette. The appellants filed writ petition being Civil Rule No. 5672 of 1997 on 03.12.1997 praying that the advertisement No. 6/97 dated 14.11.1997 inviting applications for the posts of Deputy Director in the Dairy Development Department of the Government of Assam be declared illegal, ultra vires and unconstitutional, and be quashed. In the said writ petition, the appellants also prayed for a direction on the State-respondents to regularise the appellants in the promoted posts held by them in the Directorate of Dairy Development, Assam, and to promote them to the next higher cadre. Affidavits-in-opposition were filed by the respondents in the said writ petition, parties were heard and by the impugned judgment and order dated 20.5.1998, the writ petition was dismissed by the learned Single Judge. Aggrieved, the appellants have preferred this appeal.

3. At the hearing of the appeal, Mr. B K Sharma, learned counsel appearing for the appellants, submitted that since sub-rule (5) of

rule 11 of the 1988 Rules which provided for filling up of 25% of the vacancies available in a year by direct recruitment in the promoted cadre posts stood deleted by the 1997 Amendment Rules by notification dated 11.12.1997, no direct recruitment could be made in the promoted cadre posts of Deputy Director and Assistant Director in the Dairy Development Directorate after 11.12.1997. He argued that the view taken by the learned single Judge in the impugned judgment and order that 1997 Amendment Rules would not apply to the two posts of Deputy Director and one post of Assistant Director in the Directorate of Dairy Development advertised on 14.11.1997, is not correct in law. He cited the decision of the Supreme Court in Vice-Chancellor, University of Allahbad v. AP Mishra, (1997) 10SCC 264, in which the provisions of the Act for reservation in vacancies in

favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes were held to be applicable to posts which had already been advertised. He also relied on the decision of the Supreme Court in *Rajasthan Public Service Commission v. Chanan Ram*, AIR 1998 SC 2251, in which the Supreme Court took a view that the advertisement dated 5.11.1993 inviting applications for 23 vacancies in the posts of Assistant Director (Junior) in the Agricultural Marketing Service of the State of Rajasthan had become infructuous and otiose after the amendments to the Rajasthan Agricultural Marketing Service Rules, 1986, by notification dated 19.4.1995. Mr BK Sharma contended that as soon as sub-rule (5) of rule 11 of the 1988 Rules providing for filling up of 25% of the vacancies in the promoted cadre posts including the posts of Deputy Director and Assistant Director in the Directorate of Dairy Development by direct recruitment was deleted by the 1997 Amendment Rules by notification dated 11.12.1997, no direct recruitment could be made to the said posts of Deputy Director and Assistant Director pursuant to advertisement dated 14.11.1997.

4. We are unable to accept the aforesaid submission of Mr. Sharma, learned counsel for the appellants. In *Vice-Chancellor, University of Allahabad v. A P Mishra* (supra), cited by Mr. Sharma, Section 15 of the U.P. Act providing for reservation in vacancies for Scheduled Castes, Scheduled Tribes and Other Backward Classes, expressly stipulated that the Act would apply to all selections for posts already advertised except where written tests for the posts had already been held. Thus, the Act itself provided for retrospective application of the provisions thereof to posts already advertised, and it was for this reason that the Supreme Court held in the aforesaid case that the Act also applied to the posts which had already been advertised. The 1997 Amendment Rules, on the other hand, do not state that they also apply to posts already advertised ; rather sub-rule (2) of rule 1 of

the 1997 Amendment Rules expressly states that the 1997 Amendment Rules would come into force on the date of their publication in the Official Gazette. The decision of the Supreme Court, in the case of *Vice-Chancellor. University of Allahabad v. Dr. A P Mishra*, therefore, does not apply to the facts of the present case. Regarding the decision of the Supreme Court in *Rajasthan Public Service*

Commission v. Chanan Ram (supra), on which great reliance was placed by Mr. Sharma, learned counsel for the appellants, we find on perusal of the said decision that by the amendments to the Rajasthan Agricultural Marketing Service Rules, 1986, by notification dated 19.4.1995, the erstwhile posts of Assistant Director (Junior) no longer existed after April, 1995 and they were substituted by creation of new post of Marketing Officers, and it was for this reason that the Supreme Court held that no appointment could have been given to the selected candidates to the 23 vacancies in the posts of Assistant Director (Junior) after the said amendments to the Rules, 1986, made by notification dated 19.4.1995, and, thus, the advertisement dated 5.11.1993 for the said 23 vacancies in the posts of Assistant Director (Junior) in the Agricultural Marketing Service of the State of Rajasthan had become infructuous and otiose. In the instant case, on the other hand, the 1997 Amendment Rules do not abolish the promoted cadre posts of Deputy Director and Assistant Director in the Directorate of Dairy Development, and the 1997 Amendment rules only delete the provisions in sub-rule (5) of rule 11 of the 1988 Rules for filling up of 25 % of vacancies by direct recruitment in all the promoted cadre posts including the said two posts of Deputy Director and one post of Assistant Director. The decision of the Supreme Court in Rajasthan Public Service Commission v. Chanan Ram is thus of no assistance to the appellants.

5. The fact, the learned Single Judge in the impugned judgment and order has distinguished the aforesaid two cases and has rightly held that the decisions of the Supreme Court in the aforesaid two cases do not apply to the facts of the present case. The learned Single Judge has instead placed reliance on the decisions of the Supreme Court in P. Mahendran v. State of Karnataka, (1990) 1 SCC 411, YV Rangaiah v. J Sreenivasa Rao. (1983) 3 SCC 284, and NT Bevin Katti v. Karnataka Public Service Commission, AIR 1990 SC 1233, for his conclusion that the 1997 Amendment Rules are prospective and not retrospective in nature, and would not apply to the selection for filling up the vacancies advertised on 14.11.1997 before the 1997 Amendment Rules came into force. We respectfully agree with the aforesaid conclusion of the learned single Judge in the impugned judgment and order. The consistent view of the Supreme Court in the

aforesaid cases has been that where posts fall vacant and advertisement is issued inviting applications for such posts prior to the amendment to the rules, the selection of candidates must be made in accordance with the rules as they existed prior to the amendment. Where, however, there are provisions in the amendment to the rules from which legislative intent can be gathered that the amended rules are also to apply to posts which have already fallen vacant and advertised for recruitment, the amended rules are also to apply to such posts which have fallen vacant and advertised prior to amendment to the rules. There is no indication whatsoever in 1997 Amendment Rules that sub-rules (5) of rule 11 of the 1988 Rules would stand deleted with retrospective effect from some date earlier to the amendment or the posts which had fallen vacant and advertised prior to the amendment would be filled up in accordance with the Rules as amended by the 1997 Amendment Rules by notification dated 11.12.1997. Sub-rule (2) of rule 1 of the 1997 Amendment Rules instead stated that the 1997 Amendment Rules would come into force on the date of their publication in the Official Gazette.

6. It was next submitted by Mr. Sharma, learned counsel appearing for the appellants, that the findings of the learned Single Judge in the impugned judgment and order would show that the aforesaid sub-rule (5) of rule 11 of the 1988 Rules for filling up of 25% of the vacancies available in a year by direct recruitment in all the promoted cadre posts had not been followed in the case of appointment to the posts of Deputy Director and Assistant Director in the Directorate of Dairy Development for a continuous period from 1989 to 1997, and no direct recruitment has been made to the said posts of Deputy Director and Assistant Director during the aforesaid period. He argued that these facts would go to show that the quota rule in sub-rule (5) of rule 11 of the 1988 Rules had broken down. He argued that it has been held by the Supreme Court in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra*, (1990) 2 SCC 715, that where the quota rule has not been followed continuously for several years and has broken down, it ceased to remain operative. Mr. Sharma contended that sub-rule (5) of rule 11 of the 1988 Rules has ceased to remain operative for the purpose of appointment to the posts of Deputy Director and Assistant Director in the Directorate of Dairy Development, and it was for this reason that the said sub-rule (5) of rule 11 of the 1988 Rules was deleted by the 1997 Amendment Rules. Mr.

Sharma Vehemently argued that since the quota rule in sub-rule (5) of rule 11 of the 1988 Rules had broken down and had ceased to remain operative, the advertisement dated 14.11.1997

inviting applications for direct recruitment to the posts of Deputy Director and Assistance Director in the Directorate of Dairy Development could not have been issued.

7. Paragraph - 23 of the judgment of the Supreme Court in Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra, (supra) cited by Mr. Sharma, Is quoted herein below :

'Mr. Tarkunde is right that the rules fixing the quota of the appointees from two sources are meant to be followed. But if it becomes impractical to act upon it, it is no use insisting that the authorities must continue to give effect to it. There is no sense in asking the performance of something which has become impossible. Of course, the government, before departing from the rule, must make every effort to respect it, and only when it ceases to be feasible to enforce it, that it has to be ignored. Mr. Tarkunde is right when he says that in such a situation the rule should be appropriately amended, so that the scope for unnecessary controversy is eliminated. But, merely for the reason that this step is not taken promptly, the quota rule, the performance of which has been rendered impossible, cannot be treated to continue as operative and binding. The unavoidable situation brings about its natural demise, and there is no meaning in pretending that it is still vibrant with life. In such a situation if appointments from once source are made in excess of the quota, but in a regular manner and after following the prescribed procedure, there is not reason to push down the appointees below the recruits from the other source who are inducted in the service subsequently. The later appointees may have been young students still prosecuting their studies when the appointments from the other source take place - and it is claimed on behalf of the respondents that this is the position with respect to many of the direct recruits in the present case - and, it will be highly inequitable and arbitrary to treat them as senior. Further, in cases where the rules themselves permit the government to relax the provisions fixing the ratio, the position for the appointees is still better ;

and a mere deviation there from would raise a presumption in favour of the exercise of the power of relaxation. There would be still a third consideration relevant in this context: namely, what is the conclusion to be drawn from deliberate continuous refusal to follow an executive instruction fixing the quota. The inference would be that the executive instruction has ceased to remain operative. In all these cases, the matter would however be subject to the scrutiny of the court on the ground of mala fide exercise of power. All the three circumstances mentioned above which are capable of neutralising the rigours of the quota rule are present in the cases before us, and the principle of seniority being dependent on continuous officiation cannot be held to have

been defeated by reason of the ratio fixed by the 1960 Rules.'

The discussion in the aforesaid paragraph-23 of the judgment of the Supreme Court would show that the aforesaid observations of the Supreme Court were made in the context of seniority between the promotes and the direct recruits where appointments by way of promotion were made in deviation of the quota rule for a continuous period. The Supreme Court held that in such a situation if appointments from one source were made in excess of the quota, but in a regular manner and after following the prescribed procedure, there was no reason to push down the appointees below the recruits from the other source who were inducted in the service subsequently. The Supreme Court further observed in the aforesaid judgment that in such a case the inference would be that the executive instruction providing for quota rule had ceased to remain operative or presumed to have been relaxed. But in the aforesaid judgment, the Supreme Court has not held that where the rules made under the proviso to Article 309 of the Constitution fix the quota for promotes and direct recruits to certain posts, the said rules if not followed continuously for several years, appointments can only be made from one source from which appointments had been made for a continuous period and cannot be made from the other source from which no appointment had been made for a continuous period. In the present case, we are called upon to decide whether the Government could make appointments by direct recruitment in accordance with the quota rule made under the proviso to Article 309 of the Constitution, and we are not concerned with the seniority between the promotes and direct recruits

where appointments had been made continuously in deviation of the quota rule. The aforesaid decision of the Supreme Court thus has no relevance to the present case.

8. Mr. Sharma then submitted that in any case no appointment to the promoted cadre posts of Deputy Director and Assistant Director in the Directorate of Dairy Development could be made by way of direct recruitment in excess of 25% of the vacancies available in a year as provided in the said sub-rule (5) of rule 11 of 1988 Rules. But the vacancies which were sought to be filled up by advertisement dated 14.11.1997 of the APSC were not the vacancies of any particular year but were the back-log vacancies which had been carried forward from earlier years. He vehemently argued that in the absence of clear provision in the 1988 Rules for carry forward of vacancies for the purpose of filling up by direct recruitment, a back-log of vacancies which could not be filled up by direct recruitment could not be carried forward and filled up under the 1988 Rules. He contended that according to calculation of the appellants

out of the two vacancies in the posts of Deputy Director in the Directorate of Dairy Development, one vacancy only could be filled up by direct recruitment and the other vacancy could only be filled by promotion. Thus, appointment to one vacancy of Deputy Director was in excess of quota for direct recruitment under sub-rule (5) of rule 11 of the 1988 Rules, and, therefore, the same was liable to be set aside. Similarly, as per the appellants, there being only one vacancy in the cadre rank of Assistant Director, filling up the said vacancy by direct recruitment was not permissible under sub-rule (5) of rule 11 of the 1988 Rules, and the appointment to the vacancy in the post of Assistant Director pursuant to advertisement dated 14.11.1997 was in excess of the quota as fixed under sub-rule (5) of rule 11 of the 1988 Rules, and was liable to be quashed.

9. On a perusal of the writ petition numbered Civil Rule No. 5672/ 1997, we find that the appellants had taken the following stand in paragraph-10 :-

'That the petitioners beg to state that at present there are only 4 (four) vacant posts of Dairy Director in the Directorate of Dairy Development. As per the Rules particularly per proviso to Rule 11 out of the 4(four) posts only 1 (one) post being

under 25% reservation can be advertised for direct recruitment. But contrary to this, 2(two) posts of Deputy Director having been advertised, the concerned authority has acted beyond the scope of the rules. Similarly, there being only 1 (one) vacancy in the cadre of Assistant Director and another post actually being held by an officer under suspension, the same cannot be considered vacant to be advertised for direct recruitment under 25% reservation. This will also amount to cent per cent reservation in violation of the relevant Rules assuming the post to be vacant.'

The aforesaid statement in paragraph-10 of the writ petition have been dealt with in paragraph-7 of the affidavit-in-opposition filed by the Commissioner & Secretary to the Government of Assam, Veterinary Department. The said paragraph-7 of the affidavit-in-opposition is quoted herein below :-

That with regard to the statements made in paragraph-10 of the writ petition, the deponent states that the advertisement No.6/97 was not published on the basis of present vacancies in the cadre of Dy. Director & Asstt. Director. The advertisement was published at that point of time to fill up the requisite No. of post as per Rule 11(5) of the Assam A.H. & Vety and Dairying Service Rules. 1988.'

Thus, it is clear from what has been stated in paragraph-7 of the affidavit-in-opposition filed by the Commissioner & Secretary to

the Government of Assam, Veterinary Department that the advertisement No. 6/97 dated 14.11.1997 was not published on the basis of the present vacancies in the cadre of Deputy Director and Assistant Director, but was published to fill up the requisite number of posts as per rule 11(5) of the 1988 Rules. It is, however, not clear from the said paragraph-7 of the affidavit-in-opposition filed on behalf of the State-respondents as to how the requisite number of posts have been calculated as per rule 11(5) of the 1988 Rules and accordingly published in the advertisement No. 6/97 dated 14.11.1997. In paragraph-12 of the affidavit-in-opposition filed by the private-respondent Nos. 4 to 8 a calculation is sought to be given in support of the contention of the said private-respondents that the said advertisement No. 6/97 dated 14.11.1997 had been published as per rule 11(5) of the 1988 Rules. But, it will not be safe for the court to arrive at a finding on the basis of the

statements in the said paragraph-12 of the affidavit-in-opposition filed by the private-respondents No. 4 to 8 because the State Government had sent the requisition for the posts to the APSC pursuant which the advertisement No. 6/97 dated 14.11.1997 was issued and it is only the State Government or the appropriate authority of the State Government which can explain about the said requisition.

10. In the absence of clear finding by the court that the appointments to the two posts of Deputy Director and one post of Assistant Director in the Directorate of Dairy Development by direct recruitment pursuant to the advertisement No. 6/97 dated 14.11.1997 are in excess of the quota for direct recruitment fixed in sub-rule (5) of rule 11 of the 1988 Rules, the court cannot quash the said appointments. Moreover, the appointments can be quashed only if we hold that the Government had no power whatsoever under the 1988 Rules to make the said appointments to the two posts of Deputy Director and one post of Assistant Director advertised in advertisement No. 6/97 dated 14.11.1997 of the APSC. Assuming that the contention of Mr. Sharma that the appointments to the aforesaid posts are in excess of the quota as fixed in sub-rule (5) of rule 11 of the 1988 Rules is correct, the Government has always the power to make appointments in relaxation of the said sub-rule (5) of rule 11 of the 1998 Rules. Under rule 27 of the 1998 Rules, a power has been vested in the Governor to dispense with or relax the requirement of any rule the operation of which causes undue hardship in any particular case. If hardship has been caused to intending candidates who had been aspiring for direct recruitment to the posts of Deputy Director and Assistant Director in accordance with sub-rule (5) of rule 11 of the 1988 Rules for a period from 1989 to 1997, such undue hardship could be taken care of by

the Government in exercise of the power of relaxation under the said rule 27 of the 1988 Rules.

11. Finally, Mr. Sharma contended that the private-respondents No. 4, 5 and 8 were junior to the appellants in service, but since they were less than 45 years, they were able to apply pursuant to advertisement No. 6/97 dated 14.11.1997 and have been recruited directly to the posts of Deputy Director and Assistant Director,

whereas the appellants who were more than 45 years of age could not get the benefit of such direct recruitment to the higher posts of Deputy Director and Assistant Director as their age was more than 45 years. Mr. Sharma submitted that sub-rule (3) of rule 7 of the 1988 Rules expressly provides that in case of candidates already borne in the service the maximum age limit for the purpose of direct recruitment to the cadre shall be relaxed upto the extent of their actual period of working in the service provided such period does not fall short of the relaxation provided under sub-rule (2) of the said rule. The appellants submitted applications for such relaxation, but no orders were passed by the authorities relaxing the maximum age limit for the purpose of direct recruitment in favour of the appellants.

12. In case no orders were passed on the applications filed by the appellants for relaxation under sub-rule (3) of rule 7 of the 1988 Rules, it was open for appellants to have moved this court for a direction on the respondents to consider the applications of the appellants for such relaxation. But we find on a perusal of the writ petition in Civil Rule No. 5672/1997 that no such prayer had been made before the learned Single Judge for directing the appropriate authority to consider the prayer of the appellants for relaxation and pass orders thereon in accordance with the said sub-rule (3) of rule 7 of the 1988 Rules, although the writ petition was moved on 3.12.1997 and the last date for submission of the application form was 4.12.1997 pursuant to the advertisement No. 6/97 dated 14.11.1997. At this belated stage, we are not inclined to consider this point raised by the appellants when the recruitment to the two posts of Deputy Director and one post of Assistant Director in the Directorate of Dairy Development pursuant to the advertisement No. 6/97 dated 14.11.1997 is already over.

13. For the reasons stated above, we find no merit in this appeal and we accordingly dismiss the same. Considering however the entire facts and circumstances of the case, we leave the parties to bear their respective costs.