

GAHC010009502016



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1130/2016

DR. GITAMONI HANDHIQUE GOGOI
W/O DR. JOYDEV GOGOI R/O VILL- BURAHAZAR GAON BARBARUA
BLOCK LANE, P.O. BARBARUA DIST. DIBRUGARH, ASSAM, PIN- 786007

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMMISSIONER AND SECRETARY, GOV.T OF ASSAM,
HIGHER EDUCATION DISPUR, GUWAHATI -781006, ASSAM.

2:THE DIRECTOR OF HIGHER EDUCATION ASSAM
KAHILIPARA GUWAHATI - 781019.

3:THE GOVERNING BODY OF M.D. K.G. COLLEGE DIBRUGARH
REP. BY ITS PRINCIPAL CUM SECRETARY DIBRUGARH
DIST. DIBRUGARH ASSAM PIN - 786004.

4:DR. RAGHU NATH BARBORUAH
CHAIRMAN OF G.B. M.D.K.G. COLLEGE DIBRUGARH
P.O. and DIST. DIBRUGARH ASSAM PIN - 786004.

5:DR. MAYURI DUTTA W/O DR. CHINMOY KR. PHUKAN PRESENTLY
RESIDING AT C/O PROF. NIKUNJALATA DUTTA DEPARTMENT OF
POLITICAL SCIENCE
DIBRUGARH UNIVERSITY DIBRUGARH ASSAM PIN - 786004

Advocate for the Petitioner : MR.M U MAHMUD

Advocate for the Respondent : MR. D C BORAH R-5

Linked Case : I.A.(Civil)/1146/2023

DR. GITAMONI HANDHIQUE GOGOI W/O DR. JOYDEV GOGOI R/O VILL-
BURAHAZAR GAON BARBARUA BLOCK LANE P.O. BARBARUA DIST.
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Advocate for : MR.M U MAHMUD
Advocate for : SC
HIGHER EDU appearing for THE STATE OF ASSAM AND 4 ORS

BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR

Date : 07.12.2023

ORDER

Heard Mr. M. U. Mahmud, learned counsel for the petitioner. Also heard Mr. D. Upamanyu, learned standing counsel, Higher Education Department, Government of Assam, appearing on behalf of respondents No. 1 & 2; Mr. K. K. Phukan, learned counsel, appearing on behalf of respondents No. 3 & 4; and Mr. L. N. Dihingia, learned counsel, appearing on behalf of respondent No. 5.

2. The petitioner by way of instituting the present petition, has assailed the selection process instituted for filling up the post of Assistant Professor in the

Department of Political Science of MDKG College, Dibrugarh, and has further prayed for awarding to her the eligible marks for her experience and other qualifications.

The Principal, MDKG College, Dibrugarh, vide an advertisement dated 13.12.2015, amongst others, invited applications from eligible candidates for filling up a post of Political Science lying vacant in MDKG College, Dibrugarh. The petitioner who was working as an Assistant Professor in the Department of Political Science of HCDG College, Nitaipukhuri, Sivasagar, after obtaining the NOC from the Director, Higher Education Department, applied against the said advertised post in the Department of Political Science of MDKG College, Dibrugarh and participated in the said selection process on 19.01.2016. On conclusion of the said selection process; one Dr. Mayuri Dutta, respondent No. 5 herein, came to be selected for the post advertised and her name was recommended by the governing body of the college in question. The petitioner has contended that the respondent No. 5 is not eligible, in view of the qualifications possessed by her, for being considered for the post of Assistant Professor in the Department of Political Science of MDKG College, Dibrugarh. The petitioner has also contended that the selection process was conducted by the selection committee in clear violation of the guidelines contained in the OM dated 18.08.2015. It was further contended that the marks requisite to be given for publications were not allotted to the petitioner and as such, her merit position came to be suppressed in the selection process. It is on the said premise that this writ petition was instituted before this Court.

3. I have heard the learned counsels appearing for the parties and also perused the materials placed on record.

4. It is stated in the Bar that the recommendations made by the governing body of the MDKG College, Dibrugarh, for the post in question, in pursuance of the selection held, has not been considered by the Director, Higher Education Department, under the provisions of the Assam College Employees (Provincialization) Act, 2005, and the Assam College Employees (Provincialization) Rules, 2010, on account of pendency of the present proceeding. The relevant provisions of the Rules of 2010, are quoted hereinbelow:

“5. Method of Recruitment. Recruitment shall be made in the manner prescribed hereinafter.

(1) Appointment to the post of Principal shall be by direct selection. For this the Governing Body shall constitute a Selection Committee, which shall select a person on the basis of an interview from amongst eligible candidates who apply in response to an open advertisement in newspapers. The Governing Body shall recommend this candidate to the Director, who shall issue orders of appointment.

(2) For the post of Lecturer/Librarian appointment shall be made by direct recruitment with prescribed qualifications though open advertisement in two leading dailies at least in two consecutive issues. In respect of Grade III and Grade IV posts the list of eligible candidates shall be collected from the local employment exchange/Advertisement in newspaper.

(3) Appointment to Head Assistant shall be made by promotion from the cadre of Upper Division Assistants on the basis of seniority cum merit.

(4) The post of Lower Division Assistant, Laboratory Assistant, Library Assistant shall be filled up by direct recruitment and from Laboratory Bearers/Library Bearers/Grade IV having qualification as prescribed in ratio of 75:25.

(5) Placement of Lecturers/Librarians in Selection Grade/Senior Grade Scale of pay shall be done by the Governing Body as per Rules prescribed by the UGC and the State Government from time to time on the recommendations of the Departmental Promotion Committee.

(6) In all these cases, the Governing Body shall conduct the selection process and recommend to the Director, who shall issue orders of appointment.

7. Direct Recruitment.-

(a) All appointment either by direct recruitment or by promotion shall be made by the Director on the basis of recommendations of the Governing Body based on the recommendations of the Selection Committee/Departmental Promotion Committee duly constituted;

(b) The Director shall communicate his orders within thirty days;

(c) The Selection Committee may hold such test of interview for all posts as may be considered necessary. For posts for which UGC has prescribed norms, no candidate shall be recruited without having the required norms;

(d) All fresh appointments shall be made on receipt of police verification report.”

5. There is no dispute at the Bar that the College is a provincialised college and is governed by the provisions of the Assam College Employees (Provincialisation) Act, 2005 (2005 Act) and the Assam College Employees (Provincialisation) Rules, 2010 (2010 Rules). As per section 6 of the 2005 Act, appointment of both teaching and non-teaching staff in the college shall be made by the Director of Higher Education on the basis of selection and recommendation of the Governing Body of the college in accordance with rules and procedure of the Government in force. 2010 Rules have been framed under section 12(1) of the 2005 Act. As per Rule 5(1), appointment to the post of Principal shall be by direct recruitment through selection. For this purpose, Governing Body shall constitute a Selection Committee, which shall select a person on the basis of an interview from amongst eligible candidates who apply in response to an open advertisement in newspapers. The Governing Body shall recommend the selected candidate to the Director who shall issue order of appointment. As per Rule 7(c) of the 2010 Rules, for posts in which UGC has prescribed norms, no candidate shall be recruited without having the requisite norms.

6. Having noticed the scheme of selection for the post of Principal in a provincialised college, what is admitted in the present case is that the selection process has not yet attained finality. It is only when the Director accords approval to the recommendation of the Governing Body that the selection would attain finality.

This aspect of the matter was gone into by this Court in the case of ***Sonali Bora Saharia Vs. State of Assam***, reported in [**2016(5) GLT 263**], and it was held that until the Director grants approval to the selection process, no final decision can be said to have been taken in respect of the selection. No definitive cause of

action can be said to have accrued at such a stage to clothe an un-recommended candidate as aggrieved party thereby enabling him to initiate a legal action. Selection by the Selection Committee or recommendation by the Governing Body per se, would not give rise to a cause of action for initiating a legal proceeding because no finality is attached to such recommendation at a stage prior to acceptance or non-acceptance by the Director. The relevant paragraphs are extracted hereinbelow:-

"The post of Lecturer in colleges has been re-designated as Assistant Professor following notification issued by the UGC. Recruitment of Assistant Professor in colleges is governed by a set of statutory rules called Assam College Employees (Provincialisation) Rules, 2010 which has been framed in exercise of powers conferred under Section 12(1) of the Assam College Employees (Provincialisation) Act, 2005. Rule 5 lays down the method of recruitment. As per Rule 5(2), for the post of Lecturer, re-designated as Assistant Professor, appointment shall be made by direct recruitment with prescribed qualifications through open advertisement in two leading dailies atleast in two consecutive issues. As per Sub-Rule (7) of Rule 5 the Governing Body shall conduct the selection process and make recommendation to the Director who shall issue order of appointment. Rule 7 lays down the detailed procedure while making such direct recruitment. From a perusal of Rule 7, it is seen that the recommendation of the Governing Body would be based on the recommendation of the Selection Committee duly constituted for the purpose whereafter the Director shall pass appropriate order and communicate the same within 30 days. Implicit in this is that the Director has to examine the recommendation and approve the same whereafter consequential appointment order is to be issued. For posts for which UGC has prescribed norms, no candidate shall be recruited without having the required norms.

Constitution of Selection Committee is laid down in Rule 10.

Having gone through the scheme of selection provided under the Rules, it is quite apparent that the matter relating to selection for appointment to the post of Lecturer/Assistant Professor, Education in Sipajhar College has not yet attained finality. The Director who is the appointing authority is yet to consider the recommendation made by the Governing Body. In his affidavit, the Director has stated that he has not yet received the entire set of documents relating to the selection. In so far contention of the petitioner is concerned regarding allocation of marks to respondent No. 7 under the heads of M.Phil. and teaching experience, it is evident that the same is yet to be examined by the appointing authority. In the opinion of the Court, at the stage when the writ petition has been filed, no definitive cause of action can be said to have accrued enabling the petitioner to move the Court. No final decision has been taken by the appointing authority under Rules 5 (7) and 7 of the Rules. Intervention by the Court at this stage would amount to preempting a decision by the designated authority. It is only when a decision is taken as provided under the Rules an unsuccessful candidate can be said to be an aggrieved party and such order of the Director either granting approval or not granting approval to the recommendation of the Governing Body would give rise to a cause of action enabling the aggrieved person to initiate a legal proceeding. Recommendation of the Selection Committee or recommendation of the Governing Body per se would not give rise to a cause of action for initiating a legal proceeding because no finality is attached to such recommendation at a stage prior to acceptance or non-acceptance of the same by the Director. Viewed in that context, the writ petition appears to be pre-mature as the appropriate authority is yet to take a decision one way or the other."

7. This Court in the case of ***Mrinal Kumara Borah(Dr.) v. State of Assam & ors.***[reported in ***2017(1) GLT 737***], had also considered the issue and after noticing the decision in *Sonali Bora Saharia*(supra), concluded as follows:

“At this stage, one may ponder over the role of the Director in the scheme of selection. Though the language of Rule 5(1) of the 2010 Rules is couched in mandatory language by use of the word shall twice, a deeper examination of the same would show that the Director is not to act like a rubber stamp according his approval to the recommendation of the Governing Body in a mechanical manner. The last sentence of Rule 5(1) reads as under:-

“The Governing Body shall recommend this candidate to the Director who shall issue orders of appointment.”

At first blush, it would appear that once recommendation is made by the Governing Body, the Director has no discretion, but to issue order of appointment. Rule 7(a) provides that all appointments either by direct recruitment or by promotion shall be made by the Director on the basis of recommendation of the Governing Body based on the recommendation of the Selection Committee. As per clause (b), the Director is required to communicate his order within 30 days. As per clause (c) of Rule 7 in respect of posts for which UGC has prescribed norms, no candidate shall be recruited without having the required norms.

*Therefore, from a careful and conjoint analysis of the provisions of Rule 5(1) and Rule 7 of the 2010 Rules, what logically emerges is that before according approval to the recommendation of the Governing Body and before issuing order of appointment, the Director should satisfy himself that the selection and recommendation was carried out in accordance with law. He should also satisfy himself that in respect of post like that of the Principal for which UGC has laid down detailed eligibility norms, recommendation of the selected candidate conforms to such norms. This Court in the case of *Dr. Akhil Ch. Kalita Vs. State of Assam*, WP(C) No.6538/2016, disposed of on 04.11.2016, has held that issuance of appointment order by the Director is not an empty formality; the Director of Higher Education before passing such order is required to scrutinize the selection record and only after being satisfied, he is to issue the consequent appointment order.*

Section 15 of the General Clauses Act, 1897 provides that power to appoint any person would include power to appoint ex-officio. Likewise, section 16 of the said Act provides that when a power to make any appointment is conferred on any authority, than unless a different intention appears, the authority having and exercising that power to make appointment shall also have the power to suspend or dismiss any person so appointed. By extending the rationale of the above provision, it can safely be inferred that the power to accord approval would also include the power not to accord approval provided the Director is satisfied that the recommendation is not as per law.

But this is a decision which has to be taken by the Director. Any intervention by the writ court prior to such decision being taken by the competent authority would amount to pre-empting the decision of the designated authority. It is trite that the writ court is not the primary authority to arrive at a finding based on evaluation of facts. That decision has to be taken or such finding has to be reached by the designated authority at the first instance and if a legal challenge is made to such decision or finding, the writ court would then examine the legality and validity of the same. Therefore, it would be in tune with the settled legal proposition to eschew any intervention by the writ court at a stage prior to such decision being taken by the designated authority.”

8. Applying the ratio as available in the cases of ***Sonali Bora Saharia***(supra) and ***Mrinal Kumar Borah***(supra) to the facts of the present case, it is seen that Director, Higher Education Department, Government of Assam, having not considered the matter as required under the provisions of the Assam College Employees(Provincialization) Rules, 2010, and come to a conclusion one way or the other, it can be safely construed that the writ petition is, therefore, premature.

9. Accordingly, the writ petition is hereby disposed of, requiring the Director, Higher Education Department, Government of Assam, to examine the proposal with regard to the appointment to the post of Assistant Professor in the Department of Political Science of MDKG College, Dibrugarh, and thereafter, come to a decision thereon, in accordance with the provisions of the Rules of 2010.

The Director, Higher Education Department, before arriving at his decision with regard to the proposal pertaining to the post of Assistant Professor in the Department of Political Science of MDKG College, Dibrugarh, shall afford an opportunity of hearing to both the petitioner and the respondent No. 5 and the college authorities of the MDKG College, Dibrugarh, to place their respective cases before him.

To facilitate such hearing, the petitioner and the respondent No. 5 are permitted to submit their written submissions before the Director, Higher Education Department, highlighting their respective grievances, if any, and the Director upon consideration of the matter and taking into account, the grievances as may be placed before him, by the parties involved; shall pass a speaking order containing the decision as may

be arrived at by him along with the reasons basing on which the decision was so arrived at. The speaking order so passed, shall be furnished to the petitioner as well as the respondent No. 5. Further processing in the mater shall be as per the decision that would be arrived at in the matter by the Director of Higher Education Department, Assam.

10. It is needless to say that in the event, the proposal for appointment against the post of Assistant Professor in the Department of Political Science of MDKG College, Dibrugarh, is not forwarded by the college authorities to the Director, Higher Education Department, the same shall be forwarded within a period of 7 days from the date of receipt of a copy of this order.

The petitioner is to serve a certified copy of this order to the Director, Higher Education Department, along with her representation and the Director, thereafter, shall fix a date for hearing and issue notices thereof, to the petitioner and the respondent No. 5 as well as the College authorities and thereafter, proceed with the consideration that is required to be made.

The above exercise shall be completed within a period of 2(two) months from the date of receipt of a certified copy of this order.

JUDGE

Comparing Assistant