

GAHC010106312016



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

Case No. : WP(C)/540/2016

SK. MAHBUBUL KARIM
S/O ABDUL KASHEM SHEIKH VILL- BAMUNIRVITA, P.O.JALESWAR DIST.
GOALPARA, ASSAM, PIN - 783132.

VERSUS

THE STATE OF ASSAM AND 5 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
EDUCATION SECONDARY, DEPARTMENT, DISPUR, GUWAHATI-6.

2:THE DIRECTOR OF SECONDARY EDUCATION

ASSAM
KAHILIPARA
GUWAHATI-6.

3:THE INSPECTOR OF SCHOOLS

GDC
GOALPARA
P.O. and DIST. GOALPARA
ASSAM. PIN -783101.

4:THE SELECTION COMMITTEE OF JALESWAR GIRLS HIGH SCHOOL

REP. BY ITS PRESIDENT NAMELY AFTAB UDDIN MOLLAH
VILL- SUPARIBHITA
P.O. TULSIBARI DIST. GOALPARA
ASSAM
PIN -783132.

5:THE HEAD MASTER CUM MEMBER SECRETARY OF THE

SELECTION COMMITTEE
JALESWAAR GIRLS HIGH SCHOOL
JALESWAR
PO.JALESWAR
DIST. GOALPARA
ASSAM PIN - 783132.

6:SALIM UDDIN AHMED
S/O HAZRAT ALI MONDAL VILL and P.O. JALESWAR DIST. GOALPARA
ASSAM. PIN - 783132

Advocate for the Petitioner : MD.A HUSSAIN

Advocate for the Respondent : MR.B CHAKRAVARTY R- 4and5

BEFORE
HON'BLE MR. JUSTICE KALYAN RAI SURANA
ORDER

Date : 02-05-2023

Heard Mr. U.K. Nair, learned Senior Counsel assisted by Mr. R. Islam, learned counsel for the petitioner; Mr. R. Mazumdar, learned Standing Counsel, Secondary Education Department representing the respondent nos. 1, 2 & 3; Mr. B. Chakraborty, learned counsel for the respondent nos. 4 & 5; and Mr. G.N. Sahewalla, learned senior counsel assisted by Mr. J. Ahmed, learned counsel for the respondent no. 6.

2. The petitioner and the respondent no. 6 had both applied for the post of Junior Assistant/LDA in Jaleswar Girls' High School. The authorities had issued call letter to the petitioner to appear in the written test on 20.12.2015 which was later on, re-fixed on 21.01.2016 for the written test and 24.01.2016 for the computer and oral test. The case of the petitioner is that although he had fared well in the written test, English typing and computer test, but he was given a score of 0 (zero) in the oral interview for which his total score was 44

and that the respondent no. 6 was awarded a score of 10 (ten) marks in the oral interview and his total score came to 44.5. Therefore, as the score given in oral test was 10 marks which gave an advantage of a score of 0.5 marks to the respondent no. 6, this writ petition has been filed with a prayer for setting aside and quashing of the Select/Merit List dated 24.01.2016 issued by the Selection Committee of Jaleswar Girls' High School, Jaleswar and to direct the respondent authorities to appoint the petitioner to the post of Junior Assistant/LDA of the said school.

3. The learned senior counsel for the petitioner has referred to the provisions of Rule 8(a)(i) and Rule 8(a)(iii) of the Assam Secondary Education (Provincialised) Service Rules, 2003 and has submitted that viva voce test is not envisaged for the post of Junior Assistant/LDA, which is a Class IV post. Referring to the statements made in the affidavit-in-reply by the petitioner, it is submitted that after complaints against the school authorities for the selection of Junior Assistant/LDA, the Deputy Commissioner/District Magistrate, Goalpara had taken up the proceeding and by order dated 11.02.2016, found fault at the award of marks in the oral interview and opined that at least 1 mark should have been given to all the candidates for the personal appearance before the Selection Committee after crossing all selection criteria and accordingly, the said authority had directed that 1 mark be awarded to the three candidates, who were otherwise awarded 0 (zero) mark in the viva-voce test. The learned counsel for the petitioner has referred to the affidavit-in-reply filed by the writ petitioner on 21.03.2017 and has submitted that on 29.01.2016, the proceedings before the Deputy Commissioner/District Magistrate, Goalpara, the Selection Committee members namely, Abu Taleb, In-charge Head Master-cum-member Secretary, Shariful Islam, Assistant Teacher and Abdul Kader Khan,

Parent Member of the SMDC of Jaleswar Girls' High School had made a confessional statement on 29.01.2016 that by mistake they had awarded 0 (zero) marks to the candidates including the petitioner and awarded 10 marks to the 2nd candidate who had given correct answers to the questions put to him. It is submitted thereafter that there was change in stand by the Headmaster in an affidavit filed on 08.05.2017 on behalf of the respondent nos. 4 and 5 to the effect that the said statement was given before the Officer, in the rank of Additional Deputy Commissioner to admit having committed wrong or would face trouble in their service. It is submitted that such a statement was made under threat and coercion is not supported by the stand taken in the pleadings of W.P.(C) no. 2331/2016.

4. Per contra, the learned counsel for the respondent nos. 4 and 5 has submitted that all the candidates were duly informed that they would have to undergo a written test, computer test and interview and it is submitted that interview is envisaged under Rule 4(a)(i). Referring to the documents appended to the affidavit-in-opposition filed by the respondent nos. 4 and 5 on 09.03.2017, it is submitted that the written test, computer test, interview were held on 24.01.2016 at P.R. Govt. H.S. and M.P. School, Goalpara which was an independent venue and that the said test and interview was held under the direct supervision of the Inspector of Schools, Goalpara. It is submitted that the stand of the respondent nos. 4 & 5 in their affidavit-in-opposition is to the effect that the petitioner had misbehaved during the interview process and could not answer the questions and had left the interview mid-way, it is permissible to award 0 (zero) mark. In this connection, reliance is placed in the case of *Hoshiar Singh vs. State of Haryana, 1993 (Supp.4) SCC 377*.

5. It is further submitted that this Court in the case of *Leena Borah vs. State of Assam and others*, 2017 (2) GLJ 451, has held that the Deputy Commissioner is not the competent authority in the matter of selection of non-teaching staff under the provisions of the Assam Secondary Education (Provincialised) Service Rules, 2003, and therefore Deputy Commissioner/District Magistrate, Goalpara has no authority to take up the proceedings and issue a direction to award 1 mark to the petitioner and two others. Referring to the case of *Suman Kanti Pal vs. State of Tripura and others*, 2016 Legal Eagle(Tri) 311, and *Jahiruddin Ahmed vs. State of Assam and others*, (2014) 4 GLR 783, it is submitted that having subjected himself to interview, it is not open to the petitioner to turn around and question the selection process of having been awarded marks in viva-voce test.

6. The learned senior counsel for the respondent no. 6 has made submissions similar to the submissions made by the learned counsel for the respondent nos. 4 & 5.

7. In the present case in hand, the respondent nos. 4 and 5 had filed an affidavit-in-opposition on 09.03.2017. In para 5 thereof, it has been specifically stated that the petitioner had failed to give proper reply during the course of interaction in the interview process and started to behave in a very indecent manner and was immodest towards the members of the Selection Committee and had also left the interview process mid-way. The statements made in the paragraph 5 is quoted below :

"That in response to the statements made in paragraph 5 of the writ petition, the answering Respondents vehemently deny that the petitioner have performed well in the interview process and that he answered all the questions. In fact the petitioner's performance and behavior was totally different than what he has stated in the writ

petition. The petitioner failed to give proper reply during the course of interaction in the interview process. Having failed to give proper reply to the questions put to him, the petitioner started to behave in a very indecent manner and was immodest towards the members of the selection committee members. Having failed to give proper reply, the petitioner left the interview process in the mid way which was unbecoming for any employee towards his employer. The petitioner was arrogant in his behavior and attitude and thus the selection committee, finding the Respondents No.6, who has given correct reply to the questions as queries that were put to him and thus evaluating all the pros and cons, selected the Respondent No. 6 at merit position one."

8. In the affidavit-in-reply filed by the petitioner on 21.03.2017, the petitioner has produced the translated copy of the purported confessional statement signed by Abu Taleb, Shoriful Islam and Abdul Kader Khan. The text of the English translated copy of the purported confessional statement is quoted below :

"Sir,

With due respect and humble submission we beg to state that the oral test for the post of Jr. Assistant (L.D.A.) of Jaleswar Girls' High School was held at P.R.Govt. H.S.School. In the said test we the four people being unaware about the guideline and also in hurriedness, we could not take the decision in proper manner and hence we have awarded "0" (zero) mark to the 1 candidate along with two others as they could not answer properly to the question put to them and hence by mistake we awarded "0" (zero) mark to them but in fact some marks ought to have been given to them. On the other hand we awarded 10 marks to the 2nd candidate who had given correct answer to the questions put to him.

It is therefore prayed before your honour that kindly forgives us for our aforesaid mistake and also conveys our consent to correct the same."

9. Thereafter, Abu Taleb who was the Headmaster of the said school filed another affidavit on 08.05.2017 wherein it has been stated to the effect that they had made the confessional statement under duress. The statement made

in paragraph 2 thereof is quoted below :

"That the deponent begs to state that after the selection process was completed following all the due process, the matter was taken to the District Magistrate, Goalpara on some alleged irregularities and the school authority were asked to appear before the Deputy Commissioner, Goalpara. The deponent therefore appeared as asked for and on his appearance along with two members, the deponent and the two members were asked as why the writ petitioner was given "zero" marks in interview process and to which the deponent and the members replied that the writ petitioner could not give answer to the questions that were put to him and he also misbehaved with the members of the selection committee. The officer present there, who was probably of the rank of Additional Deputy Commissioner, the name of whom is not known to the deponent, then spoke in a very high pitch and asked the deponent and the members of the selection committee as to whether they have with them any law to show that "zero" marks can be given in interview to which the deponent and the members replied that they have not come along with such law to show "zero" marks can be given. To this, the said officer asked the deponent and the members of the selection committee to write down that they have committed wrong in allotting "zero" marks or they will face trouble with their service. Thus being helpless and as the speech of the officer was more in the nature of command, the deponent and the members were left with no alternative than to give the writing which was thus given under duress and the same was therefore not given voluntarily."

10. The question as to whether the proceedings before the Deputy Commissioner/District Magistrate, Goalpara was permissible or not would be adverted to later.

11. From the copy of the Final Merit list, 2016 (Annexure-5 of the writ petition), it appears that 4 (four) persons were in the Selection Committee namely the President of the Selection Committee, Member Secretary of the Selection Committee, one Abdul Kader Khan and Shoriful Islam. Out of the four

members of the selection committee, three of them namely, Abu Taleb, Shoriful Islam and Abdul Kader Khan had admitted that they had given 0 (zero) mark to the petitioner by mistake. The said statement was given before the Deputy Commissioner/District Magistrate, Goalpara on 29.01.2016. The said statement has not been retracted at an earlier point of time in an appropriate manner. Therefore, it is too late for Md. Abu Taleb, the respondent nos. 4 and 5 to retract the said statement by filing an affidavit on behalf of the respondent nos. 4 and 5 on 08.05.2017.

12. The reason for not accepting the retraction made in the affidavit-in-opposition filed on behalf of the respondent nos. 4 and 5 on 08.05.2017 is because the retraction, if any, can only be attributed to Md. Abu Taleb but he cannot make a retraction on behalf of the Shoriful Islam and Abdul Kader Khan as the said affidavit filed on 08.05.2017 does not contain authorisation by Shoriful Islam and Abdul Kader Khan to retract the statement given on 29.01.2016 before the Deputy Commissioner/District Magistrate, Goalpara.

13. In the issue of the Deputy Commissioner/District Magistrate, Goalpara taking up the proceedings in the matter of selection to the post of Junior Assistant/LDA in Jaleswar Girls' High School, this Court does not find any provision in the Assam Secondary Education (Provincialised) Service Rules, 2003. Therefore, the proceedings drawn up by the Deputy Commissioner/District Magistrate, Goalpara in connection with the selection of Junior Assistant/LDA would be without jurisdiction. In this regard, this Court is inclined to follow the decision of this Court in the case of *Leena Borah (supra)*. Therefore, the proceedings before the Deputy Commissioner/District Magistrate, Goalpara being *non est* in the eye of law. The inherent lack of jurisdiction could

also vitiate the confessional statement made by the three members of the Selection Committee on 29.01.2016.

14. In so far as the stand taken by the respondent nos. 4 and 5 regarding the conduct of the petitioner in the interview held on 24.01.2016 is concerned, the Court finds that in the final merit list, 2016 prepared on 24.01.2016, although the four members of the Selection Committee had put their signatures, but none of the Selection Committee members made any remark to the effect that the petitioner had misbehaved with them, or did not answer their questions, or that he had left the interview process mid-way. As the final merit list dated 24.01.2016 does not contain any such remark, the stand taken in the affidavit-in-opposition filed by the respondent nos. 4 and 5 merely to bring an improvement by way of an affidavit is not permissible. In the absence of any primary evidence to the effect that there is any recorded remark in the interview sheet that the petitioner had misconducted in the manner as stated in paragraph 5 of the affidavit-in-opposition filed by the respondent nos. 4 and 5, such a stand has to be discarded, being contrary to any document on record.

15. Under such circumstances, the Court is inclined to hold that the final merit list prepared on 24.01.2016 does not contain any justification of award of 0 (zero) mark to the petitioner, who had otherwise fared better than the respondent no. 6 in the written test, English typing test, computer test, oral interview and total, where he had secured $25 + 05 + 14 + 0 = 44$ and the marks secured by the respondent no. 6 was $23 \frac{1}{2} + 03 + 08 + 10 = 44.5$.

16. The learned counsel for the respondent nos. 4 and 5 has referred to the case of *Hoshier Singh (supra)* where 0 (zero) mark was granted by the interview board to the appellant therein. In the case in para 13 thereof, the

Hon'ble Supreme Court of India has observed as follows :

"13. As regards rejection of candidates on the ground that they had misbehaved at the time of interview, we are unable to agree with the High Court that the Board could not reject a candidate on the ground that he had misbehaved at the time of interview. In the process of selection, the Board is required to adjudge the suitability of the candidate for appointment on the post of which selection is being made. The Board is entitled to take note of the behaviour of the candidate at the time of interview and if it is found that the behaviour is such as to render him not suitable for holding the post for which selection is to be made, the Board would be perfectly justified in rejecting him for appointment on the post. If the course suggested by the High Court is adopted, namely, that the Board may give zero mark to the candidate who misbehaves at the time of interview, the result would be that a candidate whose behaviour was such as to render him unfit for appointment to the post, may have to be selected and recommended for appointment on the basis of the marks secured by him in the written test although in view of his behaviour at the time of interview the Board found that he is not suitable for such appointment. The suitability of a candidate for appointment has to be considered on the basis of an overall assessment of his performance during the process of selection. The conduct and behaviour of the candidate at the time of interview is a relevant factor in making such assessment. The absence of any provision in the Rules prescribing minimum marks for interview does not mean that the Board is bound to select a candidate who is found to be unsuitable for appointment by the Board on account of his behaviour at the time of interview. We do not propose to go into the question as to whether the candidates who have been rejected by the Board on the ground of misbehavior had misbehaved at the time of interview since the selection is liable to be quashed for the reasons mentioned earlier."

17. In this regard, the final merit list dated 24.01.2016 does not contain any endorsement to the fact that the petitioner had misbehaved at the time of interview and taking into note the fact that the respondent nos. 4 and 5 have not been able to produce any document to show that the members of the

Selection Committee had made any remark on 24.01.2016 that the petitioner had misbehaved with them, not given proper answers to the questions and left the interview mid-way, the stand taken in the affidavit-in-opposition to introduce such a story is held to be contrary to the document of selection on record i.e. the final merit list dated 24.01.2016.

18. Accordingly, the Court is inclined to hold that the 0 (zero) mark granted to the petitioner in the oral interview could not be justified by the respondent nos. 4 and 5. Accordingly, in so far as the viva-voce test is concerned, it would be appropriate to remand the matter to the Selection Committee of Jaleswar Girls' High School to hold a fresh interview for the said post by inviting all the candidates.

19. In so far as the plea taken by the learned senior counsel for the petitioner that the Assam Secondary Education (Provincialised) Service Rules, 2003 does not envisage holding of viva-voce test for the post of Junior Assistant/LDA, the Court finds that on a conjoint reading of Rule 4(a)(i) and Rule 4(a)(iii), for the purpose of selection of Lower Division Assistant, requirement is to hold written test along with computer typing test and that the written test along with viva-voce test is envisaged for Class IV post. The provision of Rule 4(a)(i) of the Assam Secondary Education (Provincialised) Service Rules, 2003 are quoted below :

"Recruitment to the Cadre of Lower Division Assistant under Rule 3(2)(a)(ii) and in Class IV posts under Rule 3(2)(b) in the office of the High, Higher Secondary, Higher Secondary and Multipurpose Schools shall be made directly by the appointing authority from the select list prepared by the School Selection Committee constituted under the provisions of Rule 8(c) on the basis of test and interview."

20. The provision of Rule 4(a)(iii) of the Assam Secondary Education (Provincialised) Service Rules, 2003 are quoted below :

"After receipt of the list of candidates from District Employment Exchange the Principal or the Head master shall inform the School Selection Committee to hold the written test for selection of Lower Division Assistant along with typewriting test and written test along with viva-voce for class IV posts in consultation with the Inspector of Schools concerned".

21. Be that as it may, in the present case in hand, it is noted that on 15.01.2016, a notice was hanged in the notice board envisaging viva-voce test for the post of Junior Assistant/LDA. Therefore, as the requirement to hold the viva-voce test was never objected to by any candidate, the Court is not inclined to waive off the requirement of holding an interview though the same is not strictly in accordance with Rule 4(a)(iii) quoted herein before.

22. In view of the discussions above, this writ petition stands partly allowed by setting aside and quashing of the impugned Select/Merit list dated 24.01.2016 prepared by the Selection Committee of Jaleswar Girls' High School. The authorities of the Jaleswar Girls' High School is directed to hold a fresh viva-voce test of the candidates whose names appeared in the Final Select list dated 24.01.2016 by way of a fresh notice by fixing a venue and time for the interview. The interview Board shall be constituted in accordance with law with prior intimation to the competent authority. Such exercise shall be completed within an outer period of 2 (two) months from the date of this order.

23. As a matter of abundant caution, the petitioner shall serve a certified copy of this order to the office of the Head Master, Jaleswar Girls' High School within a week.

24. It is provided that while conducting the fresh viva voce test, the respondent authorities and the Selection Committee/Board shall not be influenced with any observation contained in this order.

JUDGE

Comparing Assistant