

# **IN THE HIGH COURT OF SIKKIM : GANGTOK**

(Civil Extra-ordinary Jurisdiction)

## **WP (C) No. 03 of 2019**

Mr. Naresh Kumar Rai  
S/o Shri Kharga Bahadur Rai  
Resident of Bozogari, Pangthang,  
Post Office Gangtok and  
Police Station Sadar Thana at Gangtok.

... Petitioner

Versus

1. State of Sikkim,  
Through Chief Secretary,  
Government of Sikkim, Gangtok.

2. Secretary  
Department of Personnel, Administrative Reforms Training  
& Public Grievances, Government of Sikkim,  
Gangtok.

... Respondents

### **BEFORE HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.**

For the Petitioner : Mr. A. Moulik, Senior Advocate with Mr. Ranjit Prasad, Advocate.

For the Respondents : Mr. Vivek Kohli, Advocate General, Sikkim.

Date of hearing : 01.09.2020

Date of judgment : 14.09.2020

### **JUDGMENT**

By filing this Writ Petition under Article 226 of the Constitution of India, the petitioner has prayed for quashing the Order dated 28.09.2018 (Annexure-P5) and for a direction to issue fresh order for promotion. The petitioner has also prayed for compensation for being subjected to mental trauma and humiliation.

2. The case of the petitioner, as presented in the writ petition, is that in pursuance of a Notification dated 17.06.2005 (Annexure P-1), the respondent no.1 had issued a common Order dated 26.09.2018, whereby

the petitioner was promoted on officiating basis along with 193 Group-D employees serving in various Government Departments to the post of Lower Division Clerk (LDC). Pursuant to the aforesaid order, the petitioner had joined the post on 27.09.2018. However, by another Order dated 28.09.2018, the officiating promotion order of the petitioner was withdrawn without assigning any reason and without issuing any show cause notice to the petitioner and he was brought back to the post of Cook.

3. It is pleaded that he was promoted on officiating basis after he had served for more than 20 years in the post of Cook in Sikkim Armed Police and he had the requisite qualification for being promoted. There were other Cooks who were also promoted on officiating basis by the said Order dated 26.09.2018 but the promotion order was withdrawn only in respect of the petitioner.

4. The respondents no.1 and 2 had filed a counter affidavit, wherein it is stated that the petitioner was appointed as a Cook in the Sikkim Armed Police vide Order dated 13.11.1998 under the post of Follower in the Group-D cadre in Sikkim Police and the service of the petitioner is governed by Sikkim Armed Police Force (Recruitment, Promotion and other Conditions of Service) Rules, 1989 (for short, the Rules of 1989). Copy of the appointment order of the petitioner was annexed with the affidavit. At the relevant time, the petitioner was working as a Cook in Sikkim Armed Police, Pangthang and the officiating promotion order of the petitioner to the post of LDC was erroneously and inadvertently issued. The said officiating promotion order was issued under Sikkim Sub-ordinate (Ministerial and Executive) Service Rules, 1984 (for short, the Rules of 1984). When a joint representation was received from the Follower (Cook) of Police Department, respondents re-verified the documents of the petitioner whereupon it was realized that the petitioner was appointed under Sikkim Police cadre and not under any civil post. In the said officiating promotion order, the petitioner was erroneously

shown as Office Attendant while he was, in fact, a Cook under Sikkim Armed Police. An Assured Career Progression Scheme (ACPS) and a Modified Assured Career Progression Scheme (ACPS) were issued under revised Office Memorandum dated 18.08.2018, extending the same to the Follower of Sikkim Police. That apart, a Notification dated 21.01.2019 was issued notifying uniform promotion avenues for the Follower under Sikkim Police service.

5. A rejoinder affidavit was filed by the petitioner stating that that the officiating promotion was given to all Government servants in Group-D working in various departments and the persons who were appointed along with the petitioner vide Order dated 13.11.1998 were not considered for promotion because they did not possess the basic educational qualification of Class-X pass. It is also stated that neither in the Order dated 13.11.1998 nor in the Rules of 1989, the post of Cook is termed as Follower and that the Rules of 1989 do not cover promotion of Office Attendant/Cook and the post of Office Attendant/ Cook does not fall under the Rules of 1989.

6. Mr. A. Moulik, learned Senior Counsel for the petitioner, has submitted that while the other Cooks, who were promoted on officiating basis, have been allowed to continue, the petitioner had been singled out and discriminatorily treated by the respondents by withdrawing his officiating promotion order. Drawing attention of the Court to Rule 28 of the Rules of 1989, which is under the heading "Residuary matters", the learned Senior Counsel points out that as there is no provision for promotion of Cook in the Rules of 1989, provision for promotion, etc., are to be regulated by the rules and orders issued by the Government from time to time, which are applicable to the corresponding rank of the Sikkim Police Force. He has submitted that by the Notification dated 17.06.2005, in exercise of powers conferred under Rule 10 of the Rules of 1984, the Government of Sikkim had relaxed the provision of Schedule-II, under item Grade-IV of the said Rules,

to promote Group-D employees possessing educational qualification of Class-X pass on seniority-cum-merit basis as well as Daftaries and Barkhandas on seniority-cum-merit basis and it is on the basis of the aforesaid Notification, as the petitioner is a Group-D employee having the requisite qualification of Class-X pass, he was given the officiating promotion. It is contended by him that the respondents acted illegally and arbitrarily in withdrawing his officiating promotion without assigning any reason and without issuing any show-cause notice and, therefore, the order cannot withstand the scrutiny of law for being in violation of principles of natural justice. Relying on paragraph 10 of the counter affidavit filed by the respondent nos.1 and 2, he submits that it is admitted by the respondents that the post held by the petitioner is a civil post and, therefore, even though he is working in Sikkim Armed Police, he could be promoted on officiating basis as LDC. It is also the contention of Mr. Moulik that there must be scope for promotion in a service rule and in this connection, he placed reliance on the judgments of the Hon'ble Supreme Court in the cases of *O. Z. Hussain (Dr) vs. Union of India*, reported in *1990 Supp SCC 688* and *State of Tripura and Others vs. K.K. Roy*, reported in *(2004) 9 SCC 65*.

7. Mr. Vivek Kohli, learned Advocate General, Sikkim, abiding by the stand taken in the affidavit, has submitted that officiating promotion order of the petitioner was erroneously issued and, therefore, the same was rectified immediately within a period of 2 (two) days. He submits that under Section 2(c) of the Sikkim Armed Police Force Act, 1981 (for short, Act of 1981), the term 'Follower' is defined and it includes any person appointed to do the work of Cook, Cobbler, etc. He has submitted that no material is placed by the petitioner to demonstrate that the Cooks, whose names appeared in the Order dated 26.09.2018, were also working in the Sikkim Armed Police. He has submitted that the petitioner was appointed as a Cook in Sikkim Armed Police and therefore, there is no manner of doubt that the Rules of 1989

applies to the petitioner. Under the Rules of 1989, there is no post of LDC or Office Attendant. The Notification dated 17.06.2005 is in respect of the Rules of 1984 only and the same is not applicable to the members of the Sikkim Armed Police. It is submitted by him that reliance placed on Rule 28 of the Rules of 1989 by Mr. Moulik is misconceived as there is no pleading whatsoever that recourse was taken to Rule 28 while promoting the petitioner on officiating basis and besides, it was only because of misconception of facts that the petitioner had been given officiating promotion. Officiating promotion does not confer any right on the petitioner and that when petitioner in the Writ Petition has failed to show how he could have been promoted to a cadre post under the Rules of 1984, it cannot now be urged by the petitioner that he had been denied the opportunity to show cause and that there has been violation of principles of natural justice, he contends. He has placed reliance on the decision of the Hon'ble Supreme Court in the case of *Gopal Singh vs. State Cadre Forest Officers Assn. & Ors.*, reported in (2007) 9 SCC 369.

8. I have considered the submissions of the learned counsel for the parties and have perused the materials on record.

9. The appointment order of the petitioner dated 13.11.1998 goes to show that the petitioner was appointed as a Cook in the Sikkim Armed Police. At the very outset, it will be appropriate to take note of Section 2(c) of the Act of 1981. It defines 'Follower', which includes a Cook. Therefore, the contention of Mr. Moulik that the term 'Follower' is nowhere defined is not correct. Rules of 1989 was framed under the Act of 1981 and the post of Cook is mentioned in Schedule-I, reference to which is made in Rules 4 and 5 relating to "Composition of strength of the Force" and "Scale of Pay and Allowances", respectively. In Schedule-I, there is no reference to any post of Office Attendant or LDC. There is no escape from the conclusion that Rules of 1989 applies to the petitioner.

10. Rule 2(j) of the Rules of 1984 defines 'Service' to mean Sikkim Subordinate (Ministerial and Executive) Service comprising of posts mentioned in Schedule-I for any of the departments and offices under the Government. A careful perusal of the above definition goes to show that posts mentioned in the Schedule-I of Rules of 1984 in any of the Departments and offices under the Government would come within the ambit of service under the Rules of 1984. Schedule-I of the Rules of 1984 lists posts under the headings 'Ministerial' and 'Executive' and it does not include any post of Cook.

11. When the Rules of 1984 were framed, post of LDC was to be filled by direct recruitment through Open Competitive Examination. Subsequently, the Rule was amended by Notification dated 29.12.2001, providing for direct recruitment to the aforesaid post through Open Competitive Examination to the extent of 85%, promotion to the extent of 5% on the basis of merit-cum-seniority from amongst Group-D employees holding grade-I post and promotion to the extent of 10% through Limited Department Competitive Examination from amongst Group-D employees having educational qualification of Class-X examination pass with minimum speed of 15 words per minute in typing. By Notification dated 17.06.2005, in exercise of powers conferred under Rule 10 of the Rules of 1984, the requirement of Departmental Competitive Examination in respect of Group-D employees was relaxed and Group-D employees along with Daftaries and Barkhandas were to be promoted on the basis of seniority-cum-merit by Departmental Promotion Committee.

12. At this juncture, it is to be placed on record that none of the parties had thrown any light on who are the Group-D employees. However, it is an admitted position that the petitioner is a Group-D employee. While the post of Cook is mentioned in Schedule-I of Rules of 1989, method of recruitment

and other eligibility conditions, which are mentioned in Schedule-II in terms of Rule 6, are, however, not indicated.

13. With regard to the submission of Mr. Moulik that Rule 28 of the Rules of 1989 was taken recourse to while promoting the petitioner on officiating basis, no factual foundation was laid and in fact, there is no reference to the Rules of 1989 in the pleadings on behalf of the petitioner at all. The contention advanced by Mr. Moulik that as the petitioner was Class-X pass, he was promoted on officiating basis in aid of the Notification dated 17.06.2005 is devoid of any merit because of the reason that the said Notification is applicable to the employees holding posts which are covered under Rules of 1984 and the petitioner could not have been promoted to a non-existent post of LDC in Sikkim Armed Police on the strength of Notification 17.06.2005.

14. Though not part of the pleadings, the learned Senior Counsel has placed a copy of Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 1981, for short, Rules of 1981 which was deemed to have come into force on and from 01.04.1974. The aforesaid Rule was framed under proviso to Article 309 of the Constitution of India. The Rules of 1989, which was framed in exercise of powers conferred under Section 27 of the Act of 1981, was to come into force from the date of publication of Official Gazette and the same was published in the Sikkim Government Gazette (Extra-Ordinary) on 24.02.1990. Annexure-R5 is a notification dated 26.04.2013 amending the Sikkim Police Force (Recruitment, Promotion and Seniority) Rules, 2000, for short, the Rules of 2000. Notification dated 17.11.2017 is also a Notification amending the Rules of 2000. Mr. Moulik had placed the Rules of 2000. No arguments are advanced by the learned counsel of the parties on the aforesaid Rules and I have referred to the above Rules only to make the narration complete and will not dilate on these Rules any further.

15. It is not disputed by the petitioner that he was wrongly shown as an Office Attendant though he was a Cook in the Order dated 26.09.2018. There is no pleading in the Writ Petition that Cooks, who were promoted on officiating basis, are employees of Sikkim Armed Police. It was also argued by Mr. Moulik that one Nar Bahadur Pradhan at Sl. No.20 of the Order dated 26.09.2018 was posted at the Police Headquarter, Gangtok and, therefore, it is not that none has been promoted and posted in the Police Department. There is no pleading regarding Nar Bahadur Pradhan and it is difficult to hazard a guess in absence of any pleading the status of Nar Bahadur Pradhan and it is also equally difficult to predicate whether Police Headquarter and Sikkim Armed Police stand on the same footing.

16. Though pleading in a Writ Petition has to be liberally construed, it is axiomatic that some foundational facts have to be brought on record in order to substantiate a plea that the petitioner is discriminated while granting benefit to similarly situated persons.

17. Though the petitioner has stated that he had joined on the very same date on the issuance of the Order dated 26.09.2018, it is not understood in which post he had joined as there is no post of LDC under the Rules of 1989.

18. Contention of Mr. Moulik that in paragraph 10 of the counter affidavit, it is admitted that post held by the petitioner is a civil post, is factually incorrect. What was mentioned in paragraph 10 is that the post of Office Attendant which was mistakenly considered to be the post held by the petitioner is a civil post. It is also categorically indicated therein that the petitioner was appointed as Cook in the Group-D cadre of Sikkim Armed Police. The petitioner, being a member of Sikkim Armed Police governed by the Rules of 1989, could not have been promoted on officiating basis to a civil post falling under Rules of 1984.



19. In *Gopal Singh* (supra), the question as to whether a person holding the post of Assistant Mill Manager under the cadre of A&N Islands Forest Department would be entitled to have consideration for promotion to the post of Deputy Conservator of Forests which was an encadred post of Indian Forest Service, was answered in the negative on the ground, amongst others, that the post of Assistant Mill Manager was outside the Indian Forest Service (Recruitment) Rules, 1966 and Indian Forest Service (Appointment by Promotion) Regulations, 1966.

20. In *Sohan Lal Gupta vs. Asha Devi Gupta*, reported in (2003) 7 SCC 492, the Hon'ble Supreme Court observed that the principles of natural justice cannot be put in a straight-jacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby. In *Karnataka SRTC vs. S.G Kotturappa*, reported in (2005) 3 SCC 409, the Hon'ble Supreme Court observed that principles of natural justice cannot be applied in vacuum and the same are not required to be complied with when it will lead to an empty formality.

21. Lord Wilberforce in *Malloch vs. Aberdeen Corpn.*, reported in (1971) 2 All ER 1278 (HL) had observed that "..... A breach of procedure .....cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which have been lost by the failure. The Court does not act in vain."

Brandon L. J. opined in *Cinnamond vs. British Airports Authority*, reported in (1980) 2 All ER 368 (CA) as follows: " ..... no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."

The above observations were quoted with approval by the Hon'ble Supreme Court in *Dharampal Satyapal Ltd. vs. Deputy Commissioner of Central Excise, Gauhati and Others*, reported in (2015) 8 SCC 519.

22. Thus, even if it is found by the Court that there is violation of principles of natural justice, it may not be necessary to strike down the action and refer the matter back to the authorities to take a fresh decision after complying with the procedural requirement in those cases when non-grant of hearing has not caused any prejudice to the person against whom the action is taken. As a corollary, it follows that every violation of a facet of natural justice may not lead to the conclusion that the order passed is null and void. The validity of the order has to be decided on the touchstone of prejudice.

23. However, it is not open for the administrative authority to dispense with the requirement of principles of natural justice by itself deciding that no prejudice is caused to the person against whom the action is contemplated. Whether opportunity of hearing will serve the purpose or not has to be considered at a later stage and this aspect cannot be presumed by the authority. It is now well established that the Courts are empowered to consider as to whether any purpose will be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom action is taken.

24. In the proceeding before this Court, which was instituted after five months of passing of the impugned order, the petitioner has failed to, even, *prima facie*, show how the impugned order dated 28.09.2018 suffers from a material defect qua the plea taken by the respondents that his officiating promotion order was issued on misconception of fact as also how he is prejudiced because of not being given an opportunity to show cause .

25. In the facts and circumstances of the case, I am of the considered opinion that it will be futile and an empty formality to set aside the order dated 28.09.2018 on the ground of violation of principles of natural justice.

26. In view of what has been discussed above, I find no merit in this Writ Petition and accordingly, the same is dismissed.

27. However, before parting with the records, it will be appropriate to record that Mr. Moulik had made submissions with regard to entitlement of a Government servant for promotion during his service career. In *O. Z. Hussain (Dr)* and *K.K. Roy(supra)*, Hon'ble Supreme Court has laid down that promotion is a normal incidence of service. However, in absence of appropriate pleadings and lack of clarity on the Rules placed before the Court, in order not to cause prejudice to either of the parties, I have not dealt with or deliberated upon this aspect of the matter. Fact remains the petitioner had not earned any promotion for last 20 years. Accordingly, while dismissing this petition, I grant liberty to the petitioner to ventilate his grievances, if any, on the issue of promotional avenue, in an appropriate manner and in an appropriate proceeding.

28. No cost.

**Chief Justice**

Avi/