GAHC010115402024

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

Case No. : WP(C)/2993/2024

MUKUL BORA
S/O- LT. BOGAI RAM BORA,
R/O- VILLAGE- MORONGIAL,
POST OFFICE- CHOTAHAIBOR,
POLICE STATION- SADAR,
DISTRICT- NAGAON, ASSAM, PIN- 782003.

VERSUS

THE STATE OF ASSAM AND 7 ORS.
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVERNMENT OF ASSAM,
DISPUR, JANATA BHAWAN, GUWAHATI-6.

2:THE PRINCIPAL SECRETARY TO THE GOVERNMENT OF ASSAM
PERSONNEL DEPARTMENT
DISPUR
JANATA BHAWAN
GUWAHATI-6.

3:THE PRINCIPAL SECRETARY TO THE GOVERNMENT OF ASSAM
DEPARTMENT OF SOCIAL JUSTICE AND EMPOWERMENT
DISPUR
JANATA BHAWAN
GUWAHATI-6.

4:THE PRINCIPAL SECRETARY TO THE GOVERNMENT OF ASSAM
HEALTH AND FAMILY WELFARE DEPARTMENT
DISPUR
JANATA BHAWAN
GUWAHATI-6.

5:THE STATE LEVEL RECRUITMENT COMMISSION FOR CLASS-IV POSTS
REPRESENTED BY ITS CHAIRMAN/ SECRETARY

ASSAM ADMINISTRATIVE STAFF COLLEGE

JAWAHARNAGAR
KHANAPARA

GUWAHATI-22.

6:THE DIRECTOR OF SECONDARY EDUCATION
ASSAM
KAHILIPARA
GUWAHATI-19.

7:THE JOINT DIRECTOR OF HEALTH SERVICES
NAGAON
DIST.- NAGAON
ASSAM- 782001.

8:THE MEDICAL BOARD
REPRESENTED BY THE PRINCIPAL-CUM- CHIEF SUPERINTENDENT

GAUHATI MEDICAL COLLEGE AND HOSPITAL

GUWAHATI-32
ASSAM

Advocate for the Petitioner : MR. S K ROY

Advocate for the Respondent : GA, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 12.06.2024

Heard Mr. S.K. Roy, learned counsel for the petitioner. Also heard Mr. C.K.S. Baruah, learned Govt. Advocate, representing respondent nos. 1 and 2; Ms. A. Lodha, learned standing counsel for respondent no.3; Mr. D. Upamanya, learned standing counsel for respondent nos. 4, 7 and 8; Mr. V.

Choudhury, learned standing counsel for respondent no. 5; and Mr. H. Terangpi, learned standing counsel for respondent no.6.

2) The petitioner projects that he is suffering from permanent disability of "low vision", which has been assessed at 40% as per the Disability Certificate issued by the Joint Director of Health Services, Nagaon.

3) The case of the petitioner is pursuant to a recruitment advertisement dated 25.03.2022, issued by the Secretary, State Level Recruitment Commission for Class-IV Posts ('SLRC' for short), the petitioner had submitted his on-line applications for filling up 13,300 nos. of vacant Grade-IV posts under the category of "Persons With Benchmark Disabilities" (hereinafter referred to as 'PwBD' for short). The recruitment was to be done as per the Assam District Recruitment for Class-III and Class-IV Analogous Posts Rules, 2022. The petitioner had cleared the written examination held on 21.08.2022 and was declared qualified for the next level of test. The petitioner had also appeared for interview on 18.01.2023. The petitioner was declared qualified as per the provisional result published by the SLRC on 04.05.2023. In the provisional result of Class-IV issued by the SLRC, it is clearly mentioned in bold letters that "IN CASE OF PWBD CATEGORY, APPOINTMENT SHALL BE CONFIRMED AFTER MEDICAL EXAMINATION AND CLEARANCE RECEIVED FROM MEDICAL BOARD." Accordingly, he had become eligible for appointment.

4) Subsequently, as per the "randomized posting result for SLRC Grade-IV recruitment" that was published on 09.05.2023, the petitioner was recommended for appointment in the post of Chowkidar in the establishments under the Education Department, Govt. of Assam.

5) By virtue of notice published on 12.05.2023, all the

recommended candidates were asked to appear before the Medical Education and Research Department for the benchmark disability of the successful PwBD candidates. It is projected that on the appointed date and time, the petitioner had appeared and subjected himself for the medical re-verification that was conducted at Guwahati Medical College & Hospital, Guwahati (GMCH for short). The result of medical re-verification was declared in newspaper on 22.05.2023, wherein the petitioner's name did not appear.

6) Thereafter, vide notice dated 06.06.2023, issued by the Principal Secretary, Department of Social Justice and Empowerment, all candidates with benchmark disability, who did not qualify in medical re-verification were called upon to file an appeal by 16.06.2023. Accordingly, the petitioner had preferred an appeal before the Principal Secretary, Department of Social Justice and Empowerment. Thereafter, by an advertisement published on 27.07.2023, all PwBD category candidates who had filed appeal were asked to re-appear before the Medical Board at GMCH on the scheduled date mentioned in the notice. The petitioner again appeared before the Medical Board at GMCH for his medical re-examination. However, again the name of the petitioner did not appear in the result declared on 19.08.2023, whereby the list of candidates who had cleared the test was notified.

7) The petitioner then approached this Court by filing a writ petition. This Court, by order dated 18.12.2023, disposed of W.P.(C) 7204/2023, directed the respondents to communicate the individual disability status to the petitioner against the post he had applied for. The petitioner claims that from other candidates, he had collected the Medical Board's comment-sheet, wherein his disability status as assessed by GMCH on 04.08.2023, was to the effect that his "low vision" was 30% (thirty percent).

8) The case of the petitioner is that in the employment advertisement, there was no disclosure of the terms and condition that a PwBD candidate would have to appear for medical re-verification. In this context, the learned counsel for the petitioner has submitted that the process was discriminatory as candidates other than PwBD were not required to undergo medical examination. It was submitted that disbelieving a certificate of disability for PwBD is also discriminatory. It was also submitted that as per Government notification dated 13.09.2023, the Medical Board was required to be constituted by Principal- cum- Chief Superintendent/ Superintendent of the concerned Medical College for the purpose of report and its report would be final and binding. Hence, it was submitted that the constitution of the Medical Board was illegal. It was further submitted that as per the disability certificate dated 08.07.2021, issued by the competent Certifying Authority, the petitioner was suffering from 40% permanent low vision disability. It was also submitted that instead of notifying Rules within 6 (six) months as envisaged under section 101 of Rights of Persons with Disabilities Act, 2016, the State Government had been following (i) clause 5 of the OM dated 21.05.2022, as well as (ii) another notification dated 13.09.2023, whereby powers were reserved for re-assessment of benchmark disability and cancelling the certificate issued by the Competent Authority.

9) It was submitted that a fresh advertisement dated 27.10.2023 has been issued for filling up 5,000 tentative vacant Class-IV posts under different departments, envisaging reservation for PwBD category. Accordingly, it was submitted that while issuing notice, one advertised post for PwBD category be kept vacant.

10) The submissions of the learned State and departmental counsel

have been heard. Opposing the admission of this writ petition and interim prayer made by the petitioner, the learned standing counsel for respondent no.6 has placed reliance on the case of *State of Uttar Pradesh & Ors. v. Ravindra Kumar Sharma & Ors., (2016) 4 SCC 791*.

11) It is not in dispute that before the petitioner was provided with an offer letter to join in service, he was asked to undergo medical re-examination. However, in such re-verification, he was not diagnosed as a person having benchmark disability. It is admitted by the petitioner that he had collected his disability status as assessed by GMCH, whereby his "low vision" was assessed as 30%.

12) Be it mentioned that in para-11 of the writ petition, the petitioner had not assailed (a) Provisional Result of Class-IV issued by SLRC for Class-IV Post; (b) notice published on 12.05.2023; (c) advertisement dated 06.06.2023, by which the petitioner was asked to appear for medical verification; or (d) notice published on 19.08.2023, requiring the petitioner to appear for his medical re-verification at GMCH.

13) By the order dated 18.12.2023, passed by this Court in W.P.(C) 7204/2023, filed by the petitioner, he was granted liberty to assail the decision of the Medical Board and/or Department of Social Justice & Empowerment by filing a fresh writ petition.

14) Thus, in the said writ petition, the petitioner had not assailed (a) Provisional Result of Class-IV issued by SLRC for Class-IV Post; (b) notice published on 12.05.2023; (c) advertisement dated 06.06.2023, by which the petitioner was asked to appear for medical verification; or (d) notice published on 19.08.2023, referred to above. Hence, the Court is constrained to hold that

the petitioner had waived his right to challenge the constitution of the Medical Board. By allowing this Court's order dated 18.12.2023, passed in W.P.(C) 7204/2023 to attain finality, the petitioner had abandoned challenge to the constitution of the Medical Board, and/or to challenge (a) Provisional Result of Class-IV issued by SLRC for Class-IV Post; (b) notice published on 12.05.2023; (c) advertisement dated 06.06.2023, by which the petitioner was asked to appear for medical verification; or (d) notice published on 19.08.2023. Therefore, the principle of *constructive res judicata* would be squarely applicable in this case and the petitioner cannot be permitted to now turn around and lay a challenge to the manner in which the Medical Board was constituted, which he had waived and/or failed to challenge in his previous writ petition. It is well settled that having appeared in a selection process, it is not permissible for an unsuccessful candidate to turn back and challenge the selection process. If one needs any authority on the point, the case of *D. Sarojkumari v. R. Helen Thilakom & Ors., (2017) 9 SCC 476*, decided by the Supreme Court of India may be referred to.

15) If on medical re-verification conducted at the GMCH, the percentage of "low vision" of the petitioner is assessed at 30%, which is below the benchmark disability, the petitioner cannot be said to be entitled for claiming appointment under PwBD category.

16) This is not a case where the appropriate Government, after conclusion of recruitment process, had declared certain percentage of specified disability as benchmark disability and appointed persons on pick and choose basis. Hence, it cannot be said that there was any discrimination against the petitioner in any manner whatsoever.

17) In this Court, a series of writ petitions have been filed by various

candidates with grievance similar to that of the present petitioner. Five of such writ petitions are registered as W.P.(C) Nos. 2808/2024, 2991/2024, 2995/2024, 3013/2024 and 3015/2024. The learned standing counsel for the Health Department and SLRC has submitted that there are several other similar writ petitions. Thus, it appears that this is not a solitary case where upon re-verification, the percentage of disability was not found in consonance with the disability certificate held by the unsuccessful candidates.

18) In the case of *State of Uttar Pradesh (supra)*, the Supreme Court of India had observed as follows:-

> ***2**. The question involved in the appeal is as to the right of the appellant to verify the disability certificates issued by the Medical Board under the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996. The respondents applied for BTC training course under the physically handicapped category on the basis of certificates issued under the aforesaid Rules. It was claimed that they completed the training and had been offered appointment in the primary schools run and managed by the State Government. Complaint was received from Bhartiya Viklang Sangh of illegal usurpation of the quota reserved for handicapped persons on the basis of fraudulently procured certificates without suffering from the disability certified under the Rules of 1996.*
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> ***3**. The State Government issued an order dated 3.11.2009 making a provision for constitution of fresh Medical Board in order to verify and assess the disability of the candidates. The candidates questioned communication dated 15.7.2010 issued by the Director, State Council for Educational Research & Training based upon the G.O. dated 3.11.2009 requiring them to appear before the Medical Board constituted in order to assess the disability. Out of the 234 candidates selected under the handicapped category on being examined by the Medical Board it was found that 21% of the candidates were not handicapped.*
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> ***5**. It is apparent from Rules of 1996 that disability certificate is required to be issued by Medical Board. It can issue permanent disability certificate or the Medical Board shall indicate the period of validity in the certificate in case where there is any chance of variation in the degree of disability. In case of*

refusal of disability certificate an opportunity is required to be given to the applicant of being heard, and there can be a review by the Medical Board on representation by the applicant and Rules contains a provision to the effect that the certificate issued by the Medical Board shall make a person eligible to apply.

* * *

***10**. The Division Bench of the High Court has ignored and overlooked the material fact that verification has already been done by the Medical Board and it has been found that certificates of 21% were fraudulently obtained. The High Court has issued a direction in the impugned order for physical verification of the candidate by the authorities and in case he does not suffer from disability so certified candidate can be subjected to fresh medical test. The High Court has overlooked that on mere physical verification it may not be possible to know various kinds of disabilities such as that of eyes, ear impairment etc. That can only be done by the medical examination and particularly when the High Court itself has observed that in case there is genuine suspicion and fraud has been committed medical certification can be reopened. Direction issued in this regard has not been questioned by the respondents and in fact process of re-verification was already over when High Court issued aforesaid directions.*

***11**. In our considered opinion in the peculiar facts of this case of such a fraud and genuine suspicion raised in the representation lodged by the Viklang Sangh and when 21% of such certificates have been found to be fraudulently obtained there was no scope for the Division Bench to interfere and issue order to perpetuate fraud, writ is to be declined in such a scenario and no equity can be claimed by the respondents.*

***12**. In the circumstance we set aside the impugned judgment and order passed by the Division Bench of the High Court and dismiss the writ petition. However before taking any action against the individuals they shall be issued show cause in the matter and thereafter decision will be rendered in accordance with law. Let this exercise be completed within a period of four months. The appeal is allowed to the aforesaid extent*.

19) Thus, in view of the above, as the disability of "low vision", suffered by the petitioner is assessed on re-verification to be 30%, such a disability cannot be said to be a benchmark disability.

20) Moreover, similar to the case of *State of Uttar Pradesh (supra)*,

several candidates have approached this Court to assail the lesser degree of disability assessed by a Medical Board, which is sufficient to demonstrate that the decision of the competent authority to get the disability re-assessed cannot be faulted with. The power to do such verification flows from the OM No. ABP.180/2017/211 dated 21.05.2022, which is impugned in this writ petition.

21) Under the facts of this case, and on considering the decision of the Supreme Court of India in the case of *State of Uttar Pradesh (supra)*, the petitioner has not been able to make out a case to sustain the challenge to the legality of the said OM No. ABP.180/2017/211 dated 21.05.2022. The Court is inclined to hold the said OM No. ABP.180/2017/211 dated 21.05.2022 to be valid.

22) On re-verification, the petitioner is not found to be suffering from benchmark disability and yet, if he is selected and appointed in a Grade-IV post on the strength of a medical certificate showing him to be suffering from benchmark disability, then the petitioner would be infringing the right of a candidate, who upon medical re-verification is found to be suffering from benchmark disability. That would be more unjust and iniquitous to persons actually found on medical re-verification to be suffering from benchmark disability.

23) The petitioner subjected himself to medical re-verification without any demur. After the result is unfavourable to the petitioner, he cannot be allowed to turn around and challenge the procedure adopted for selection and appointment, which was disclosed in advance in clause 8(iii) of the employment advertisement dated 25.03.2022, as well as in the provisional result of Class-IV. The word "verification", appearing therein cannot be given a restrictive meaning.

24) Moreover, it is no longer *res integra* that after the selection process is concluded, any subsequent vacancy is required to be filled up by a fresh recruitment process. The new and/or newly available vacancies cannot be filled up from the persons who had participated in earlier selection process. Therefore, as the admitted case of the petitioner is that a fresh advertisement dated 27.10.2023, has been issued for filling up 5,000 tentative vacant Class-IV posts under different departments, envisaging reservation for PwBD category, no case has been made out by the petitioner to keep one newly advertised post under PwBD category vacant for accommodating the petitioner, who has not even participated in the subsequent selection process.

25) In light of the discussions above, this writ petition fails and is hereby dismissed at the "motion" stage, without issuance of notice on the respondents.

JUDGE

Comparing Assistant