

Mukul Saikia & Ors vs State Of Assam & Ors on 18 November, 2008

Equivalent citations: AIR 2009 SUPREME COURT 747, 2008 AIR SCW 7971, 2009 LAB. I. C. 469, 2009 (1) SCC 386, (2010) 3 SERVLJ 197, 2008 (14) SCALE 622, (2009) 1 LAB LN 47, (2008) 14 SCALE 622, (2009) 1 SCT 218, (2009) 3 SERVLR 140, (2009) 2 GAU LT 38, (2009) 1 CURLR 351

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Bench: Lokeshwar Singh Panta, R. V. Raveendran

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No. 6690 OF 2008
[Arising out of S.L.P. (C) No.21315 of 2006]

Mukul Saikia & Ors. Appellants

Versus

State of Assam & Ors. Respondents

JUDGMENT

Lokeshwar Singh Panta, J.

1. Leave granted.

2. This appeal is directed against the common judgment and order dated 15.09.2006 passed by a Division Bench of the High Court of Gauhati, dismissing Writ Appeal Nos. 471/2003 and 08/2005 filed by the appellants herein against the common judgment and order dated 14.08.2003 of the learned Single Judge in WP (C) No. 2026/2001, WP (C) No.2036/2001 and WP (C) No.4932/2001 whereby the learned Single Judge has dismissed the said writ petitions.

3. Briefly stated the facts of the case are as follows:-

The Assam Public Service Commission (hereinafter referred to as "APSC") had issued an advertisement dated 19.08.1997 for filling up 27 posts of Child Development Project Officer (hereinafter referred to as "CDPOs"), pursuant whereupon a selection process was held. Finally, a select list dated 17.07.2000 containing the names of 64 candidates far in excess of the notified vacancies was prepared and published by the APSC. The names of the appellants who are 13 in number before this Court appeared in the select list below 27 persons who were appointed on merit by the State Government.

4. The appellants filed two separate writ petitions before the High Court of Gauhati, inter alia, challenging the Cabinet Memorandum dated 16.06.2000 circulated by the Commissioner and Secretary, Government of Assam, Social Welfare Department under Rule 17 of the Assam Rules of Executive Business relating to the regularization of 18 CDPOs/ Probation Officers who were appointed under Regulation 3 (f) of the Assam Public Service Commission (Limitation of Function) Regulation, 1951 (for short "Regulation 1951") and praying for a direction to the State- respondent to appoint the appellants in the vacant/newly created posts of CDPOs/ Probation Officers. The appellants also challenged the policy decision taken by the State to regularize the services of the private respondents herein, who were initially appointed temporarily under Regulation 3 (f) of Regulation of 1951 and could not succeed in the selection process conducted by the APSC. The appellants contended before the High Court that giving benefit of regularization of service to the private respondents to the posts of CDPOs was contrary to the recruitment rules and the action of the State Government would amount to giving backdoor entry to the unsuccessful candidates into the State Services.

5. The stand of the respondent-State before the High Court was that 27 advertised vacant posts meant for direct recruitment quota, were filled up by the State Government on merits out of the select list prepared by the APSC dated 17.07.2000. The select list having thus exhausted, the appellants, whose names figured below the 27 selected candidates in the select list, therefore, could not claim to be appointed in excess of the advertised vacancies of CDPOs; and that if any future vacancies which arose after the publication of the advertisement, were to be filled up out of the left out candidates of the select list, the said appointment would amount to depriving other persons who, in the meantime, would have become eligible for selection and appointment. It was also submitted that as soon as the posts advertised were filled up or the validity of the select list expired, whichever event was earlier in point of time, the candidates whose names appeared in the select list could not thereafter claim appointment as the select list got exhausted. It was stated that the appellants have neither challenged the policy decision taken by the Government on the basis of the Cabinet decision nor the Notification issued pursuant thereto by the State Government regularising the service of 18 CDPOs/ Probation Officers. It was also stated that the decision to regularize 18 CDPOs, who were initially appointed under Regulation 3 (f) of Regulation, 1951, was taken by the State in view of the fact that they had already rendered more than four years of service satisfactorily and their continuation in service was necessary to implement the time-bound scheme of the Government of India for which ICDS Project was created in the State of Assam. It was categorically

stated that 18 CDPOs were regularized by the State Government to the posts meant for promotees.

6. The stand of the private respondents-appointees was that 27 advertised vacancies were filled up by the State Government on the basis of merit list prepared by the APSC on 17.07.2000 and as soon as those vacancies were filled up against the direct quota, the select list got exhausted. They stated that the appellants could not, as a matter of right, claim that they shall be appointed against the unadvertised future vacancies, merely because their names are found in the select list prepared by APSC. The respondents-appointees submitted that since they were not regularized against the posts advertised by the APSC by means of advertisement dated 19.08.1997, the appellants could not claim that they should be appointed against those posts pursuant to their selection when 18 vacancies in the cadre of CDPOs were meant to be filled up by way of promotion. They submitted that the decision to regularize their services was taken by the State Government by giving relaxation as contemplated under Clause 11 of the Assam Social Welfare (Recruitment and Promotion) Service Order, 1994 (for short "the Service Order, 1994) and the said decision in fact has not been challenged by the appellants/original writ petitioners either in the writ petitions or in the writ appeals filed by them before the High Court.

7. The learned Single Judge of the High Court dismissed the writ petitions of the appellants, inter alia, holding that no posts beyond 27 advertised vacancies could be filled up from the select list and the appellants had challenged only the Cabinet Memorandum dated 16.06.2000 without challenging the Cabinet decision taken on 13.10.2000 followed by the Notification dated 16.11.2000 issued by the State Government whereby the services of the private respondents came to be regularized.

8. Being aggrieved thereby, the appellants filed the above- said two writ appeals (being WP(C) 471/2003 and WP (C) 08/2005) which have been dismissed by the Division Bench by common judgment and order dated 15.09.2006. Now, all the appellants have preferred this single appeal challenging the impugned order of the High Court.

9. On notice issued by this Court, Shri Joydeep Shukla, Extra Assistant Commissioner, Government of Assam, has filed affidavit stating, inter alia, that the private respondents have rendered highly satisfactory and dedicated service in implementation of time-bound Integrated Child Development Scheme Projects (ICDS) ever since they joined the services and their retention in service would also be highly beneficial to the interest of the Project as well as the public at large. It is stated that at the relevant point of time, there were 18 vacant posts of CDPOs in the promotional category and another 10 additional vacancies meant for the promotees had also arisen thereby making a total number of 28 vacancies meant to be filled up by promoting departmental candidates as per the requirement of Service Order, 1994. It is stated that the private respondents submitted representations to the authorities praying for regularization of their services which was duly considered by the Department of Social Welfare, Government of Assam and taking into consideration the interest of ICDS Projects, it was decided that regular absorption of the private respondents against the promotional posts of CDPOs was in the best interest of the Projects which are funded by the Central Government in the State for the welfare of the general public. It is stated that a Cabinet Memorandum dated 16.06.2000 was circulated under Rule 17 of the Assam Rules of Executive Business, after obtaining the approval of the Personnel (B) Department of the State of

Assam for regularizing the services of the private respondents in the exceptional circumstances of the matter against 28 available vacancies meant for promotees by invoking power of Rule 11 of the Service Order, 1994. On the basis of the Cabinet Memorandum dated 16.06.2000, a Cabinet decision was taken on 13.10.2000 granting approval of regularization of services of the respondents. The respondent-State also submitted that the appellants have not challenged the one-time policy decision taken by the Cabinet nor the Notification dated 16.11.2000 issued pursuant to the Cabinet decision regularizing the services of the private respondents have been challenged by the appellants before the learned Single Judge or the Division Bench of the High Court and the High Court has rightly dismissed the writ petition and appeals of the appellants, inter alia, on the grounds that the appellants have no enforceable right to get appointments to the posts of CDPOs against promotional quota merely because their names had figured in the select list prepared by the APSC against the direct quota.

10. The private respondents, in their counter affidavit filed before this Court have stated that total number of notified vacancies of CDPOs were only 27, yet a select list dated 17.07.2000 was published by the APSC wherein as many as 64 candidates were recommended. In order of merit, 27 selectees were appointed out of whom 17 were appointed in the general quota and 10 from the reserved category as per the rules. The names of the appellants appeared below 27 candidates who have been appointed; therefore, the appellants have no legal right to claim appointment against the excess quota of the advertised vacancies. The Secretary to the Government of Assam, Personnel (B) Department by circular bearing No. 98/4 dated 18.12.1998 had requested the APSC to recommend the candidates equal to the number of vacancies notified in the advertisement. The contesting respondents stated that in the year 1996-97, there were total number of 45 vacant posts of CDPOs and allied cadre in the Department of Social Welfare including the backlog vacancies and as per Service Order, 1994, 60 per cent of the vacancies are required to be filled up by way of direct recruitment and the remaining 40 per cent by means of promotion of suitable departmental candidates. Accordingly, only 27 (60 per cent) vacancies of CDPOs were available at the time of issuing the advertisement notice dated 19.08.1997 for which selection was made by the APSC and on the basis of merit, 27 vacancies were filled up by the State Government after complying with the provisions of the rules including the reservation in favour of SCs/STs/OBCs. The remaining 18 vacancies being 40 per cent of total 45 vacancies were to be filled up by eligible departmental candidates. In addition thereto, 10 more vacancies were also available to be filled up by way of promotion thereby making 28 total number of vacancies. The State Government regularized the services of private respondents against 18 vacancies in the cadre of CDPOs which were meant to be filled up by way of promotion from departmental candidates and as such, the appellants who had applied against direct quota have no legitimate right to be selected and appointed against promotees quota.

11. The private respondents also submitted that they have been regularized on the basis of the Cabinet decision dated 13.10.2000 and Notification dated 16.11.2000 in deference to Rule 11 of the Service Order, 1994. They submitted that there was an urgent need on the part of the Department to fill up all the vacant posts for the purpose of proper and effective implementation of the time-bound Projects of the State. It is stated that, in view of the long services rendered by the private respondents and having due regard to their past satisfactory performance and also the service

record, they have been regularized against those promotional vacancies, purely in the interest of the public. It is also submitted that subsequently by Notification No. 59 PSC/DR-41/1/2005-06 dated 20.04.2006, the APSC has also conveyed its approval to the regularization of the respondents' services. They have stated that the procedure for regularization of the respondents' services was a one-time measure adopted by the State Government in the special circumstances and their regularization has not, in any manner, caused any prejudice to the interest of the appellants. The respondents also stated that the appellants have not challenged the Cabinet Decision dated 13.10.2000 and subsequent Notification dated 16.11.2000 issued by the State Government in the writ petitions filed by them nor they have challenged the same before the Division Bench of the High Court. In that view of the matter, the private respondents submitted that the appellants had no locus standi to file the writ petitions under Article 226 of the Constitution of India.

12. We have heard learned counsel for the parties. Mr. A.K. Ganguly, learned senior counsel appearing for the appellants, submitted that the private respondents were appointed in the year 1995-96 only for four months on ad hoc basis in terms of Regulation 3(f) of Regulation 1951, or till regular appointments in accordance with the preference and recommendations were made by the APSC under the Service Order, 1994, as such their continuance on ad hoc basis was de hors the rules and they are illegally regularized on 16.11.2000 after they have put in barely four years of service. He submitted that in identical cases, namely, *Pranjit Kumar Das v. State of Assam & Ors.* (1995) 1 GLR 229 and *Dr. Anoop Kumar Das v. Dr. Sanjib Kakati & Ors.* (2000) 2 GLR 479, the Gauhati High Court has held that any appointment under Regulation 3 (f) of Regulation 1951 is ad hoc in nature and de hors the rules, and therefore, could not be sustained. He submitted that the Cabinet decision in regard to the regularization of the private respondents was in disregard to the binding law as laid down in the above cited decisions. He submitted that the appellants who were duly selected by the APSC could have been appointed against the vacancies which subsequently arose in excess of 27 advertised posts. In support of this submission, reliance is placed on decisions in *Virender Singh Hooda v. State of Haryana and Anr.* [1999 (3) SCC 696], *Suvidya Yadav & Ors. v. State of Haryana & Ors.* [(2002) 10 SCC 299] and *Sandeep Singh v. State of Haryana & Anr.* [2002 (10) SCC 549]. Lastly, it was contended that the regularization of the service of private respondents to the posts of CDPOs after they remained unsuccessful in the test held by the APSC is in violation of Articles 14 and 16 of the Constitution of India as well as in derogation of the law laid down by a Constitution Bench of this Court in *Secretary, State of Karnataka and Ors v. Uma Devi & Ors.* [(2006) 4 SCC 1].

13. While refuting the submissions of the appellants, Mr. P.P. Rao, learned senior counsel for the State, on the other hand, submitted that the posts in which the private respondents were regularized were promotional posts to be filled up by promotion from amongst the persons who have rendered 10 years' continuous service in the feeder cadre and the appellants cannot have any claim to be considered for appointment against promotional quota. He submitted that all the 27 advertised posts have been filled up on the basis of the select list prepared by the APSC and the appellants cannot have any right to claim appointment against the anticipated vacancies which were never advertised and they have a right to be considered along with other eligible candidates as and when posts are advertised for direct recruitment. He then contended that when the regularization of the private respondents took place in the year 2000, the law declared by this Court in *State of Haryana v. Piara Singh* [(1992) 4 SCC 118], was holding the field, which required the State Government to

regularize the services of ad hoc employees who have put in a few years of continuous service. He submitted that the law laid down by a Constitution Bench of this Court in Secretary, State of Karnataka's case (supra) relied upon by the appellants in support of their case will be of no help and assistance to the appellants as in the said decision, this Court has clarified that the regularization, if any, already made, but not sub judice, need not be re-opened on the basis of the judgment.

14. Mr. P.S. Patwalia, learned senior counsel, appearing on behalf of the private respondents in addition to the submission of Mr. P.P. Rao, learned senior counsel, submitted that the appellants have no right that can be enforced in the present proceedings, particularly, in view of the fact that admittedly their names appeared in the select list dated 17.07.2000 below the persons who have been appointed against the 27 vacancies. He submitted that the Rules applicable to the present case do not permit inclusion of more number of candidates in the select list in excess of the notified vacancies. In support of this submission, reference is made to the decisions of this Court in *Madan Lal v. State of J & K & Ors.* [(1995) 3 SCC 486], *Shri Kant Tripathy & Ors. v. State of U.P. & Ors.* [(2001) 10 SCC 237], *State of U.P. & Ors. v. Raj Kumar Sharma & Ors.* [(2006) 3 SCC 330] and *Prem Singh v. Haryana State Electricity Board* [1996 (4) SCC 319]. He submitted that the appellants have no locus standi to file the writ petition under Article 226 of the Constitution of India before the High Court as the private respondents would stand on a completely different footing as compared to the appellants. It was also submitted that the decision to regularize the services of the private respondents was taken by the Cabinet in its meeting dated 13.10.2000 pursuant whereupon separate Notification dated 16.11.2000 was issued by the State Government regularizing their services in deference to Rule 11 of Service Order, 1994 by relaxing the rules. It was then contended that the Cabinet decision as well as the subsequent Notification of the State Government have not been challenged in the writ proceedings, the High Court has rightly dismissed the writ petition and the appeals of the appellants.

15. At the outset it should be noticed that the select list prepared by APSC could be used to fill the notified vacancies and not future vacancies. If the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised, even though APSC had prepared a select list of 64 candidates. The selection list got exhausted when all the 27 posts were filled. Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. The fact that evidently and admittedly the names of the appellants appeared in the select list dated 17.07.2000 below the persons who have been appointed on merit against the said 27 vacancies, and as such they could not have been appointed in excess of the number of posts advertised as the currency of select list had expired as soon as the number of posts advertised are filled up, therefore, appointments beyond the number of posts advertised would amount to filling up future vacancies meant for direct candidates in violation of quota rules. Therefore, the appellants are not entitled to claim any relief for themselves. The question that remains for consideration is whether there is any ground for challenging the regularization of the private respondents.

16. At the time of issuing the advertisement dated 19.08.1997, the total number of vacancies available in the cadre of CDPOs in the year 1996-97 was 45 out of which 27 vacancies, being 60 per cent of the total number of vacancies were available for being filled up by way of direct recruitment

as per Service Order, 1994. The Joint Secretary, Personnel (B) Department, circulated the Cabinet Memorandum under Rule 17 of the Assam Rules of Executive Business. It was made clear in the said Cabinet Memorandum that the private respondents could not pass the APSC written examination, but they have gathered sufficient experience under Social Welfare Department and the performance of the officers was also found satisfactory. It was stated that their services were not terminated and they were allowed to continue in their respective posts and in the interest of the public service, the State Government had decided to regularize their services and to absorb them under Social Welfare Department against posts held by them. The Commissioner and Secretary to the Government of Assam, Social Welfare Department on 16.06.2000, concurring with the proposal of Joint Secretary, Personnel (B) Department, as a special case sought the approval of the Cabinet for regularization of appointment of 18 CDPOs/Superintendents/ Home Probation Officers who were appointed in terms of Regulation 3 (f) of APSC and in accordance with the method as provided in Clause 5(c) by invoking discretion of relaxation under Clause 11 of Service Order, 1994. The Cabinet in the meeting held on 13.10.2000, decided to regularize the services of the private respondents in the special circumstances that they have been working against the posts of CDPOs for the last more than four years and their performance was found satisfactory and their continuity in the existing posts was also needed for effective implementation of the time-bound scheme of the Government of India for which ICDS Projects were provided in the State of Assam. Pursuant to the Cabinet decision, Notification No. SWD 34/99/104 dated 16.11.2000 was issued by the Commissioner and Secretary to the Government of Assam, Social Welfare Department by which the services of the appellants were ordered to be regularized with effect from the date of their joining the Social Welfare Department. Indisputably, the appellants have challenged only the Cabinet Memorandum dated 16.06.2000 in the writ petition before the High Court while the Cabinet decision dated 13.10.2000 was taken on the basis of the said Memorandum and the subsequent Notification regularizing the services of the appellants issued by the State Government on 16.11.2000 had remained unchallenged. The Cabinet took the decision dated 13.10.2000 in exercise of the powers under Rule 17 of the Assam Executive Business Rules which was subsequently notified by the State Government on 16.11.2000 as a one-time measure to regularize the services of the private respondents. It appears that the appellants were not serious in regard to challenging the regularization of the private respondents but were only interested in pursuing their own claim for appointment as CDPOs against the vacancies reserved for direct quota. In the circumstances and the facts of the present case, the appellant cannot maintain any claim whatsoever in respect of the 18 vacancies of CDPOs against which the private respondents were regularized. The appellants and the private respondents stand on a completely different footing. The services of the private respondents have been regularized against the vacancies meant for promotees and the source of legal right of the appellants and the private respondents being from two different and distinct sources, their relative rights cannot be compared with each other and, therefore, there cannot be any violation of fundamental rights under Article 14 of the Constitution of India as a consequence of the regularization of the services of the respondents.

17. We have gone through the Service Order, 1994 issued by the Government of Assam, Social Welfare Department dated 01.08.1994. Clause 3 of the Service Order classifies the class and cadre of the services. The post of Child Development Project Officer is in Class II cadre. Clause 5 thereof envisages method of recruitment and promotion. The relevant portion of Clause 5 reads as under:-

"5 Recruitment to the Cadre of the service shall be made in the following manners:-

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) In the order of District SWO/ CDPO/ Special Home/ Principal Balbhawan VTRC/ Probationary Officer/ PWO/ Liaison Officer/ Vice Principal, Jorhat, Blind Institute. The posts shall be filled up by direct recruitment through the Commission as per norms fixed jointly with Ministry of Welfare, Government of India by the Social Welfare Department."

Clause 11 of the Service Order deals with relaxation. It reads:-

"Where the Governor is satisfied that the operation of any of the provisions of these orders has caused undue hardship in any particular case, he may dispense with or relax the requirement of that provision to such extent and subject to such condition as he may consider necessary for dealing with the case in a just and equitable manner.

Provided that the case of any Government servant shall not be dealt with in any manner, less favourable to him than that provided in these orders."

18. Annexure-1 attached to Service Order, 1994 contains class of posts, cadre of posts, cadre strength, scale of pay and qualifications & experience for the service. At serial No. 3, in Class II the total cadre strength of CDPOs has been shown as 68 in the pay scale of Rs.1635-3950/-. Column 6 of Annexure I prescribes that 40 per cent of the posts of CDPOs have to be filled up by promotion from amongst the persons who have rendered 10 years of continuous service in the cadre of ACDPOs/Assistant Superintendent Homes and Allied Cadre and 60 per cent by direct recruitment. The private respondents, no doubt, were appointed on ad hoc basis and admittedly they have not completed 10 years of continuous service in the cadre of ACDPOs, but the State of Assam, with the approval of the Cabinet, decided to regularize the services of the appellants as a special case by giving relaxation under para 11 of the Service Order. Therefore, the decision of the Cabinet pursuant whereof the State Government issued Notification cannot be held to be arbitrary and irrational. The appellants fall in different categories and they have no enforceable right to challenge the regularization of the private respondents who have been regularized against the vacancies meant for promotional quota. In their writ petition, they have prayed for their appointment because their names were included in the select list by the APSC against the direct quota. The State Government appointed 27 persons in order of merits out of the select list prepared by the APSC, as such the appellants being selectees cannot claim appointment as a matter of right in excess to the advertised vacancies. It is well settled law that filling up of the vacancies over and above the number of vacancies advertised would be violative of Articles 14 and 16 of the Constitution of India. Mere inclusion of the appellants in the select list of the direct appointees does not confer any right on them to be appointed against the vacancies reserved for promotees. The decision of the Cabinet and

the Notification issued by the State Government pursuant thereto in our view, are both in consonance and in conformity with Clause 11 of the Service Order to save the services of the private respondents from being thrown out of the job which otherwise would cause extreme hardship and injury to them and to the members of their families.

19. In the facts and circumstances of the present case, we find that the High Court has rightly held that the appellants do not have any enforceable right of being appointed to the post of CDPOs against the quota meant for promotees and more particularly against the decision of the State Government regularizing the services of the private respondents. The Cabinet decision was taken as a one-time measure having regard to the special circumstances of the case, the satisfactory performance rendered by the private respondents and their past service record which was found to be unblemished by the Government as well as in the exigencies of the Scheme of the Central Government which were to be operationalised in a time-bound manner and also keeping public interest in mind. In these circumstances, the High Court is right in holding that the appellants have no locus standi to challenge the regulation of private respondents against the vacancies meant for the promotional quota the appellants who appeared in the interview held by APSC as direct candidates could not have any grievance against their regularization against 40 per cent promotional posts.

20. In the backdrop of the above stated facts and the relevant provisions of rules, we do not find any error or infirmity in the impugned judgment and order passed by the High Court which would warrant any interference by this Court in this appeal. None of the contentions raised by the appellants merits acceptance. The law laid down by the Constitution Bench of this Court in Uma Devi's case (supra) in the present set of facts and circumstances will be of no help and assistance to the appellants. The decision of the Gauhati High Court in the cases cited at Bar by the learned senior counsel for the appellants will turn on the facts and circumstances of the said cases and the ratio laid down therein cannot be made binding on the peculiar facts of the present case.

21. For the above-stated reasons, the appeal fails and it is accordingly, dismissed.

In the facts and circumstances, the parties are left to bear their own costs.

.....J. (R. V. Raveendran)J. (Lokeshwar Singh Pantia)
New Delhi, November 18, 2008.