

GAHC010024272016



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

Case No. : WP(C)/5331/2016

SELAH UDDIN
S/O. MD. KAMAL UDDIN, VILL. LAWGAON, P.O. SOLMARI, DIST. NAGAON,
ASSAM.

VERSUS

THE STATE OF ASSAM AND 8 ORS
REP. BY THE CHIEF SECRETARY TO THE GOVT. OF ASSAM, DISPUR, GHY.-
06.

2:THE PRINCIPAL SECRETARY
TO THE GOVT. OF ASSAM
EDUCATION DEPTT.
DISPUR
GHY.-06.

3:THE COMMISSIONER and SECY.

TO THE GOVT. OF ASSAM EDUCATION SECONDARY DEPTT.
DISPUR
GHY.-06.

4:THE COMMISSIONER and SECY.
TO THE GOVT. OF ASSAM
FINANCE DEPTT.
DISPUR
GHY.-06.

5:THE DIRECTOR

SECONDARY EDUCATION
ASSAM

KAHILIPARA
GHY.-19.

6:THE TREASURY OFFICER

NAGAON
P.O. and DIST. NAGAON
ASSAM.

7:THE SUPDT.-CUM-MEMBER SECY.

RUPAHI SR. MADRASSA and SELECTION COMMITTEE
RUPAHI SR. MADRASSA.

8:THE SELECTION COMMITTEE

RUPAHI SR. MADRASSA
REP. BY ITS CHAIRMAN
P.O. RUPAHI
PIN-782125
DIST. NAGAON
ASSAM.

9:MR. ANISUS ZAMAN
S/O. MOHAMMAD ALI
VILL. KASOKHAITY
P.O. MAGURMARI
DIST. NAGAON
ASSAM

B E F O R E

Hon'ble MR. JUSTICE SANJAY KUMAR MEDHI

Advocate for the petitioner: Shri A. R. Bhuyan, Advocate.

Advocate for respondents : Ms. D. Das Barman, GA,
Shri N. J. Khataniar, SC, Secondary Education,
Shri A. Chaliha, SC, Finance,
Shri S. R. Rabha, Respondent No. 9.

Date of hearing : 20.06.2023

Date of judgment : 20.06.2023

JUDGMENT & ORDER

The legality and validity of a selection process for filling up of the post of LDA in the Rupahi Senior Madrassa in the district of Nagaon is the subject matter of challenge.

2. I have heard Shri A. R. Bhuyan, learned counsel for the petitioner. I have also heard Ms. D. Das Barman, learned State Counsel; Shri N. J. Khataniar, learned Standing Counsel, Secondary Education Department; Shri A. Chaliha, learned Standing Counsel, Finance Department; and Shri S. R. Rabha, learned counsel for the respondent no. 9.

3. The case projected in the petition is that an advertisement was published on 08.12.2015 by the Director of Madrassa Education for filling up of a post of LDA in the Rupohi Senior Madrassa (hereinafter the School) along with other posts. The petitioner, who claims to be eligible for such appointment had applied and the interview was held on 17.12.2015 in which the petitioner claims to have fared well.

4. It is the case of the petitioner that without publishing any merit list, a select list dated 28.02.2016 was published by the Director whereby the respondent no. 9 was appointed in the said post. It is further contended that the respondent no. 9 is inferior to him in academic proficiency and the selection is also filled with anomalies to favour blue-eyed candidates.

5. Shri Bhuyan, the learned counsel for the petitioner submits that the selection process was conducted in violation of the ***Assam Madrassa Education (Provincialisation) Act, 1995*** (hereinafter Act of 1995), more specifically Section 5

(2) thereof. The petitioner also alleges violation of Rule 4 of the ***Assam Secondary Education (Provincilisation) Service Rules, 2003*** (hereinafter Rules of 2003). The learned Counsel submits that it is the specific case of the petitioner that the notification dated 26.11.2015 followed by the advertisement dated 08.12.2015 are in conflict with the qualification criteria under the Rules of 2003. It is further contended that the select list was published by the Director, Madrasa Education which was in violation of Section 5 (2) of the 1995 Act.

6. By drawing the attention of the Act of 1995, Shri Bhuyan, the learned counsel submits that Section 8 gives the power to make Rules and till date Rules are not being framed. He submits that in absence of any Service Rule, the present selection could not have been made and is liable to be declared *void ab initio*.

7. Giving a brief history of the case, the learned counsel for the petitioner has submitted that initially PIL No. 48/2013 was filed regarding insertion of necessary qualifications for teachers of Madrasa in which this Court vide an order dated 22.01.2014 had disposed of the said PIL recording the submission made on behalf of the State that such requirement would be introduced in as a part of the qualification. The aforesaid order dated 22.01.2014 was however extended vide an order dated 02.06.2014 by another 6 (six) months.

8. By drawing the attention of the notification dated 26.11.2015 by which the Selection Board was constituted, the learned counsel for the petitioner submits that such powers as per the Act of 1995 has been conferred to the President of the Managing Committee who would constitute such Selection Board and the impugned notification has not been issued by the President of the Managing Committee but by the Director, Madrasa Education and therefore the entire selection stands vitiated. The learned counsel has also drawn the attention of this Court to an affidavit filed by the Department in another writ petition in which under similar circumstances, it was

stated that the 2003 Rules are being applied.

9. Shri Bhuyan, learned counsel reiterates that Rules have not been framed under the Act of 1995 and in absence of that, the Selection Board is required to be constituted by strictly following the mandate of Section 5 (a) which has not been done. Drawing the attention of this Court to the select list, he submits that in the *viva voce*, while the petitioner has been given 20 marks, the respondent no. 9 has been given 25 marks as a result of which the respondent No. 9 had stole a march over the petitioner.

10. The learned counsel accordingly submits that the selection of the respondent no. 9 be interfered with.

11. *Per contra*, Shri N. J. Khataniar, learned Standing Counsel of the Department has submitted that the present challenge pertains only to the selection and appointment of the respondent no. 9 and in this regard, he drawn the attention of this Court to the prayer of the writ petition.

12. For ready reference, the prayer of the writ petition is extracted herein below:-

“A) set aside/quash the selection process carried out in Rupahi Senior Madrassa pursuant to the Notification dated 26.11.2015 and advertisement dated 08.12.2015 for the post of LDA;

B) set aside/quash the Notice (Select list) dated 28.02.2016 in respect of Selection of Respondent No. 9;

C) revoke/rescind the appointment letter issued in favour of the Respondent No. 9 on the force of the Select list dated 28.02.2016;

D) set aside/quash the appointment of the Respondent No.9 to the post of LDA of Rupahi Senior Madrassa;

E) direct/command the Respondent No. 1, 2, 3 and 5 to initiated a de-novo recruitment process for the post of LDA in Rupahi Senior Madrassa;

F) pass an order in the effect of conducting a high level enquiry in respect of the anomalies and illegalities in the ensuing selection process with proper authority;
G) pass further such order/orders as this Hon'ble Court deem fit and proper;
Upon cause/causes being shown by the respondents and on perusal of records and hearing the parties be pleased to make the Rule absolute."

13. The learned Standing Counsel submits that it is only the selection and appointment of the respondent no. 9 which has been put to challenge whereas the notification dated 26.11.2015 by which the Selection Board was constituted is not the subject matter of challenge. He submits that in absence of such challenge, the present challenge only to the selection and appointment of the respondent no. 9 would be without any basis. As regards, the allegation of more marks being allotted to the respondent no. 9 in the *viva voce*, the learned Standing Counsel submits that the selection does not consist of the marks obtained in *viva voce* alone and only 25 marks was allotted to the said segment. He otherwise submits that allotment of marks were given by the Members of the Committee which was duly constituted vide notification dated 26.11.2015 and in absence of any allegation of bias against the Committee Members by making them party respondents, the said allegation is not liable to be entered into.

14. Shri Khataniar has also raised the issue of waiver by contending that the petitioner had all along participated in the selection initiated vide the advertisement dated 08.12.2015 very well knowing about the constitution of the Selection Board vide notification dated 26.11.2015. There was no challenge at any prior point of time regarding any deficiency in such Selection Board. It is submitted that the petitioner who took a calculated risk cannot be allowed to challenge the selection process only because of the fact that he has come out unsuccessfully.

15. Ms. D. Das Barman, learned Govt. Advocate has endorsed the submission of the

learned Standing Counsel of the Department.

16. Shri S. R. Rabha, the learned counsel for the respondent no. 9 while endorsing and supporting the submission made on behalf of the Department has further submitted that the recruitment has been done in a fair manner as per the notification dated 26.11.2015 which however is not the subject matter of challenge. He further submits that the eligibility and qualification of his client has not been questioned and only his selection has been challenged without any prayer against the notification dated 26.11.2015.

17. In his rejoinder, Shri Bhuyan has referred to an Office Memorandum dated 29.12.2015 issued by the Department laying down the guidelines for recruitment of Junior Assistant in provincialised Higher Secondary and High Schools/High Madrassas.

18. The rival contentions made by the learned counsel for the parties have been duly considered. The primary allegation as would appear from the writ petition is with the selection and appointment of the respondent no. 9 as LDA of the School. The prayer which has been quoted above would show that the challenge is confined only to the selection and appointment of the respondent no. 9 and there is no challenge to the notification dated 26.11.2015 by which the Selection Board was constituted.

19. In view of the above, this Court is actually not required to go into the aspect of the legality of the said notification. However, since an argument has been sought to be developed in the Court during the hearing, this Court, in the interest of justice, has also decided to take up the issue.

20. The primary allegation is that the notification dated 26.11.2015 is in teeth of the provision of Section 5 (2) of the Act of 1995. For the sake of convenience, Section 5 (2) is extracted herein below:-

“(2) The selection for recruitment to any post, teaching or non-teaching, in a Madrassa

except the post of Superintendent of a Senior Madrassa and Principal of a Title Madrassa or an Arabic College shall be made by a Selection Board, which shall be constituted by the President of the Managing Committee or the Governing Body, as the case may be, of the Madrassa for each such Madrassa, as stated below:-

(i) President of the Managing Committee of the Senior Madrassa or the President of the Governing Body of the Title Madrassa or the Arabic College, as the case may be- Chairman

(ii) Superintendent of the Senior Madrassa or the Principal of the Title Madrassa or the Arabic College, as the case may be- Member-Secretary,

(iii) Two academicians to be selected by the Managing Committee of the Senior Madrassa from outside the Managing Committee or Governing Body of the Title Madrassa or the Arabic College from outside the Governing Body, as the case may be- Member

(iv) Two members selected by the Managing Committee of the Senior Madrassa from the Managing Committee or selected by the Governing Body, of the Title Madrassa or the Arabic College from the Governing Body, as the case may be- Members

(v) One representative to be nominated by the Deputy Director of Madrassa Education, Assam –Member.”

21. Juxtaposed, let us have a look that the constitution of the Selection Board vide the notification dated 26.11.2015. On a reading of both the provision in the Act and the notification would show that the Selection Board constituted is in substantial compliance of the requirement of Section 5 (2).

22. The learned counsel for the petitioner has emphasized that the notification is issued by the Director of Madrassa Education and not by the President of the Managing Committee as per 5 (2) of the Act. The aforesaid contention is not liable to be acceptable as no prejudice, whatsoever has been suffered by the petitioner in the manner of constitution of the Board which consist of Members and is in tune with the requirement of Section 5 (2). Further, the notification is issued by none other the Director of Madrassa Education which the petitioner was fully aware and had never made any protest or objection. The petitioner having submitted to the jurisdiction of

the Board which was constituted vide the notification dated 26.11.2015 and had all along participated in the selection process cannot be allowed to make a volte-face and challenge the selection only on the ground that the Board was constituted by an authority not stipulated by the Act. It is a settled law that normally, an unsuccessful candidate is not allowed to challenge a selection only because of the fact that he had come out unsuccessful.

23. In the case of ***Madan Lal & Ors. Vs State of Jammu & Kashmir*** reported in ***(1995) 3 SCC 486*** it has been laid down that unsuccessful candidate who had taken a calculated risk of participating in the selection process is not permitting to challenge the same only because he had come out unsuccessful.

24. The case of ***Madan Lal*** (supra) has been followed in the later cases including the case of ***K.A. Nagamani vs. Indian Airlines and Ors. reported in (2009) 5 SCC 515***, wherein the following observations have been made:-

“54. The Corporation did not violate the right to equality guaranteed under Articles 14 and 16 of the Constitution. The appellant having participated in the selection process along with the contesting respondents without any demur or protest cannot be allowed to turn round and question the very same process having failed to qualify for the promotion.

55. In Madan Lal vs. State of J&K this Court observed: (SCC p.493, paras 9-10)

‘9. ... It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair...

10. Therefore, the result of the interview test on merits cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful.’ ”

25. This Court had also noticed that in the affidavit filed by the respondent no. 9, the select list has been annexed as Annexure-3. From the same it reveals that the

petitioner was in the 3rd position and there is another candidate, Moinul Rahman in the 2nd position below the respondent no. 9, who was placed at 1st position. This Court is of the opinion that if the stand taken by the learned counsel at the time of hearing with regard to the validity of the selection process initiated by the notification dated 26.11.2015 is to be accepted, the other selected candidate is also liable to be made a party which has not been done. Further, even assuming that the case of interference would have been made out, only the selection of the respondent no. 9 would be interfered in which case also the petitioner will not get any fruits as there is another candidate above him and therefore this Court is of the opinion that the present is not a fit case for interference.

26. The writ petition accordingly stands dismissed.

JUDGE

Comparing Assistant