

GAHC010189162018



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

Case No. : WP(C)/6012/2018

RAJIB DAS
S/O SRI MANOJ KUMAR DAS
R/O RED CROSS ROAD,
KARIMGANJ, ASSAM, PIN - 788710
(M) 94353-75439

VERSUS

THE STATE OF ASSAM AND 10 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
EDUCATION DEPARTMENT,
ASSAM, SECRETARIAT, DISPUR, GUWAHATI- 781006.

2:THE DIRECTOR OF HIGHER EDUCATION

ASSAM
KAHILIPARA
GUWAHATI
KAMRUP (METRO)
ASSAM

PIN - 781019.

3:CHAIRMAN SELECTION COMMITTEE
PANDIT DEENDAYAL UPADHYA ADARSHA MAHAVIDYALAYA
DALGAON

REP. BY D.C. DALGAON
P.O. MANGALDOI
PIN - 784125.

4:CHAIRMAN SELECTION COMMITTEE

PANDIT DEENDAYAL UPADHYA
ADARSHA MAHAVIDYALAYA
AMJONGA REP. BY D.C.
GOALPARA
P.O. BALADMARI
PIN - 783121.

5:CHAIRMAN SELECTION COMMITTEE

PANDIT DEENDAYAL UPADHYA ADARSHA MAHAVIDYALAYA
TULUNGIA
REP. BY D.C. BONGAIGAON
P.O. BONGAIGAON
PIN- 783380

6:PANDIT DEENDAYAL UPADHYA ADARSHA MAHAVIDYALAYA

DALGAON
DARRANG
P.O. MANGALDOI

PIN - 784125.

7:PANDIT DEENDAYAL UPADHYA ADARSHA MAHAVIDYALAYA

AMJONGA
P.O. BALADMARI
PIN - 783121.

8:PANDIT DEENDAYAL UPADHYA ADARSHA MAHAVIDYALAYA

TULUNGIA
P.O. BONGAIGAON
PIN- 783380

9:THE PRINCIPAL

PANDIT DEENDAYAL UPADHYA ADARSHA MAHAVIDYALAYA
DALGAON

DARRANG
P.O.MANGALDOI

PIN - 784125.

10:THE PRINCIPAL

PANDIT DEENDAYAL UPADHYA ADARSHA MAHAVIDYALAYA

AMJONGA
P.O. BALADMARI
PIN - 783121.

11:THE PRINCIPAL
PANDIT DEENDAYAL UPADHYA ADARSHA MAHAVIDYALAYA

TULUNGIA
P.O. BONGAIGAON

PIN - 783380.

12:UNIVERSITY GRANTS COMMISSION
REPRESENTED BY ITS CHAIRMAN

Advocate for the Petitioner : MR. S DUTTA

Advocate for the Respondent : SC, HIGHER EDU

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 16.03.2023

Heard Mr. S. Dutta, learned senior counsel, assisted by Mr. S. Dutta, learned counsel for the petitioner. Also heard Mr. K. Gogoi, learned standing counsel for the Education (Higher) Department, representing respondent nos. 1 and 2, and Ms. J. Gayan, learned counsel for respondent no. 12. None appears for the respondent nos. 3 to 11 on call.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has prayed for directing the respondent authorities to award appropriate marks to the petitioner in accordance with OM dated 25.06.2012 in M.Phil. and teaching experience; and thereafter to appoint the petitioner in the post of Assistant Professor (Information Technology/ Computer

Science).

3. The petitioner has projected that he is serving as Assistant Professor in the Karimganj College since 01.07.2005 and presently he is the Head of Department of Computer Science and Application under self-financing scheme in the said college. The petitioner had acquired Ph.D. Degree in Computer Science from Assam University, Silchar, which was conferred in the 14th Convocation, held on 15.11.2014. In course of service, on 19.12.2006, the petitioner got himself enrolled in M. Phil Degree course in Annamalai University under Distance Education Mode after obtaining no-objection certificate from his employer college. The petitioner was awarded his Master of Philosophy in Computer Science Degree by the said Annamalai University in the examinations held in September, 2008, and he was placed in First Division.

4. Pursuant to employment advertisements dated 02.05.2017, 04.05.2017, 08.05.2017 issued by the respondent nos. 4, 5 and 6 respectively, the petitioner had applied for selection and appointment to the post of Assistant Professor in the Pandit Deendayal Upadhyaya Adarsha Mahavidyalaya (PDUAM for short) at Amjonga in Goalpara District, Tulungia in Bongaigaon District and Dalgaon in Darrang District. The learned senior counsel for the petitioner has submitted that though the petitioner appeared in the interview process held on different dates, but by granting lower marks by ignoring his entitlement, his candidature was rejected.

5. The points raised by the learned senior counsel for the petitioner is discussed issue-wise. The issues raised are summarized as follows:-

a. Whether the petitioner was awarded lesser marks by not treating

time spent for pursuing M.Phil. and Ph.D. Degree as teaching experience?

b. Whether the petitioner was illegally denied marks despite having M.Phil. Degree?

c. Whether the petitioner was awarded lesser marks by way of hostile discrimination on account of language?

On whether lesser marks was awarded to the petitioner by not treating time spent in pursuing M.Phil. and Ph.D. Degree:

6. The learned senior counsel for the petitioner has submitted that at Dalgaon, the petitioner had been given 8.01 marks less and at PDUAM, Tulungia, he was given 1.03 marks less, which is in violation of OM dated 25.06.2012. It is also submitted that as per the petitioner's assessment, he was ideally entitled to 63.94 marks, amongst others, because the petitioner was entitled to (i) 5 marks for teaching experience, (ii) 5 marks for his M. Phil degree, and (iii) 5 marks for Ph.D. Degree. The chart showing marks awarded were as follows:-

Heads	Marks as per OM dated 25.06.2012	Marks awarded		
		(Amjonga)	(Tulungia)	(Dalgaon)
HSLC (10% of total %age)	10 Marks	5.46	5.45*	5.45*
HSSLC (15% of total %age)	15 Marks	8.19	8.19	8.19
Degree (20% of total %age)	20 Marks	11.37	11.36*	11.37
Master Degree	25 Marks	15.92	15.91*	15.92

(25%)				
Ph.D. (in lieu of NET/ SLET/ SET)	7 Marks	0	0	0
M. Phil.	5 Marks	5	5	0*
Research Paper/ Article published with ISSN/ ISBN number	6 Marks	6	5*	6
Chapter/Article published with ISBN number	2 Marks	2	2	2
Presentation of paper in international/ national seminar	5 Marks	5	5	5
Teaching Experience	5 Marks	5	5	2*
Petitioner's total Score/ Marks		63.94	62.91	55.93

7. To project entitlement of the petitioner to 5 marks for teaching experience, it is submitted that although under OM No. AHE.262/2012/13 dated 25.06.2012, it was provided that the period of time taken to acquire M.Phil. and/or Ph.D. degree shall not be considered as teaching/ research experience to be claimed for appointment to the positions, but vide communication under D.O. No. F-17/8/2013(PS) dated 01.03.2016, the Secretary, UGC had clarified that *"The period of active service spent on pursuing research degree i.e. for*

acquiring Ph.D. degree simultaneously without taking any kind of leave may be counted as teaching experience for the purpose of direct recruitment/ promotion to the post of Associate Professor and above." Accordingly, it is submitted that the M.Phil. Degree, being research based, the same principle would apply there also.

8. Per contra, the learned standing counsel for the Higher Education Department has countered the communication of the Secretary, UGC under D.O. No. F-17/8/2013(PS) dated 01.03.2016, by submitting that that as per Clause 3.9.0 of the "University Grants Commission on minimum qualifications for appointment of teachers and other academic staff in universities and colleges and measures for the maintenance of standards in higher education (3rd Amendment) Regulations, 2016" published in the official gazette vide UGC notification dated 04.05.2016, it is provided that "*The period of time taken by candidates to acquire M.Phil. and/or Ph.D. degree shall not be considered in teaching/ research experience to be claimed for appointment in teaching positions.*"

9. In the Office Memorandum No. AHE.262/2012/13 dated 25.06.2012 (Annexure-13 to the writ petition), it has been mentioned in clause (vii) thereto that "*The period of time taken by candidates to acquire M.Phil. and/or Ph.D. Degree shall not be considered as teaching/ research experience to be claimed for appointment to the positions (Clause -3.9.0).*" The learned standing counsel for the Higher Education Department has demonstrated that the reference regarding Clause 3.9.0, as mentioned in Clause (vii) of the said OM dated 25.06.2012, is preferable to "UGC Regulations on minimum qualifications for appointment of teachers and other academic staff in

Universities and Colleges and measures for the maintenance of standards in higher education 2010", bearing No.F.3-1/2009 dated 28th June, 2010. Clause 3.9.0 therein reads as follows – "*3.9.0. The period of time taken by candidates to acquire M.Phil. and/or Ph.D. Degree shall not be considered as teaching/ research experience to be claimed for appointment to the teaching positions.*" The said Clause 3.9.0 is continued in the subsequently notified "University Grants Commission on minimum qualifications for appointment of teachers and other academic staff in Universities and Colleges and measures for the maintenance of standards in higher education (3rd Amendment), Regulations, 2016", bearing No.F.1-2/2016 (PS/ Amendment) dated 4th May, 2016. Resultantly, the petitioner is not found entitled to the benefit of the D.O. No. F.17-8/2013(PS) dated 1st March, 2016, referred to herein before because the said clarification is followed by the herein before referred UGC notification dated 04.05.2016.

10. Thus, the point of determination no. (a) is answered by holding that the respondent no. 2 had not committed any illegality in refusing to consider marks to the petitioner by treating time spent for pursuing M.Phil. and/or Ph.D. Degree as teaching experience, notwithstanding that the petitioner might have actually rendered service to his college during that time.

Whether the non acceptability of the M.Phil. Degree of petitioner is illegally? And whether lesser marks was awarded to the petitioner on account of lack of proficiency in local language:

11. The point of determination no. 2 and 3 are taken up together.

12. The petitioner had initially approached this Court by filing W.P.(C)

No. 5403/2017, amongst others, on the ground that marks for M.Phil. degree is being denied to him. However, as the Director of Higher Education, Assam was yet to approve the recommendation of the Selection Committee, the Court by order dated 04.09.2017, was disinclined to entertain the writ petition. However, it was observed that the Director of Higher Education, Assam must examine whether the petitioner deserved marks for his M.Phil. degree in distance mode from Annamalai University. The said authority, by order dated 24.01.2018 (Annexure-29) arrived at a conclusion that in PDUAM at Dalgaon, three persons have been appointed in Department of Computer Science, namely, Sri Subrata Chetia, Sri Bikram Patir and Md. Zaved Iqubal Ahmed and by considering that the enrolment of students in College in H.S. 1st year was 6 and in Degree 1st Semester, it was 46, the said authority was of the opinion that for 46 nos. of students, 4 teachers cannot be given. Hence, it was held that even if the petitioner is awarded marks for M.Phil. and teaching experience, he cannot be given the post as the college has very less enrolment.

13. Aggrieved by the said order dated 24.01.2018, the petitioner had approached this Court again and by filing W.P.(C) 1488/2018. This Court, by order dated 16.03.2018, had made the following observation:

“4. The purport of the order of this Court dated 04.09.2017 was that while examining the candidature of the petitioner, the Director shall give a consideration as to whether the marks for having M.Phil degree in the distant mode from the Annamalai University and the marks in the heading experience for having pursued Ph.D degree should be given to the petitioner. Therefore, the Director was simply required to enquire on the said aspect of the matter and pass an order thereon. But instead of doing the needful as required by the order dated 24.01.2018 the Director had taken some other aspect of the matter into account as to whether such appointment should be made in the college in view of the number of students involved in the concerned subject. But, at the same time, while considering the requirements of the order of this Court, the Director instead of doing the needful

as indicated above, merely states that as the petitioner again agitates regarding the marks given to him, he may file a separate representation for the purpose. This Court fails to understand why the Director has passed such order when the direction of this Court was to consider whether the marks for M.Phil and experience in Ph.D should be added.

5. *It is also noticed that it is not the only occasion when this particular Officer has passed such order by which the orders of this Court are overreached and a contrary conclusion is arrived. The Chief Secretary to the Govt. of Assam is requested that this particular officer Sri BL Sarma, ACS be instructed in a proper manner that orders of this Court are to be followed and not be over reached and adjusted in a different manner. If the orders of the Court are not in conformity, it is open for the concerned person to file an appeal or a review in a prescribed manner, but an officer of the government cannot change the orders of the Court even if the same are not agreeable. The compliance of such action taken by the Chief Secretary shall be informed to the Registry of this Court.*

6. *As regards the order of 24.01.2018, the same is accordingly set aside and the matter is remanded back to the Director of Higher Education to give an appropriate consideration as required by the order dated 04.09.2017 in WP(C)No.5403/2017."*

14. It is seen that in his order dated 18.07.2018, the Director of Higher Education has admitted that there are 4 (four) sanctioned posts of Assistant Professor in Computer Science in PDUAM, Dalgaon and that advertisement had been issued for filling up all the four posts. Accordingly, while the candidature of the petitioner was rejected, four candidates, namely, (1) Md. Zaved Iqbal Ahmed, (2) Sri Subhomoy Deb, (3) Sri Subrat Chetia, and (4) Sri Bikram Patir were appointed. However, Sri Subhomoy Deb had expressed his unwillingness to join and therefore, the other three candidates were appointed. The Director of Higher Education had again reiterated the observation made in the said authority's earlier order dated 24.01.2018 that "*As such, even if Sri Rajib Das is given the marks for teaching experience and M.Phil Degree then also he cannot be given the post as the college has very less enrolment.*" The Court finds the reiteration of the said observations not only unjustified, but is

again a blatant attempt to over-reach (i) the order dated 04.09.2017 passed by this Court in W.P.(C) No. 5403/2017; and (ii) order dated 16.03.2018 in W.P.(C) No. 1488/2018. In both the said orders, this Court had emphasized that the Director shall give a consideration as to whether the marks for having M.Phil degree in the distant mode from the Annamalai University and the marks in the heading experience for having pursued Ph.D degree should be given to the petitioner.

15. In the considered opinion of the Court, as the Director of Higher Education, Assam had admitted that four posts of Assistant Professor in Computer Science was advertised and was being otherwise filled up but for the refusal of one selected candidate to join. It is not open for the Director of Higher Education, Assam to change the stand that because of fewer students, the petitioner cannot be appointed. It may be mentioned that the recruitment process was initiated vide advertisement dated 08.05.2017 (Annexure-9), amongst others, for selecting candidates for 4 posts of Assistant Professor in Computer Science in PDUAM, Dalgaon, issued by the Deputy Commissioner, Darrang, Mangaldai, a mention has been made regarding the communication no. PC/HE Plan/132016/57 dated 25.04.2017, issued by the Director of Higher Education, Assam. This would lead to a presumption that the Director of Higher Education, Assam has approved of the advertisement for 4 posts of Assistant Professor in Computer Science, selected and appointed 4 candidates to fill up all the said four posts, but when the said authority has found that it would have to consider the claim of the petitioner, the Director of Higher Education, Assam has found a convenient escape route by manufacturing a plea that there are less students in the concerned college. Therefore, from the above, the indelible opinion of the Court is that both the then Directors of Higher Education had

blatantly attempted to over-reached (i) the order dated 04.09.2017 passed by this Court in W.P.(C) No. 5403/2017; and (ii) order dated 16.03.2018 in W.P.(C) No. 1488/2018 by a manufactured plea that there was less enrollment of students in PDUAM, Dalgaon. The said reasoning by the Director of Higher Education in the impugned order dated 18.07.2018 deserves to be and is accordingly, rejected.

16. The learned senior counsel for the petitioner has been able to demonstrate that Bengali is one of the State language of Assam. Moreover, it has also been demonstrated that as per the notification No. ABP.45/63(P) 37 dated 31.03.1964, contained in the Handbook of General Circulars, 1965, referred to herein before, the respondent authorities could not have discriminated the petitioner on account of his MIL in Bengali. Therefore, the rejection of the candidature of the petitioner on account of "not having proficiency in local language, which is mandatory as per the advertisement" is not sustainable on facts and in law.

17. In this regard, the learned senior counsel for the petitioner had referred to the General Circulars, 1965 (Annexure-14), and it is submitted that under para-5.1 and 5.2 thereof, which is an extract of the notification under No. ABP.45/63(P) 37 dated 31.03.1964, the respondent authorities could not have discriminated the petitioner on account of his MIL in Bengali. The said paragraphs are quoted below:-

"5.1. In accordance with the Public Employment (Requirement 5 as to Residence) Act, 1957, the State Government prescribed a model form of advertisement, but to safeguard the interests of the people of the State, a knowledge of Assamese or Bengali or one of the Tribal languages of Assam was prescribed as an essential qualification. Though the language condition covers most of the languages in Assam, yet the condition will put the linguistic minorities, whose mother- Longue is other than the languages prescribed, in a disadvantageous position. It has therefore been

decided to delete the language clause in the advertisement and henceforth an adequate knowledge of Assamese or Bengali or one of the Tribal languages of Assam should not be prescribed as an essential qualification for recruitment.

5.2. After initial appointment, a Government servant should have an adequate knowledge of the language of the area in which he is posted. There are already Rules for Conduct of Departmental Examinations in many Departments, wherein, it has been provided that an officer would be confirmed only after his passing Assamese and another language which may be either Bengali or a Hill language. The quantum of rewards, when officers learn additional languages has also been recently increased. However, there are a large number of Departments who have made no provision for learning of languages by officers of their departments. Where there are no such rules requiring an officer to learn the language of the area in which he is posted, the Department should issue instructions to the effect that their officers should be required to have a working knowledge of the languages of the district in which he is posted in order to discharge his duties satisfactorily. Besides the efficiency of a person should be judged on the basis of his having acquired a working knowledge of the language."

18. In the aforesaid context, the learned standing counsel for the Higher Education Department had submitted that the advertisement contained such a clause and therefore, the petitioner, having participated in the selection process without challenging the advertisement, the petitioner cannot be permitted to challenge the selection process. In this regard, it is too well settled that a candidate, by agreeing to participate in the selection process, only accepts the prescribed procedure and not the illegality in it. In this regard, we may refer to the case of *Dr. (Major) Meeta Sahai v. State of Bihar & Ors., (2019) 20 SCC 17*. The relevant passage of the said judgment is quoted below:-

"17. It is well settled that the principle of estoppel prevents a candidate from challenging the selection process after having failed in it as iterated by this Court in a plethora of judgments including Manish Kumar Shahi v. State of Bihar, (2010) 12 SCC 576, observing as follows:

"16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the appellant is not entitled to challenge the criteria or process of selection. Surely, if the appellant's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The appellant invoked jurisdiction of the High Court under Article

226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the appellant clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition." See also: *Madan Lal v. State of J&K*, (1995) 3 SCC, *Marripati Nagaraja v. State of A.P.*, (2007) 11 SCC 522, *Dhananjay Malik v. State of Uttaranchal*, (2008) 4 SCC 171 and *K.A. Nagamani v. Indian Airlines*, (2009) 5 SCC 515.

The underlying objective of this principle is to prevent candidates from trying another shot at consideration, and to avoid an impasse wherein every disgruntled candidate, having failed the selection, challenges it in the hope of getting a second chance.

18. However, we must differentiate from this principle insofar as the candidate by agreeing to participate in the selection process only accepts the prescribed procedure and not the illegality in it. In a situation where a candidate alleges misconstruction of statutory rules and discriminating consequences arising there from, the same cannot be condoned merely because a candidate has partaken in it. The constitutional scheme is sacrosanct and its violation in any manner is impermissible. In fact, a candidate may not have locus to assail the incurable illegality or derogation of the provisions of the Constitution, unless he/she participates in the selection process.

19. The question of permissibility of giving weight age for 'work experience' in government hospitals is also not the bone of contention in this case. Medicine being an applied science cannot be mastered by mere academic knowledge. Longer experience of a candidate adds to his knowledge and expertise. Similarly, government hospitals differ from private hospitals vastly for the former have unique infrastructure constraints and deal with poor masses. Doctors in such non-private hospitals serve a public purpose by giving medical treatment to swarms of patients, in return for a meager salary. Hence, when placing emphasis on the requirement of work experience, there is no dispute on such recognition of government hospitals and private hospitals as distinct classes. Instead such recognition ensures that the doctors recruited in not-so-rich states like Bihar have the requisite exposure to challenges faced in those regions.

20. The appellant has thus rightly not challenged the selection procedure but has narrowed her claim to only against the respondents' interpretation of 'work experience' as part of merit determination. Since interpretation of a statute or rule is the exclusive domain of Courts, and given the scope of judicial review in delineating such criteria, the appellant's challenge cannot be turned down at the threshold. However, we are not commenting specifically on the merit of appellant's case, and our determination is alien to the outcome of the selection process. It is possible post what is held hereinafter that she be selected, or not.

19. Therefore, unless the respondent authorities demonstrate from any Act, Rules, Notification, etc. that any “local language” has been prescribed for Dalgaon, the rejection of the candidature of the petitioner on the said ground is legally unacceptable in light of notification No. ABP.45/63(P) 37 dated 31.03.1964, contained in the Handbook of General Circulars, 1965. Moreover, the learned senior counsel for the petitioner has successfully demonstrated that in the evaluation sheet, which was provided to him through RTI, there is no such remark by the panelists who had interacted with the petitioner and evaluated his merit. Therefore, the remark “not having proficiency in local language, which is mandatory as per the advertisement”, which is contained in impugned order dated 18.07.2018 by the Director of Higher Education, Assam, thereby disqualifying the petitioner, is held to be a manufactured ground, not existing in the record. It may be mentioned that as per RTI reply furnished by PDUAM, his candidature at PDUAM, Amjonga was rejected for the reason – “Not eligible for non proficient in local language”. In respect of PDUAM, Tulungia, his candidature was rejected for the reason – “*General MIL (Bengali). Not 1L. So not recommended.*”

20. Therefore, the lack of proficiency in local language, being one of the reasons to deny appointment to the petitioner vide impugned order dated 18.07.2018 is also rejected.

21. From the impugned order dated 18.07.2018, it is evident that the Director of Higher Education, Assam had failed to perform duty cast on him to scrupulously act as per directions contained in (i) the order dated 04.09.2017 passed by this Court in W.P.(C) No. 5403/2017; and (ii) order dated 16.03.2018

in W.P.(C) No. 1488/2018.

22. A specific direction was issued by this Court vide order dated 16.03.2018, passed in W.P.(C) No. 1488/2018 to consider whether the marks for M.Phil. and experience in Ph.D. should be added and accordingly, the order of 24.01.2018 by the Director of Elementary Education, Assam was set aside and the matter was again remanded back to the said authority to give an appropriate consideration as required by the order dated 04.09.2017 in WP(C) No.5403/2017. However, for the second time, the Director of Secondary Education, Assam has failed to do as was directed vide two successive orders passed by this Court in WP(C) 5403/2017 and WP(C) 1488/2018, by ignoring that this Court had also requested the Chief Secretary to the Govt. of Assam that the particular officer, namely, Sri B.L. Sarma, ACS, the then Director of Higher Education be instructed in a proper manner that orders of this Court are to be followed and not be over reached and adjusted in a different manner, by further observing that if the orders of the Court are not acceptable, it is open for the concerned person to file an appeal or a review in a prescribed manner, but an officer of the government cannot change the orders of the Court even if the same are not agreeable. With such an observation, it was provided that the compliance of such action taken by the Chief Secretary shall be informed to the Registry of this Court. We are not informed as to whether the compliance was intimated to the Registry.

23. The learned standing counsel for the Higher Education Department had cited the case of *R. Muthukumar & Ors. v. The Chairman and Managing Director Tangedco & Ors.*, 2022 LiveLaw (SC) 140 for the proposition that one wrong committed in one case cannot be allowed to repeated in another

case as there is no concept of negative equality. We have no quarrel with the said proposition. However, it is still open to be examined why in respect of other similarly situation persons, the Higher Education Department has been granting approval of their appointment to the post of Assistant Professor on the strength of their selection with marks allotted for Ph.D. obtained from Distance Learning Mode, but an exception is carved out for denying the petitioner the same treatment merely because he had MIL in Bengali Language. In the opinion of the Court, if the petitioner can show hostile discrimination on the basis of caste creed, language or religion, such an examination becomes more imperative because the provision of Article 16 of the Constitution of India mandates that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State, and that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. Therefore, when the learned senior counsel for the petitioner has been able to demonstrate that the notification dated 31.03.1964 knowledge of a specific language should not be prescribed as an essential qualification for recruitment. Therefore, in light of the touchstone of Article 16 of the Constitution of India, principle of negative equality determined in light of Article 14 of the Constitution of India is negated as the provision of Article 14 and 16 of the Constitution of India operates in different field.

24. The decision of *Union of India & Ors. v. Mahendra Singh*, MANU/SC/0919/2022 was cited by the learned standing counsel for the Higher Education Department to bring home the point that as the advertisement specifically contains that the period of time taken by candidates to acquire M.Phil. and/or Ph.D. degree shall not be considered in teaching/ research

experience to be claimed for appointment in teaching positions and thus, when there is prescription to do a particular act in a particular manner, following the principles laid down in the case of *Nazir Ahmad v. King Emperor, AIR 1936 PC 253*. There is no quarrel with the point urged. However, despite such salutary principles, the Director of Higher Education should also have known that when this Court had for the second time issued to it a direction to consider whether the marks for M.Phil. and experience in Ph.D. should be added, the said authority ought to have taken a decision in the manner directed and in no other manner or consideration.

25. Therefore, as the Director of Higher Education has failed to comply with (i) the order dated 04.09.2017 passed by this Court in W.P.(C) No. 5403/2017; and (ii) order dated 16.03.2018 in W.P.(C) No. 1488/2018, for which we are inclined to hold that the impugned order No. DHE/CE/CC/51/2017/39 dated 16.03.2018, passed by the Director of Higher Education, Assam is set aside and quashed.

26. For the reasons as discussed above, as regards the point of determination no. (b) and (c), the Court is of the considered opinion that the competent authority in the Higher Education Department should take a call. We refrain from deciding the matter as it involves examining various notifications and OMs of the (i) Higher Education Department of the State, University Grants Commission, Indira Gandhi National Open University, and Distance Education Council and therefore, such an examination is left to the Higher Education Department.

27. Accordingly, we are inclined to remand the matter for fresh consideration by the authorities in the Higher Education Department. As it is for

the second consecutive time that the Director of Higher Education, Assam has not complied with the orders of this Court, we are inclined to impose a cost of Rs.25,000/- on the Higher Education Department, Government of Assam, to be paid to the petitioner as cost of the litigation, which shall be paid to the petitioner within a period of one month from the date of receipt of certified copy of this order. The Government in the Higher Education Department will have the liberty to recover the said amount from the concerned officer posted as the Director of Higher Education, who had passed the impugned order No. DHE/CE/CC/51/2017/39 dated 18.07.2018, if so advised, and in accordance with law.

28. As it is seen that the Director of Higher Education, Assam has not complied with the requirement of (i) the order dated 04.09.2017 passed by this Court in W.P.(C) No. 5403/2017; and (ii) order dated 16.03.2018 in W.P.(C) No. 1488/2018, and has ventured on other irrelevant issues regarding "less number of students" and "lack of proficiency in local language", which were otherwise irrelevant and not required to be gone into in light of the directions contained in the herein before referred two orders of the Court. Thus, we pass the following order:-

- a. The matter for a decision before the Head of the Department/ Secretary, Higher Education Department (i.e. HoD by whatever designation held) as to whether the non-granting of marks to the petitioner for M.Phil. and experience in Ph.D. for selection and appointment as Assistant Professor in PDUAM is liable to be interfered with.
- b. The said authority shall take note of the grievance of the petitioner that pursuant to employment advertisements dated 02.05.2017,

04.05.2017, 08.05.2017 issued by the respondent nos. 4, 5 and 6 respectively, he had applied for selection and appointment to the post of Assistant Professor in the PDUAM i.e. Pandit Deendayal Upadhyaya Adarsha Mahavidyalaya at Amjonga in Goalpara District, Tulungia in Bongaigaon District and Dalgaon in Darrang District, but he was not given marks for M.Phil. and experience in Ph.D. was not added and resultantly his candidature was rejected.

c. While examining the matter it would be open to the said authority to examine whether the M.Phil. and Ph.D. Degree granted to the petitioner would entitle the petitioner any advantage in securing appointment to the post of Assistant Professor in Computer Science in the concerned college, without commenting on validity or otherwise of the Degree, as the validity of the degree is not under challenge/question.

d. The said authority shall take note of the fact that in this order, we have already adjudicated and decided that the petitioner would not be entitled to marks for time taken by the petitioner to acquire his M.Phil. and Ph.D. Degree by considering it as teaching/ research experience to be claimed for appointment to the teaching positions.

e. The Head of the Department, Higher Education Department shall pass a speaking order within an outer period of 30 (thirty) days from the date of service of the certified copy of this order on the said authority, through his office. Needless to mention that whatever order is passed, shall be communicated to the petitioner in his e-mail address to be provided by the petitioner.

f. In the event the authority is of the view that the selection and

appointment of the petitioner is entitled to be approved, the said authority shall pass an appropriate order for approval and appointment of the petitioner, if necessary, by creating a supernumerary post with concurrence with other departments like Finance, etc., till the service of the petitioner is adjusted against a vacant post.

29. Accordingly, the petitioner shall produce a certified copy of this order together with (i) a copy of the writ petition with all enclosures, (ii) a copy of affidavit-in-opposition filed on behalf of the Director of Higher Education, Assam (respondent no. 2), and (iii) affidavit-in reply filed by the petitioner, and shall also provide his e-mail address for communication.

30. Writ petition stands disposed of on terms and cost as indicated above.

JUDGE

Comparing Assistant