

GAHC010204272016



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

Case No. : WP(C)/3054/2016

PURUSUTTAM PATGIRI and 3 ORS.
S/O. SRI DILIP SAIKIA, VILL. DEKARGAON, TEZPUR-784501, DIST.
SONITPUR, ASSAM.

VERSUS

THE STATE OF ASSAM and 8 ORS.
REP. BY THE COMM. and SECY., GOVT. OF ASSAM, EDUCATION
SECONDARY DEPTT., ASSAM SECRETARIAT, DISPUR, GHY.-781006.

Advocate for the Petitioner : MR. M K CHOUDHURY

Advocate for the Respondent : SC, SECONDARY EDUCATION

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 11.04.2023

Heard Mr. M.K. Choudhury, learned senior counsel, assisted by Ms. N. Ahmed, learned counsel for the petitioners. Also heard Mr. U. Sarma, learned standing counsel for the Secondary Education Department, representing respondent nos. 1 to 4 and Dr. P.K. Goswami, learned counsel for the

respondent no. 8. None appears on call for respondent nos. 5, 6, 7, and 9. We have also heard Mr. D. Saikia, the learned Advocate General of the State of Assam pursuant to order dated 03.04.2023.

2. In connection with selection process initiated for filling up the post of Junior Assistant in various provincialised High and Higher Secondary Schools in the district of Sonitpur, the petitioners had submitted their application for the post of Junior Assistant in Dekargaon High School. A written test was conducted on 19.01.2016 and it is projected that the petitioner no. 1 was placed in the first position. The computer/ typing test was conducted on 22.01.2016 and a panel of successful candidates was prepared on 29.01.2016, where the respondent no. 9 was placed at serial no. 1 and the list was sent to the Inspector of Schools (respondent no.4) for approval. On 30.01.2016, some candidates including the petitioners had submitted representation dated 30.01.2016 before the Inspector of Schools, alleging malpractice in selection. Accordingly, the computer/ typing test was directed to be re-conducted on 03.02.2016 in Tezpur Government Higher Secondary School under the supervision of Shri H.K. Chetry, Head Master of Haleswar High School. The aggrieved petitioners again complained before the Deputy Commissioner, Sonitpur, Tezpur for re-conducting the selection process afresh by a new Selection Committee. As no steps was taken, the petitioner no. 1 approached this Court by filing W.P.(C) No. 1065/2016, challenging the validity of the selection proceeding. However, the Inspector of Schools (respondent no. 4) by an order dated 26.02.2016, appointed the respondent no. 9 as Junior Assistant in the concerned Dekargaon High School.

3. Thereafter, with leave of this Court, the said writ petition was

withdrawn and the present writ petition has been filed under Article 226 of the Constitution of India whereby the petitioner has prayed for setting aside the selection and appointment of the respondent no. 9.

4. The learned senior counsel for the petitioner has submitted that the selection committee was not constituted in accordance with the mandate of Assam Secondary Education (Provincialised) Service Rules, 2003 (hereinafter referred to as "2003 Rules"). It is also projected that the "so called" computer expert engaged to evaluate the computer/typing skill was a close relation of the respondent no. 9. In support of his submission, reliance is placed on the case of *Bhupendra Nath Hazarika & Anr. v. State of Assam & Ors., (2013) 2 SCC 516*.

5. The learned standing counsel for the Secondary Education Department, per contra, has submitted that after the initial complaint, the computer/typing test was conducted in a different school, i.e. in Tezpur Govt. H.S. School, and under supervision of a different Head Master, i.e. Shri H.K. Chetry, Head Master of Haleswar High School. By referring to the Office Memorandum no. ASF.714/2015/7 dated 29.12.2015 by the Secretary to the Govt. of Assam, Secondary Education Department, it was submitted that guidelines had been issued for selection of Junior Assistant in provincialised schools in Assam, which was as per the provisions of 2003 Rules, as amended in 2012. Moreover, it was submitted that the authorities had also followed the directions contained in the letter bearing memo no. GB-EST/Approval/1/2015/112 dated 13.11.2015, issued by the Director of Secondary Education, Assam and addressed to the Sonitpur District Circle, Tezpur, which prescribed, amongst others, that the typing test and viva voce test be conducted in consultation with the Inspector of Schools. Thus, it has

been submitted that the selection committee was approved by the Inspector of Schools and the computer/typing test was conducted under the supervision of the Headmaster of Tezpur Govt. HS School, as directed by the Inspector of Schools and therefore, there was no illegality or malpractice in the selection and appointment of the respondent no. 9. It was also submitted that having appeared before the selection committee and failed, it is not open to the petitioners to assail the selection process.

6. The learned counsel for the respondent no.8 has submitted that the selection process was not vitiated and no illegality was committed because the allegation is that the respondent no. 9 was the relative of the President of the Governing Body of the School who was not a member of the Selection Committee and it was not the allegation that the said candidate was a relative of the Chairman of the Selection Committee. It has been submitted that the petitioners have questioned the constitution of the selection committee after they were unsuccessful, which is not permissible and that such a challenge ought not to be entertained by the Court. It has also been submitted that as per the provision of Section 8(4) of the 2003 Rules, it is provided that "*In addition to above, there shall be a Subject Expert in case of selection of Post Graduate Teacher and Graduate Teacher, wherever necessary.*" Therefore, in this case, the Inspector of Schools had deemed appropriate that to adjudge computer/ typing skill, the service of an expert be engaged. It is also submitted that the respondent no. 9 had fared better than the petitioners in computer/typing test held on both occasion, i.e. 22.01.2016 and 03.02.2016. Hence, it is submitted that this writ petition deserves to be dismissed. In support of his submissions, the learned counsel for the respondent no. 8 had placed reliance on the case of *Madan Lal v. State of J&K & Ors., (1995) 3 SCC 486*, and has also submitted a

written argument, which is kept as a part of record.

7. It is seen that as per the provision of Section 3 of the 2003 Rules, non-teaching staff of provincialised school consist of two classes, Class-III, which includes the cadres of (i) Senior Assistant; and (ii) Junior Assistant. The provision relating to method of recruitment is provided under Rule 4 of the 2003 Rules, which reads as follows:-

4. Method of recruitment-

(a)(i) 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;

(ii) The Principal or the Head Master, as the case may be, where the vacancy exists or likely to exist within the next 3 months shall submit the proposal for filling up the said posts to the Inspector of Schools for approval. After obtaining approval of the Inspector of Schools the Principal or the Head Master shall inform the District Employment exchange about the vacancies with a request to send the list of candidates for selection to fill up the vacancies;

(ii) 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 alongwith typewriting test and written test alongwith viva-voce for Class IV posts in consultation with the Inspector of Schools concerned;

(iv) Then the School Selection Committee shall prepare a select list of candidates containing double the number of vacancies and the Member-Secretary shall submit the select list to the Appointing Authority for appointment;

The Appointing Authority, i.e. the Inspector of Schools concerned shall fill-up the vacancies in order of merit/ preference from the select list and shall maintain the reservation provisions as per rule wherever applicable.

(a) Academic qualification-

The qualification for direct recruitment for the post of Lower Division Assistant in High, Higher Secondary, Higher Secondary and Multipurpose Schools shall be Higher Secondary Examination passed or equivalent and having diploma in English and Assamese typewriting. The qualification for the post of Class IV employee shall be Class X standard.

(c) Age- A candidate for the post of Lower Division Assistant and Class IV shall be within the age limit of 18 to 36 years as on the 1st day of January of the year of

advertisement for direct recruitment.

8. Therefore, as per the provision of Section 4(a)(i) of the 2003 Rules, the Selection Committee is to be constituted under the provision of Rule 8(c) of the 2003 Rules. Interestingly, the provision of erstwhile Rule 8, which contained Rule 8(c) was substituted by the present Rule 8 by Assam Secondary Education (Provincialised) Service (Amendment) Rules, 2012, which was published in the official Gazette on 10.07.2012, w.e.f. 10.07.2012. Before substitution, the Rule 8 read as follows:-

“(a) The Member Secretary of the School Selection Committee i.e. the Principal/ Head Master of the School shall ensure the vacancy position of posts in the School with sanction number, allotment and retention order of those posts from the concerned Inspector of Schools and collect applications through advertisement locally at least in one local newspaper in addition to the circulation of the copy of the advertisement in neighbouring public offices both Government and NGO's is to be ensured after obtaining approval from the Inspector of Schools;

(b) On receipt of the applications the School Selection Committee shall hold interview. Selection shall be made on the basis of marks secured by the candidates. The Selection Committee shall prepare the penal of selected candidates with double the number of vacancies against the vacancies advertised;

(c) The School Selection Committee for selection of Post Graduate/Graduate and Non-teaching staff of the school shall be as follows- :

Chairman: The President of the Managing Committee.

Member: (a) One teacher to be nominated by the Managing Committee.

(b) One parent to be nominated by the Managing Committee.

Member-Secy.: The Principal/Head Master of the School, i.e. the Secretary of the Managing Committee.

In the School Selection Committee, there shall be one more member besides four in the Committee, who shall be Subject expert in case of selection of Post-Graduate Teachers and Graduate Teachers wherever necessary:

(d) The District Approval Committee for accordance of approval of the penal of selection for Graduate Teacher and Intermediate Teacher made by the School Selection Committee shall be as follows-

Chairman : Deputy Commissioner of the District.
Member-Secretary : Inspector of Schools
Member : District Elementary Education Officer;

(e) After approval of the Panel of the selected candidates by the District Approval Committee, the Inspector of Schools shall appoint the selected candidates in order of merit from the approved select list observing all formalities to fill up the reserved quotas. Any appointment made from outside the select list shall ab-initio be invalid except appointment made on compassionate ground by the Government;

(f) The validity of the select list shall not exceed beyond one year from the date of publication."

9. In view of the fact that it was observed by the Court that there is a reference to Rule 8(c) in the provision of Rule 4(a)(i) of the 2003 Rules, we had put the learned Advocate General of the State to notice to address us on the point vide order dated 03.04.2023. Accordingly, the learned Advocate General had made his submissions on 11.04.2023. In his usual fairness, it was submitted that it appears that the reference to Rule 4(c) was a draftsmanship error and therefore, in the context of the facts of this case, the Court may apply the principle of "reading down" the 2003 rules so as to give it a purposeful meaning.

10. In this connection, the Court is of the considered opinion that as the issue has not been raised by any of the parties to the litigation, there is no necessity for the Court to delve into the matter because statutory construction raises a presumption that an Act or a provision therein is constitutionally valid unless it appears to be ultra vires or invalid. In the said context, it would be appropriate to mention that in the case of *Nalinakhya Bysack v. Shyam Sunder Halda*, 1953 SCR 533: AIR 1953 SC 148, the Supreme Court of India had refused to rewrite legislation to make up omissions of the legislature. In this

case, we are inclined to follow the same principle.

11. Therefore, as there is no Rule 8(c) in the 2003 Rules, which is referred to in Rule 4(a)(i) of the 2003 Rules, the Court is constrained to hold that it was permissible for the Secondary Education Department to issue OM dated 29.12.2015 and for the Director of Secondary Education, Assam to issue letter dated 13.11.2015 to regulate the appointment to Grade-IV posts including the post of Junior Assistant.

12. In the case in hand, it is seen the first round of computer test and viva voce test was conducted on 22.01.2016 and the panel of selected candidates was forwarded to the Inspector of Schools on 29.01.2016. Thereafter, a complaint was lodged on 30.01.2016. Therefore, it appears that the complaint was made after results were sent to the competent authority. Accordingly, the Inspector of Schools had passed an order on 30.01.2016 for conducting of viva vice test, typing test and computer knowledge test afresh on 03.02.2016 at Tezpur Govt. H.S. School under the supervision of H.K. Chetry, who was the Head Master of Haleswar High School. In the second test also, the respondent no. 9 had scored better than the petitioners. The petitioners have not been able to demonstrate that any member of the selection committee was related to the respondent no. 9.

13. It would be appropriate to extract the contents of the communication no. ESSTT.59/APT.LDA/2015/198 dated 17.02.2016 by the Inspector of Schools, Sonitpur District Circle, which is addressed to the Deputy Commissioner, Sonitpur, Tezpur, on the subject "Submission of report on allegation vide dated 08.02.2016 and 30.01.2016", which reads as follows:-

"With reference to the subject cited above, I have the honour to submit the

following report in connection with allegation vide dated 08.02.2016 & 30.01.2016

That sir, the re-examination for computer test, Type writing (English & Assamese) and Viva for the post of Junior Asstt. of Dekargaon High School was conducted on 03.02.2016 at Tezpur Govt. HS. School under the supervision of the undersigned The Viva was taken by the School Selection Committee of Dekargaon High School as per Govt. guide line. The entire process was completed as per Govt. guide line in presence of observer appointed by the undersigned with the approval of AD.C.(Education) Sonitpur, Tezpur and no illegal practice was done during the Examination by the School Selection committee as alleged.

In this connection, the report of Headmaster-cum Member Secretary of the School Selection Committee of Dekargaon High is enclosed herewith for your kind information."

14. Thus, the re-examination was conducted under the supervision of the Inspector of Schools and no illegal practice was done.

15. The learned senior counsel for the petitioner had placed reliance on the case of *Bhupendra Nath Hazarika (supra)* for the legal proposition that where recruitment of service is regulated by the statutory rules, the recruitment must be made in accordance with those rules and if any appointment is made in breach of the rules, the same would be illegal. In the said context, while reiterating the opinion that as there is no Rule 8(c) in the 2003 Rules, which is referred to in Rule 4(a)(i) of the 2003 Rules, it was permissible for the Secondary Education Department to issue OM dated 29.12.2015, and for the Director of Secondary Education, Assam to issue letter dated 13.11.2015 to regulate the appointment to Grade-IV posts including the post of Junior Assistant, the Court is of the considered opinion that the case of *Bhupendra Nath Hazarika (supra)*, relied upon by the learned senior counsel for the petitioner would have no application.

16. Thus, as the re-examination was conducted under the supervision of the Inspector of Schools and no illegal practice was reported, the Court is of the considered opinion that the petitioner has failed to make out a case for interference with the selection and appointment of the respondent no. 9 to the post of Junior Assistant in Dekargaon High School.

17. In this case, we are unable to dismiss the writ petition on the ground that the constitution of selection committee was not assailed, for which the petitioner had relied on the case of *Madan Lal (supra)*. In this case when the petitioner had appeared in the selection process, he might not be aware that the constitution of the selection committee was to favour one particular candidate, who is respondent no. 9 in this case. In this regard, the Court is of the considered opinion that when one appears in the selection process, the candidate accepts the legality of it and the illegality in it and therefore, it is permissible to make a challenge to the selection process after the petitioner became aware of the illegality in the selection process. In this regard, if one requires any authority on the point, the case of *Dr. (Maj.) Meeta Sahai v. State of Bihar & Ors., 2019 SCC OnLine SC 1632* may be referred to.

18. Therefore, in light of the discussions above, this writ petition fails and the same is dismissed. However, there shall be no order as to cost.

JUDGE

Comparing Assistant