

GAHC010185032021



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

Case No. : WP(C)/5881/2021

SHAHUD AHMED BARLASKAR
S/O LATE SHAMSUL HAQUE BARLASKAR, VILL. DURAGANAGAR PT-III,
P/S AND P/O UDHARBOND, DIST. CACHAR, PIN 788030

VERSUS

THE STATE OF ASSAM AND 4 ORS
REPRESENTED BY COMMISSIONER AND SECY. TO THE GOVT. OF ASSAM,
EDUCATION DEPTT., DISPUR, GUWAHATI 06

2:THE CHAIRMAN

STATE SELECTION BOARD TO THE GOVT. OF ASSAM
DISPUR
GUWAHATI 06

3:THE DIRECTOR

SECONDARY EDUCATION
ASSAM
KAHILIPARA
GUWAHATI 19

4:THE INSPECTOR OF SCHOOLS

CDC
SILCHAR
CACHAR

5:BHARATI BHATTACHARJEE

W/O SATYABRATA MAZUMDER

R/O UDAYAN COMPLEX
H.NO 13
W/O NO. 18
NATIONAL HIGHWAY
P.O. RANGIRKHARI
P.S. SILCHAR
DIST. CACHAR
ASSAM
PIN 7880005
DIST. CACHAR

Advocate for the Petitioner : MR F Z MAZUMDER

Advocate for the Respondent : SC, SEC. EDU.

BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

ORDER

07-06-2023

Heard Mr. F.Z. Mazumder, learned counsel for the petitioner. Also heard Mr. A. Khatoniar, learned Standing Counsel, Secondary Education Department, for the respondents no. 1 to 4 and Mr. B. Purkayastha, learned counsel for the respondent no.5.

2] By this writ petition by the petitioner has challenged the appointment order dated 27.10.2021 issued by the Director of Secondary Education whereby the respondent no.5 was appointed as the Principal of DN Higher Secondary School, Udarbond, Cachar on a regular basis under the provisions of Assam Secondary Education (Provincialised) Services Rules, 2003 (*in short Rules, 2003*). An advertisement dated 16.06.2016 was issued by the School Management Committee inviting applications for filling up the post of Principal of the said School. The petitioner as well as the private respondent no.5 submitted

their applications in response to the said advertisement. The School Management Committee thereafter forwarded a select list of three candidates for the selection to the post of Principal of DN Higher Secondary School, Cachar. The recommendations of the Selection Committee were forwarded to the Director of Secondary Education, Assam for approval. However, the private respondent no.5 approached this Court by filing several writ petitions and in view of interim orders issued therein, the panel of names selected by the Selection Committee could not be approved by the competent authority as prescribed under the rules.

3] Neither the petitioner nor the respondent no.5 was recommended by the selection committee and their names were not included in the panel which was forwarded for due consideration by the authority prescribed under the Rules. During the pendency of the matter before the competent authority regarding approval of the panel list forwarded by the Selection Committee, the candidates at serial nos.1 & 2 of the said panel list retired in the meantime. The candidate selected at serial no.3 also expressed his unwillingness to accept the post of Principal.

4] The respondent no.5 approached this Court by filing WP(C) No.2873/2017 challenging the Advertisement for the post of Principal on the ground that it was published ignoring the provisions of Person with Disability Act, 1995 (in short Act of 1995) and The Rights of Persons with Disabilities Act, 2016 (in short Act of 2016). WP(C) No.3074/2018 was also filed by the respondent no.5 as the petitioner assailing the *vires* of the Rules of 2003 as it violates the mandates under the provisions of Act of 1995 and the Act of 2016. Both the writ petitions came to be disposed of vide order dated 03.03.2020 by a Division Bench on the statement of the respondent no.5 that no cause survives, as the Rules of 2003

had been repealed and the new Rules of 2018 came into force.

5] Thereafter, the writ petition being WP(C) No.9552/2019 was filed by the petitioner putting the Assam Secondary Education (Provincialised) Schools Services Rules, 2018 (*in short Rules, 2018*) to challenge on the ground that the said Rules did not have any provision for appointment of a person with disability nor are there any reservations made in terms of the Rights of Persons with Disability Act, 2016 in respect of appointments to be made to the posts of Principal of Higher Secondary Schools. WP(C) No.9552/2019 also came to be disposed of by the Division Bench of this Court by the order dated 03.03.2020 on the basis of the submissions made by the learned Standing Counsel for the Department of Education and on the basis of affidavits filed by the Department that the errors which crept in will be corrected by the Department/Government. In view of such submissions made by the learned Standing Counsel, Secondary Education Department, the aforesaid writ petition being WP(C) No. 9552/2019 was also disposed of with liberty granted to the petitioner to approach this Court again if the errors projected under the Rules of 2018 are not found to have been corrected by the Departments as per submissions made.

6] Learned counsel for the petitioner submits that there is a specific mandate under the Rules of 2003 as it then was that the recruitment to the post of Principal of the Higher Secondary School is to be proceeded with as per the procedure prescribed under Rule 13 of the said Rules. It is submitted that under the said Rule 13 the applications are required to be sought for by way of an advertisement to be published by the Member Secretary School Selection Committee. The School Selection Committee will scrutinize the applications, hold an interview and prepare a panel of names of 3 (three) candidates on the basis of the qualities such as leadership skill, administrative ability, integrity and

commanding personality. The said panel of names prepared by School Selection Committee is thereafter required to be forwarded to the State Selection Committee through the concerned Inspector for approval.

7] The State Selection Board will then prepare a select list equal to the number of vacant posts taking into consideration the leadership skill, administrative ability, integrity and commanding personality. The said select list so prepared and recommended by the State Selection Board shall be submitted to the Government, which may after causing verification as deemed necessary shall accord approval for appointment as the Director deems fit and proper. The select list so prepared was to be valid for a period of 1 year.

8] It is submitted by the learned counsel for the petitioner that as many as 13 persons applied for the post of Principal of DN Higher Secondary School, Udorbond, Cachar including the petitioner and the respondent no.5. Out of the said candidates, 3 (three) candidates were shortlisted and the select list was sent for approval. The petitioner or the respondent no. 5 were not included in the short listed candidates. However, in view of the fact that the persons at serial nos.1 & 2 having retired in the meantime, and the person at serial no.3 expressing his unwillingness to accept the post on selection, the respondent no.5 was selected and appointed as a regular Principal of the said School by the order dated 27.10.2021 passed by the Department of Secondary Education. The petitioner, during the process of selection of regular Principal was given charge of the In-charge Principal. However, pursuant to the order dated 27.10.2021 passed by the Department, the respondent no.5 was appointed as regular Principal and the petitioner was no longer allowed to hold the charge of the Principal of the said school. Learned counsel for the petitioner submits that the impugned order passed by the Director is completely in contravention with the

procedures prescribed by the Rules of 2003.

9] The respondent Secondary Education Department has filed an affidavit whereby it was stated that the select list consisted of 3 (three) candidates but however, in view of the fact that the candidates at Serial No.1 & 2 having retired and candidate at serial no.3 having expressed his unwillingness to be appointed, the name of the respondent no.5 was considered as she was a specially abled person and accordingly, she was appointed as a regular Principal of the DN Higher Secondary School vide the order dated 27.10.2023. The affidavit encloses a copy of the communication dated 08.07.2021 which reflects the reasons regarding the appointment of the respondent no.5 as the Principal of DN Higher Secondary School.

10] Mr. B. Purkayastha, learned counsel for the respondent no.5 submits that there is no illegality in the order issued by the Director as in a writ petition filed by the respondent being WP(C)No.9552/2019, a Division Bench of this Court by the order dated 03.03.2020 while disposing of the writ petition recorded the submissions of the State Counsel that the errors in the Rules of 2018 (relating to selection of a person with disabilities) are being addressed to by the State by bringing in necessary amendments. This Court granted liberty to the petitioner to file a fresh petition if the cause still arises after the required amendments have been incorporated in the Rules, 2018. It is submitted that the under notification dated 30.09.2021 Rule 12 and Rule 18 was amended by incorporating that the Provision of the Right of Persons with Disabilities Act, 2016 will be applicable in the recruitment to the post of Principal of provincialised Higher Secondary Schools and also in all cadres and grades including Grade-I and Grade-II posts on the basis of the total numbers of posts identified for the purpose of recruitment. The reservations of the persons with

the Bench marks of disabilities shall be horizontal reservations and the persons having the bench marks of disabilities have to be placed in appropriate category, namely SC/ST/OBC unreserved depending upon the category to which they belong in the roster meant for reservation in SC/ST/OBC.

11] Learned counsel for the respondent no. 5 submits that the order appointing the petitioner was passed by the Director on 27.10.2021 appointing the private respondent no.5 as the regular Principal after the amendment dated 30.09.2021 was brought in by the State. As such, with effect from 30.09.2021 the Rule 18 of the Rules of 2018 includes the reservations prescribed for persons with disabilities under the provisions of the Right of Persons with Disabilities Act, 2016. It is submitted that as the respondent no.5 was the only candidate in the category of Persons with Disabilities, amongst the candidates who had applied for the post of Principal, there was no infirmity in the order dated 27.10.2021 passed by the Director appointing the respondent as the Principal of the said school. It is further submitted that a perusal of the statement for interview to the post of Principal would reveal that she had scored the fourth highest after the 3 (three) persons whose names were shortlisted in the panel during the selection process. As such, under the peculiar circumstances of the case, as the shortlisted candidates in the select list could not be appointed as the Principal, the respondent no.5 having secured the fourth highest marks was appointed as the Principal. It is submitted that there is no infirmity with the order of appointment of respondent no.5 as the procedure prescribed by law has been followed by the Department for appointment of the Principal. As such, the writ petition being devoid of merit the same should be dismissed.

12] Learned counsels for the parties have been heard. Pleadings in the

records have been carefully perused. I have given my anxious consideration to the submissions made by the learned counsel for the parties.

13] There is no dispute that the names of both the respondent no.5 and the petitioner were not included in the select list which was prepared pursuant to the interview of all eligible candidates in the process for selection. It is also seen that the persons who were originally selected by the Selection Committee and included in the select list and placed at serial No.1, 2 & 3 respectively could not be appointed to the post of the Principal of DN Higher Secondary School, inasmuch as, the candidates at serial no.1 & 2 superannuated during the selection process and the candidate at serial no.3 expressed his unwillingness to be appointed as the Principal of DN Higher Secondary School. Under such circumstances, what was left for the Department to be done was to call for a fresh selection process in terms of the Provisions of Rule 12 of the Rules, 2018 as the Rules of 2003 come to be replaced by the Rules of 2018 in the meantime. The process for selection of regular Principal as per the prescription of the Rules, 2018 lays down a process which is substantially elaborate. There are no provisions for preparation of any waiting list beyond the select list prescribed under the Rules. It is also seen from the "statement of interview" regarding the candidates who presented themselves for the interview to post of the Principal that the petitioner has indeed scored the fourth highest marks. Every school, to which these Rules apply, ordinarily required to have its Principal and Vice-Principal in regular capacity. It is also seen that there is no provision under the Rules for appointment of Principal or Vice-Principal on an "In-charge basis". While it is true that the Rules prescribe that a select list to be prepared and the appointments to be made from the said select list, in the peculiar circumstances of the case where the selected candidates at the serial no.1 & 2

had superannuated during the currency of the select list and the candidate no.3 expressed his unwillingness to be appointed as the Principal of the said school, the Department proceeded to appoint the next available candidate from the "statement of the interview" as per the marks obtained. There is no dispute that the private respondent no.5 had secured more marks than the petitioner. There is also no dispute that the respondent no.5 is a person with disability and is entitled to the rights of such person with disability as have been elaborately laid down under the Rights of Persons with Disabilities Act, 2016. From a perusal of the order dated 03.03.2020 passed by the Division Bench of this Court in WP(C) No.9552/2019, it is seen that the said writ petition was disposed of by recording the submission of the learned Standing Counsel, Secondary Education Department that there are inherent defects noticed by the Department in the provisions (regarding reservations) under the Rules of 2018, and that, the Government is contemplating to rectify such errors. The Government thereafter by notification dated 30.09.2021 rectified the said defects by bringing an amendment to Rules , 2018 to include the reservations relating to persons with disabilities as prescribed under the Act, 2016.

14] While it was appropriate for the Government to call for the fresh advertisement by prescribing reservation for the persons with disabilities under the reservation clause but the same was admittedly not done at the time of issuing of the advertisement dated 16.06.2016 as in view of the fact that the provisions of Rules, 2003 did not prescribe for reservations of persons with disabilities. Nevertheless, it cannot be lost sight of the fact that the Act of 2016 prescribing for reservations for the persons with disabilities was in force when the advertisement dated 16.06.2016 was issued. The Government realizing the defects in the Rules of 2018 rectified the deficiency in the Rules as regards the

reservations of the Act of 2016 by way of notification dated 30.09.2021.

15] Under such circumstances, the Government proceeded to appoint the private respondent no.5 although she was not included in the select list originally.

16] There is another aspect of the matter which has to be taken note of. The qualifications prescribed under Rule 12 inter alia, lays down that the age of the candidates must not be more than 57 years as on the 1st January of the year of recruitment. The affidavit sworn in by the writ petitioner shows his age to be 56 years on 3rd November, 2021 on which date the affidavit to the writ petition was sworn in. As on date, the petitioner has crossed the prescribed age of 57 years. Even if the appointment of the respondent no.5 is interfered with, there can be no consequential direction to the petitioner to be either considered for being appointed as the Principal or even for the post of "In-charge" Principal as he does not satisfy the mandatory requirements prescribed under the Rule 12 of the Rules, 2018. The challenge to the respondent no.5's appointment is not made by any candidate who falls under the category of Persons with Disabilities. The present petitioner is admittedly not a person who falls under the said category of Persons with Disabilities.

17] Writ jurisdiction is a discretionary jurisdiction exercised under Article 226 of the Constitution of India. Merely because a legal case is made out by the petitioner that by itself ipso facto does not necessary warrant issuance of writ if this Court is of the view that issuance of such a writ as prayed for will eventually not give the petitioner the benefit as prayed for.

18] A writ by way of a writ petition cannot be issued to the respondents merely to enforce the right of the petitioner to be appointed as an 'In-charge' Principal of the said school in the eventuality of the interference of the

appointment of the private respondent no.5. The petitioner will otherwise not be eligible for consideration to the post of Principal of a Higher Secondary School as he does not satisfy the mandatory requirement of Rule 12 of the erstwhile Rules of 2003 or the Rules of 2018 as on date. Although the petitioner satisfied the prescription under Rules 12 of the Rules of 2003 or Rules of 2018 on the date when the writ petition was filed, considering the fact that as on date the petitioner does not satisfy the prescription of Rules 12 of the Rules of 2018, issuance of a writ at the instance of the writ petitioner will amount to issuance of a futile writ and which a writ court in its discretionary jurisdiction should decline to issue.

19] Accordingly, in view of all the discussions above, this Court declines to entertain the writ petition by issuing any appropriate directions or the orders to the respondents as prayed for.

20] Accordingly, the writ petition fails and is consequently dismissed.

21] No order as to cost.

JUDGE

Comparing Assistant