



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

W.A No.411 of 2013

1. Sri Nirod Kumar Das

S/O:- Late Gajen Chandra Das
Village:- Santipur, P.O.:- Hajo,
P.S:- Hajo, District:- Kamrup, Assam

2. Sanjay Kumar Mandal

S/O:- Sri Madhab Chandra Mandal
Bakrapara, (Nutun Bazar), P.O:- Basistha Chariali,
District:- Kamrup, Assam

3. Satyendra Kumar Kakati

S/O:- Sri Deban Chandra Kakati,
Village:- Garali (Near APBN Camp)
P.O:- Suakuchi, District: Kamrup, Assam

4. Md. Mahidul Islam

S/O:-Abdul Hamid
Village:- Alipub, P.O.:- Baihata Chariali,
P.S.:- Baihata Chariali
District:- Kamrup, Assam

5. Md. Khalilur Rahman

S/O:- Ubed Ali
Village:- Niran Chuba, P.O:- Patharighat,
P.S.:- Sipajhar
District:- Darrang, Assam

6. Sri Deepak Kurmi

S/O:- Sri Ghanshyam Kurmi,
Village:- Chaliha Nagar, Sect. I,
By Lane No:-4, P.O:- Tinsukia,
P.S.:- Tinsukia, District:- Tinsukia, Assam

7. Arup Lahkar

S/O:- Hemanta Lahkar
P.O:- Fatasil Ambari, Guwahati:- 781 025
District:- Kamrup, Assam

8. Prasanta Loying

S/O:- Late Bhola Ram Loying
Village:- Uppertemara Gaon
P.O:- Badalipar, P.O:- Bokakhat,
District:- Golaghat, Assam

.....Appellants

-Versus-

1. Md. Musharraf Hussain Choudhury

S/O: Late M.H. Siddique Hussain Choudhury,
R.O:- Sonai Path, Guwahati-781 005,
District, Kamrup, Assam,

2 Syeda Roushan Araa Begum,

D/O:- M.A. Hannan
Ghandibasti, Near Ghandi Basti Sports Club,
Guwahati:- 781 003,
Dist:- Kamrup, Assam

3 Jayanta Bora

S/O:- Harendra Nath Bora
Ward No:- 10, Mangaldoi,
District:- Darrang, Assam, PIN: 784 125

4. The State of Assam,

represented by The Commissioner and Secretary,
Labour and Employment Department to the Government
of Assam, Dispur, Guwahati-6

5. The Commissioner and Secretary,
Labour and Employment Department,
to the Government of Assam, Dispur,
Guwahati-6

6. The Accountant General (A & E),
Assam, Maidamgaon, Guwahati-29

.....Respondents

- B E F O R E -
HON'BLE THE CHIEF JUSTICE (ACTING) MR. N. KOTISWAR SINGH
HON'BLE MR. JUSTICE SOUMITRA SAIKIA

Advocate for the appellants : Mr. D. Das, Sr. Advocate assisted by
Ms. S. Sharma, Advocate

Advocate for the respondents : Mr. D. Nath, Sr. Government Advocate
assisted by Ms. R. Gogoi, Advocate

Date of Judgment & Order: 06.02.2023

JUDGMENT AND ORDER(ORAL)

[N. Kotiswar Singh, CJ (Acting)]

Heard Mr. D. Das, learned Senior counsel assisted by Ms. S. Sharma, learned counsel for the appellants. Also heard Mr. D. Nath, learned Senior Government Advocate assisted by Ms. R. Gogoi, learned counsel for the State. None appears for the private respondents.

2. We have gone through the records as to the reason why the respondents are not present before this Court.

3. The respondent No. 1, who was represented by a counsel whose name is also reflected in the cause list has not appeared before the Court today. Similarly, respondent No. 2 was also represented by a counsel whose name is also reflected in the cause list has not appeared today. Since they have not opted to appear before this Court inspite of their names being shown, there is no legal impediment to proceed with the matter.

4. As regards the respondent No. 3, the Office note dated 15.02.2022 mentions that notice can be deemed to have been served upon respondent No. 3.

5. Under the circumstances, we are of the view that inspite of absence of the private respondents, the matter can be disposed of at this stage.

6. Coming to the facts of the case as may be relevant for the disposal of this appeal, it is noticed that the State authorities i.e., the Labour and Employment Department, Government of Assam had initiated a recruitment process for appointment to 10 Nos. of posts

of Pharmacists along with other posts of Laboratory Technician, Staff Nurse, ANM and Dresser vide Advertisement dated 04.02.2006. The said Advertisement was issued in respect of those candidates who were registered with the Employment Exchange.

7. In other words, the said Advertisement was not by way of general public advertisement inviting applications from all the eligible candidates, but for only those candidates who were registered with the employment exchange.

8. Be that as it may, the present appellants who were sponsored along with 95 candidates including respondent Nos. 1 & 3 took part in the recruitment process. The present eight appellants along with two others were selected for appointment to the 10 posts of Pharmacists and accordingly were appointed vide order dated 13.07.2006.

9. It appears that not only the said 10 posts of Pharmacists but other posts advertised along with pharmacist were also filled up in the same year with which we are not concerned with, as the present appeal is confined only to the post of Pharmacist.

10. It appears that after the appellants were appointed, their appointments were put to challenge by the three writ petitioners, who are the private respondents herein, in W.P.(C) No. 3619/2006 and this Court declared that the appointment of the private respondents therein, the appellant herein, cannot be legally sustained and accordingly, the learned Single Judge directed the authorities to go for a fresh selection process by re-advertising the posts in terms of the Rule 13 of the Pharmacist Service Rules, 1986.

11. The reasons for allowing the said writ petition are as follows.

The learned Single Judge while allowing the writ petition held that the Assam Pharmacist Service Rules, 1986 which lay down the method for recruitment to the post of Pharmacist were not followed.

Secondly, the learned Single Judge also found that the said selection process was confined only to the candidates sponsored by the Employment Exchange and was not open to all the candidates which was violative of Article 14 and 16 of the Constitution.

12. While coming to the aforesaid conclusion, the learned Single Judge also referred to the decision of Hon'ble Supreme Court in

Excise Superintendent Malkapatnam, Krishna District, A.P.

Vs. K.B.N. Visweshwara Rao, in (1996) 6 SCC 216, which

declared that restricting the selection only to the candidates sponsored by Employment Exchange is improper and wider competition should be ensured by publication of the recruitment notice in newspapers with wide circulation as to be consistent with the requirements of Article 14 & 16 of the Constitution.

13. The aforesaid decision of the learned Single Judge rendered on 31.10.2013 in W.P(C) No. 3619/2006 has been put to challenge before this Court.

14. Mr. D. Das, learned Senior counsel appearing for the appellants has raised the following grounds in assailing the said decision of the learned Single Judge.

First of all, it has been submitted that it will not be correct to say that the Assam Pharmacist Service Rules, 1986 would hold the field for an appointment to the post of Pharmacist.

15. It has been submitted that when the said posts of Pharmacists were advertised, these were under the Department of

Labour and Employment and not under the Health and Family Welfare.

16. It has been submitted that the said aforesaid Pharmacist Service Rules, 1986 were applicable in respect of the Health and Family Welfare Department, and not applicable in respect of the Labour and Employment Department without there being any decision on the part of Labour Department to adopt the said rules.

17. Therefore, in absence of adoption of the aforesaid Service Rules of 1986 by the Labour and Employment Department, there cannot be any automatic application of the aforesaid rules which are meant for another Department. To that extent, the finding of the learned Single Judge is not in accordance with law.

18. It appears that learned Single Judge passed the order as there was no affidavit filed by the State as regards the extant Service Rules which are applicable in the Labour and Employment Department. This aspect however, was subsequently clarified by the Department in the appellate stage, after a direction was issued by this Court to clarify as to the applicability of the aforesaid Pharmacist Rules, 1986.

19. In this regard, the State Government has filed an affidavit on 17.12.2022 wherein it has been clarified in Paragraph-10 to the effect that the Assam Pharmacist Service Rules, 1986 govern the service conditions of the Health and Family Welfare Department and are not applicable to the employees of the Labour Welfare Department and these posts of Pharmacists which have been filled up come under the Labour and Welfare Department to which the said Rules are not applicable.

20. Mr. D. Nath, learned Senior Government Advocate has also stated that when the said advertisement was issued, there were no service rules in existence nor the said service Rules of 1986 were adopted in the Labour and Welfare Department.

21. Under the circumstances, we are of the view that the findings of the learned Single Judge that the Assam Pharmacist Service Rules, 1986 were applicable and the provisions thereof were violated, does not appear to be correct.

22. We will now consider second limb of the ground in setting aside the appointment of the appellants which is on the ground that though the names of the appellants and other candidates were

sponsored by the Employment Exchange, there was no wide publication inviting applications from other eligible candidates.

23. As regards the decision of the Hon'ble Supreme Court in *Excise Superintendent Malkapatnam, Krishna District, A.P. (Supra)* referred to by the learned Single Judge, there cannot be any dispute about the proposition of law that in matters of public employment, necessary and wide publication should be adopted so as to enable all the eligible candidates to apply for as it would be in tune with the requirement of Article 14 and 16 of the Constitution of India.

24. However, Mr. D. Das, learned Senior Counsel has referred to the decision of the Hon'ble Supreme Court in *Union of India and Ors. Vs. N. Hargopal and Ors* reported in (1987) 3 SCC 308, wherein it was observed by the Hon'ble Supreme Court that in absence of a better method of recruitment, any restriction that employment in Government Department should be through the medium of employment exchange does not offend Article 14 and 16 of the Constitution. Accordingly, it has been submitted that merely because it was not widely publicized as held by the Hon'ble Supreme Court in *Excise Superintendent Malkapatnam, Krishna District, A.P. (Supra)*

and merely because the recruitment process was restricted to the candidates sponsored by the Employment Exchange, it cannot render any such appointment to be illegal in view of the decision in ***N. Hargopal (Supra)***.

25. We have given our anxious consideration on this aspect as dwelt with in *Excise Superintendent Malkapatnam, Krishna District, A.P. (Supra)*. The Hon'ble Supreme Court reiterated that in matters of public employment widest publication must be adhered to so that there will be equality of opportunity in the matter of employment available to all eligible candidates.

26. However, while going through the said decision, we have noted that in the said case, the observation was made by the Hon'ble Supreme Court in respect of appointment to 723 posts through the medium of employment exchange and some candidates who applied independently without the medium of employment exchange were not considered. Accordingly, they challenged the recruitment process for the said 723 posts before the State Administrative Tribunal. The State Administrative Tribunal held that sponsorship of the candidates through the medium of employment

exchange was valid and not violative of Article 14 and 16 of the Constitution. But the Hon'ble Supreme Court observed that many of the candidates came to be selected in the meantime and they were also appointed. The Hon'ble Supreme court also considered its earlier decision in *N. Hargopal (Supra)* and held that it would be consistent with the principles of fair play, justice and equal opportunity if all eligible candidates are considered and not restricted only to the candidates sponsored by Employment Exchange. However, the Hon'ble Supreme Court did not interfere with the appointments already made.

27. Though we are fully in agreement with the principle followed by the learned Single Judge in terms of the decision of the Hon'ble Supreme Court in *Excise Superintendent Malkapatnam, Krishna District, A.P. (Supra)* that Article 14 and 16 of the Constitution demand that equal opportunity be given to all eligible candidates and not restricted to the candidates sponsored by Employment Exchange while making appointment to public posts.

28. In the present case, what we find is that the appellants have been serving since 2006 continuously though their services

were held to be not legally sustainable by the learned Single Judge in its order dated 31.10.2013. The said impugned Judgment was stayed by the Division Bench on 09.12.2013, and the said stay order continues till date, by virtue of which the present appellants have been continuing as Pharmacists since 2006 till now. Under circumstances, though the appellants' appointments as Pharmacists may not be strictly in terms of the law laid down by the Hon'ble Supreme Court in *Excise Superintendent Malkapatnam, Krishna District, A.P. (Supra)*, yet keeping in view that they have been serving continuously since 2006, we are reluctant to interfere with their actual appointments.

29. That apart, we also have observed that the learned Single Judge while declaring their appointments as not legal, has observed that even the Assam Pharmacist Services Rules, 1986 require issuance of advertisement for direct recruitment and it does not permit appointment by limiting the competition only to those who are sponsored by the Employment Exchange. If the Pharmacist Rules were indeed applicable, the said opinion of the learned Single Judge would be beyond impeachment. However, in view of our

finding that the said Assam Pharmacist Service Rule, 1986 will not be applicable in the recruitment to the said posts of Pharmacists under the Labour and Employment Department, the aforesaid observation will not be applicable in the present case.

30. Mr. Das, learned Senior Counsel for the appellants also submitted that a Cabinet decision was taken in 1998 by which 27 dispensaries and one hospital which were under the State ESI Scheme, which was earlier administered by the Health and Family Welfare Department were subsequently brought under the administrative control of the Labour and Employment Department with effect from 15.08.1984 and a decision was taken by the Cabinet on 05.04.1996 to create an independent separate cadre of medical and para-medical staff in the ESI Scheme. Following the aforesaid creation of separate cadre, it became necessary to frame service rules for the medical staff, doctors to regulate the recruitment and condition of service and accordingly, draft service rules were framed called Assam ESI Doctors Service Rules, 2000.

31. From the above, it is clear that the authorities sought to prepare separate service rules without following the earlier service

rules which were governing the Health and Family Welfare Department.

32. Mr. D. Nath, learned Senior Government Advocate has also submitted that after the bifurcation there was an urgent need to fill up the 10 nos. of Pharmacists along with other posts under the then Labour and Employment Department (presently Labour and Welfare Department) for which the then Labour and Employment Department vide letter dated 04.02.2006 intimated the Director of Employment & Craftsman Training, Assam, Guwahati to notify the vacancies to the Employment Exchanges in a notice board of the Employment Exchanges of various districts of Assam and thereafter not only the present appellants but some other candidates including the respondents No. 1 & 2 in the writ petition appeared.

33. Thus, though the posts were not widely publicized as contemplated and held by Hon'ble Supreme Court in *Excise Superintendent Malkapatnam, Krishna District, A.P. (Supra)*, the fact remains that the recruitment was made through employment exchange by considering all those candidates who were sponsored

by the Employment Exchange and as such there was an element of competition amongst the eligible candidates.

34. Be that as it may, we also have noted, as pointed out by learned Senior counsel for the appellants that the writ petitioner No. 1 is now well settled and runs his own business of medicine. Similarly petitioner No. 2 is presently serving as the Pharmacist in the Department of Health and Family Welfare in Tezpur PHE and the petitioner No. 3 is presently serving as a Pharmacist in one of the reputed Hospitals i.e., GNRC Hospital.

35. Having considered all the aspects and also keeping in mind that the present appellants have been serving as Pharmacists since 2006 continuously till now, we are not inclined to disturb their services, however, if there be any further vacancies to the post of Pharmacist let these posts be filled up by wide publicity by not restricting to the candidates sponsored by the Employment Exchange.

36. With the above observations, the present appeal stands allowed. Accordingly, the impugned order 31.10.2013 passed in

W.P.(C) 3619/2006 by the learned Single Judge stands modified to the extent indicated above.

JUDGE

CHIEF JUSTICE (ACTING)

Comparing Assistant