

GAHC010316212019



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

Case No. : WA/8/2022

THE STATE OF ASSAM AND ANR
REP. BY THE SECRETARY TO THE GOVT.OF ASSAM, CO-OPERATION
DEPARTMENT, DISPUR, GUWAHATI-06.

2: THE ADDITIONAL CHIEF SECRETARY
GOVT. OF ASSAM
CO-OPERATION DEPARTMENT
ASSAM
GUWAHATI-06

VERSUS

SMTI BORNALI TAMULI AND 5 ORS
W/O- SRI MRIDUL KR. BORAH, R/O- FLAT NO. A-7/021, GROUND FLOOR,
SHANTIGRAM HOUSING COMPLEX, TRIPURA ROAD, NEAR NERIM, P/O
KHANAPARA, P.S. BASISTHA, DIST.- KAMRUP(M), ASSAM, PIN- 781022.

2:THE COMMISSIONER AND SECRETARY
WPT AND BC DEPARTMENT
DISPUR
GUWAHATI-06.

3:THE ASSAM PUBLIC SERVICE COMMISSION
REP. BY IT SECRETARY
KHANAPARA
GUWAHATI-22.

4:THE PRINCIPAL SECRETARY
GOVT. OF ASSAM
PERSONNEL (B) DEPARTMENT
DISPUR
GHY-06.

5:THE COMMISSIONER

CENTRAL ASSAM DIVISION
NAGAON
CAMP-GHY
PANBAZAR
GHY-01.

6:REGISTRAR OF COOPERATIVE SOCIETIES
ASSAM
SAMABAI BHAWAN
KHANAPARA
GUWAHATI-781022

Advocate for the Petitioner : MR. T C CHUTIA

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA
HONOURABLE MR. JUSTICE ROBIN PHUKAN

Date : 27-01-2023

JUDGMENT & ORDER (ORAL)

(A.M. Bujor Barua, J)

Heard Mr. TC Chutia, learned counsel for the appellants and Ms. M Hazarika, learned senior counsel for the respondent No. 1 Smti Bornali Tamuli. It is noticed that the respondent No. 2 is the Commissioner and Secretary to the Government of Assam in the WPT&BC Department, respondent No. 3 is the Assam Public Service Commission, respondent No. 4 is the Principal Secretary to the Government of Assam in the Personnel (B) Department, respondent No. 5 is the Commissioner, Central Assam Division and the respondent No. 6 is the Registrar of Co-operative Societies. In other words, all the respondents other than respondent No. 3 are various officials under the Government of Assam. The appeal is instituted by the State of Assam through the Secretary to the Government of Assam in the Co-operation Department. Considering the incongruity as indicated above, we deem that this is a writ appeal by the State

of Assam represented by the Chief Secretary instead of it being through only the Co-operation department. Mr. TJ Mahanta, learned senior counsel has represented the respondent No. 3 Assam Public Service Commission (APSC).

2. The respondent No. 1 Smti Bornali Tamuli who is a person otherwise of the general category, married to Sri Mridul Kumar Borah in the year 1992, where Sri Mridul Kumar Borah belong to the Schedule Caste community. On the strength of her marriage with Sri Mridul Kumar Borah, the respondent No. 1 was issued a Schedule Caste certificate as per the certificate No. 4218 dated 20.08.1996 issued by the Deputy Commissioner, Nagaon. The respondent No. 1 appeared in the combined competitive examination of the year 1998-99 conducted by the APSC as a Schedule Caste candidate, wherein the aforesaid certificate dated 20.08.1996 was relied upon. In the combined competitive examination, the respondent No. 1 was selected on merit as a Schedule Caste candidate and on the basis of such selection by the APSC she was appointed as an Assistant Registrar of Co-operative Societies in the Co-operation Department of the Government of Assam. Later on, various complaints were received by the authorities in the Government of Assam that under the law the respondent No. 1 is not entitled to the benefit of a Schedule Caste certificate and therefore, she could not have appeared in the combined competitive examination as a Schedule Caste candidate.

3. The complaints resulted in certain process being undertaken by the Co-operation Department of the Government of Assam which resulted in a satisfaction being arrived at that under the law, the respondent No. 1 Smti Bornali Tamuli is not entitled to the benefits of the law of reservation to be employed on the strength of the Schedule Caste certificate dated 20.08.1996. It is stated that in the meantime, the Schedule Caste certificate dated 20.08.1996

issued to the respondent No. 1 Smti Bornali Tamuli had been cancelled.

4. In the aforesaid conspectus of facts, a proceeding under Rule 9 of the Assam Services (Discipline and Appeal) Rules, 1964 (in short Rules of 1964) was initiated against the respondent No. 1 as per the show cause notice dated 22.04.2010 of the Secretary to the government of Assam in the Co-operation Department. The allegation of misconduct against the respondent No. 1 in the said disciplinary proceeding was that the respondent No. 1 by concealing certain actual prevailing fact had submitted false documents to get a caste certificate from the office of the Deputy Commissioner and had used such certificate to enter into Government service under the law of reservation.

5. The proceeding resulted in the order dated 19.12.2015 of the Principal Secretary to the Government of Assam in the Co-operation Department. The Principal Secretary in the order dated 19.12.2015 had given its consideration to the disciplinary proceeding initiated against the respondent No. 1, took note of the report of the state enquiry officer on the allegation against the respondent No. 1 as well as took note of the advice of the LR and the WPT&BC Department and arrived at his conclusion that the disciplinary proceeding is required to be discontinued against the respondent No. 1. But, however, in doing so, by the same order dated 19.12.2015, the Principal Secretary to the Co-operation Department had also provided as extracted:-

“NOW, in view of the above observations and having considered all aspects of the matter of caste certificate of Smti B. Tamuli, ARCS who produced SC certificate at the time of the entry into the service and has admitted no objection if she is treated as General Caste candidate, the Governor of Assam is pleased to dispose the D.P. exonerating Smti B. Tamuli from the charges levelled against her considering her as a General Category Candidate and directed the adjustment in between the Roster of SC and General Category. However, it is also made clear that petitioner, henceforth shall not be entitled to

take any further advantage of the reservation in future. This order has been passed in keeping with the spirit of judgement passed by the Hon'ble Supreme Court in Dattu, S/O, Namdev Thakur- vs- Maharashtra & others reported in (2012) SCC 54.

The D.P. drawn against Smti B. Tamuli is hereby dropped.

The Petition submitted by Smti B. Tamuli, ARCS dtd. 29-07-2015 is also disposed accordingly."

6. Upon the order of the Principal Secretary dated 19.12.2015 being reviewed, a de-novo proceeding under Rule 9 of the Rules of 1964 was instituted against the respondent No. 1 as per the show cause notice dated 22.03.2018. It is taken note of that the charges and the statement of allegations against the respondent No. 1 in the de-novo proceeding initiated by the show cause notice dated 22.03.2018 was same as that of the charges and allegations made in the earlier proceeding pursuant to the show cause notice dated 22.04.2010.

7. Being aggrieved by the de-novo disciplinary proceeding instituted against the respondent No. 1, WP(C) No. 2864/2018 had been instituted which was given a final consideration by the order dated 09.04.2019. In the order dated 09.04.2019, the Court arrived at its satisfaction that the charges and the statement of allegations against the respondent No. 1 in the initial proceeding pursuant to the show cause notice dated 22.04.2010 and the subsequent show cause notice dated 22.03.2018 are same, meaning thereby that on the same allegation of misconduct, a de-novo proceeding had been initiated. Considering the aspect that the de-novo proceeding on the same set of allegation is impermissible in law when the earlier proceeding had resulted in an exoneration, the subsequent proceeding by the show cause notice dated 22.03.2018 had been interfered by the order dated 09.04.2019 in WP(C) No. 2864/2018. Being aggrieved, the State of Assam through the Co-operation

department has instituted this writ appeal.

8. In the appeal, there are two aspects that are to be taken into consideration. Firstly, when the interference of the learned Single Judge to the de-novo proceeding pursuant to the show cause notice of 22.03.2018 on the same set of allegation of misconduct as that of the earlier proceeding by the show cause notice dated 22.04.2010 would be impermissible under the law, the other aspect that is required to be considered is that while closing the earlier disciplinary proceeding pursuant to the show cause notice dated 22.04.2010 as per the order dated 19.12.2015 of the Principal Secretary to the Government of Assam in the Co-operation Department not only the disciplinary proceeding was closed because of the reason stated therein, but over and above in the paragraph indicated above, allowed the respondent No. 1 to continue as a general category candidate, is required to be given a consideration as to whether it will be sustainable in law.

9. The disciplinary authority is within his own discretion to take a decision as to whether to continue with the disciplinary proceeding or not to continue or whether to exonerate the delinquent inasmuch as, such decision would pertain to the allegation of misconduct that may have been made against the respondent No. 1. But at the same time, in the factual matrix as indicated above, a further question would arise that if the respondent No. 1 had entered the service on merit as a Schedule Caste candidate and subsequently the Schedule Caste certificate is either cancelled or withdrawn on the ground that the respondent No. 1 was not entitled to the Schedule Caste certificate, the question would remain as to whether and in what manner the respondent No. 1 would now continue in service.

10. The Principal Secretary had merely provided without providing any reason

that she would now continue as a general category candidate. The said aspect in the view of the Court requires a further consideration as to whether on merit and otherwise in law, the respondent No. 1 can continue in service as a general category candidate inasmuch as, her appointment as a reserved Schedule Category candidate would now be unacceptable.

11. A legal fiction would now be created upon the interference with the de-novo disciplinary proceeding against the respondent No. 1 that the said portion of the order of the Principal Secretary now allowing the respondent No. 1 to continue as a general category candidate would prevail and attain its finality without there being adequate and appropriate application of mind vis-à-vis the law in force as to whether the respondent No. 1 can now continue in service as a general category candidate. From the said point of view although we are in acceptance with the conclusion of the learned Single Judge as well as the contention of the respondent No. 1 that a de-novo enquiry on the same set of charges and allegations related to misconduct would not be sustainable in law, but at the same time, because of the legal fiction that may be created, we at the same time cannot accept the view expressed by the Principal Secretary without any further consideration in his order dated 19.12.2015 that the respondent No. 1 would now continue in service as a general category candidate.

12. Considering the matter in its entirety, we direct the Chief Secretary to the Government of Assam to examine the aspect, peruse all the relevant materials on record on the aforesaid question and also take note of the prevailing legal principle as to whether a person having been appointed as a reserved category candidate upon it being later on found that such person is not entitled to continue as such, whether, without any further deliberation, the person

concerned can be allowed to remain in service as a general category candidate. Meaning thereby the Chief Secretary would also be required to examine the aspect as to whether the respondent No. 1 on merit otherwise would have been entitled to continue as a general category candidate and whether in the circumstance where she had entered the service on the basis of an incorrect certificate can be further allowed to continue in service as a general category candidate. The Chief Secretary to also consult the APSC and obtain their view whether the respondent No. 1 can be allowed to remain in service as a general category candidate.

13. In doing so, the Chief Secretary to also issue notice to the respondent No. 1 Smti Bornali Tamuli and give all the required opportunity to the person to present her case and also allow her to produce any relevant materials or law as she may desire and the Chief Secretary thereupon to take a reasoned decision as to whether the respondent No. 1 Smti Bornali Tamuli is required to be allowed to now continue as a general category candidate. Depending on the reasoned order that may be passed, the further continuance of the respondent No. 1 Smti Bornali Tamuli in service shall be governed by.

14. The reasoned order be passed by the Chief Secretary within a period of three months from the date of receipt of a certified copy of this order.

The appeal is allowed to the extent as indicated above.

JUDGE

JUDGE

Comparing Assistant