

GAHC010120782017



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

Case No. : WP(C)/283/2017

SMTI. HALIDA PARBIN.
W/O. MD. TAHURUDDIN ALI, VILL. ATIACHAR, P.O. JATRADIA, P.S.
TARABARI, DIST. BARPETA, ASSAM.

VERSUS

THE STATE OF ASSAM and 4 ORS.
THROUGH- THE SECRETARY, TO THE GOVT. OF ASSAM, SOCIAL
WELFARE DEPTT., DISPUR, GHY.-06.

Advocate for the Petitioner : MR.T DEWAN

Advocate for the Respondent : MR. A U CHOUDHURY (r-5)

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : Ms. U. Nanda, Advocate

For the Respondents : Mr. T. C. Chutia,
Additional Sr. Government Advocate.
Mr. S. Islam, Advocate
Respondent No. 5.

Date of Hearing : 12.02.2024

Date of Judgment & Order : 22.04.2024

JUDGMENT & ORDER (CAY)

1. Heard Ms. U. Nanda, learned counsel for the petitioner. Also heard Mr. T. C. Chutia, learned Senior Government Advocate for the State respondents and Mr. S. Islam, learned counsel for the respondent No. 5.

2. The instant writ petition is filed assailing the selection and appointment of the respondent No. 5 as Anganwadi Worker of No. 6. Atiyachar Anganwadi Centre. The further challenge made in this writ petition is order dated 09.09.2016 passed by the Director, Social Welfare, Assam in pursuance of an order dated 17.12.2015 passed by this Court in WP(C) No. 5634/2009.

3. The brief facts leading to the present writ petition are as follows:-

I. An advertisement dated 08.09.2009 was issued by the respondent

No. 4 inviting application for filling up of posts of Anganwadi Worker and Helper for the newly created Anganwadi Centre and Mini Anganwadi Centre.

- II. Pursuant to such advertisement, the petitioner applied for the post of vacant post of Anganwadi Worker (AWW) in No. 6 Atiyachar Mini Anganwadi Centre.
- III. The respondent No. 5 also applied for the post in question. However, according to the petitioner, her candidature was rejected on the ground that she is not a local resident and she is under aged in terms of condition No. 3 of the advertisement.
- IV. An interview was held on 30.10.2009. It is also the contention of the petitioner that the respondent No. 5 who even did not appear in the interview was appointed to the post in question on 23.11.2009.
- V. Being aggrieved, the petitioner approached this Court by filing writ petition being WP(C) No 5634/2009 and this Court by its order dated 17.12.2015, disposed of the said writ petition granting liberty to the petitioner to approach the respondent No. 2 by agitating her grievances as raised in the said writ petition with a further direction to the respondent No. 6 to take a decision in the event such approach is made by giving a hearing to all the parties and to pass a speaking order.

VI. Accordingly, the petitioner preferred a representation on 06.01.2016 and thereafter, hearing was taken on 17.08.2016 and the Director of Social Welfare Department, Assam passed a speaking order on 09.09.2016, whereby the claim of the petitioner was rejected. Such order is under challenged in this writ petition.

4. The claim of the petitioner was rejected and decision to appoint the respondent No. 5 was upheld by passing the impugned order dated 09.09.2016. In the speaking order, the following conclusions were made and reasons were recorded:-

- I. On the date of submission of application, the respondent No. 5 was below 18 years.
- II. However, on the date of issuance of the appointment letter in the month of November, 2009, she was major.
- III. The respondent No. 5 attained the age of majority. She stood first in the interview. She has been performing her duty with full satisfaction of higher authority.
- IV. The petitioner is not staying in the concerned locality since last five years and therefore, the claim of the petitioner cannot be accepted at this stage.

5. Assailing the impugned speaking order, the learned counsel for the petitioner contends the following:-

I. The respondent No. 5 admittedly was a minor on the last date of submission of application and therefore, her candidature ought to have been rejected by the authorities and her appointment is void-ab-initio and the selection of the respondent No. 5, is also in gross violation of the advertisement dated 08.09.2009.

II. By illegally appointing the respondent No. 5, the petitioner who was the sole eligible candidate has been denied appointment, thus, violated her right under Articles 14 and 16 of the Constitution of India. Therefore, the impugned order dated 09.09.2016 as well as appointment of the respondent No. 5 to the post in question is liable to be struck down.

III. The reason recorded by the Director, as regards residence of the petitioner is also not sustainable under law inasmuch as staying away from the permanent residence cannot be a ground to reject the claim of the petitioner.

6. The learned State Counsel Mr. T. C. Chutia, relying on the speaking order and the affidavit-in-opposition filed through the respondent Nos. 3 and 4 argues that the reasons given in the speaking order in rejecting the claim of the petitioner are justified.

7. The respondent No. 5 has filed an affidavit-in-opposition and contended that the respondent No. 5 was a major and her date of birth is 01.01.1991. However, her date of birth is recorded as 01.07.1991 in her Admit Card issued in connection with

her Matriculation Examination and therefore, the respondent No. 5 was major at the time of submission of her candidature for the post in question. The respondent No. 5 has also raised certain preliminary objection as regards the maintainability of this writ petition urging that the disputed question as regards residence of the petitioner cannot be determined in a writ petition. It is further contended that the birth certificate being not disputed by the petitioner by filing reply affidavit, the age of the petitioner should be accepted on the basis of such birth certificate and accordingly, this writ petition is liable to be dismissed. It is also the case of the respondent No. 5 that the respondent No. 5 approached the Secretary, Board of Secondary Education, Assam by submitting representation for correction of her date of birth in the Admit Card but same has not been corrected till date.

8. This Court has given anxious consideration to the arguments advanced by the learned counsel for the parties. Also perused the materials available on record.

9. The dispute as regards the residential status of the petitioner could not have been determined by way of the speaking order for the reason that such issue was not at all a subject matter of dispute either in the earlier writ proceeding or in the representation filed by the petitioner. The fact also remains that the petitioner was allowed to participate in the selection process in question considering her residential status and no dispute as regards her residential status was raised by the selection committee. That being so, the determination made by the Director in its speaking order is interfered with inasmuch as the reason of staying away from her permanent

residence, subsequent to the date of selection, cannot be a ground to hold that she is not a resident of the locality.

10. So far relating to the residential status of the respondent No. 5, same has been determined after an enquiry and therefore, the dispute raised by the petitioner that respondent No. 5 is not a resident of the locality cannot also be determined by this Court in exercise of its power of judicial review. Therefore, such finding is not interfered with.

11. Coming to the issue of age, it is seen that Condition No.3 of the advertisement in question prescribes that the minimum age of the candidate as on 01.01.2009 should be 18 years and maximum should be 44 years. Such condition is an essential condition for appointment to the post in question.

12. It is by now well settled that the basic question on eligibility is to be determined on the basis of the date prescribed and crystallized in the advertisement itself. If no specific date is prescribed in the advertisement, then on the last date of submission of the application form, the candidate must have satisfied the eligibility condition.

13. As held by the Hon'ble Apex Court in the case of ***Rakesh Kumar Sharma –Vs- State (NCT of Delhi)*** reported in ***2013 11 SCC 58***, in the given facts of the present case also there could be large number of candidates who were under-aged as that of the respondent No. 5 as per the prescription of condition-3 of the advertisement but did not apply since they did not attain the minimum age on

01.01.1991. Therefore, granting any benefit to the respondent No. 5 would be violative of the doctrine of equality, a backbone of the fundamental rights guaranteed under Article 14 and 16 of the Constitution of India. However, the respondents have done what law forbids them to do by appointing the petitioner to the post in question even after determining that as on 01.01.2009 the respondent No.5 was below 18 years.

14. In the case in hand, it is undisputed that in terms of the Admit Card issued by the competent authority, the age of the respondent was below 18 years as on 01.01.2009 and thus, she did not fulfill the condition No. 3 of the advertisement. Admittedly, such fact was within the knowledge of the respondent and such condition was ignored while appointing the respondent No. 5. Therefore, the appointment of the respondent No. 5 was in violation not only of the condition No. 3 of the advertisement but also in violation of Articles 14 and 16 of the Constitution of India. Therefore, no concession to such appointment on the ground of long satisfactory service or on the ground that on the date of appointment, the respondent No. 5 attained the minimum age could have been granted by the Director. Such course of action is not permissible under law.

15. Having determined so, now let this Court deal with the issue which has been raised for the first time in this writ petition by the respondent No. 5 as regards her actual date of birth. The Admit Card of the respondent No. 5, dates back to the year 2007, which certifies that the date of birth of the petitioner is 01.07.1991. The hearing

in terms of this Court's order dated 17.12.2015 passed in WP(C) No. 5634/2009 was held on 17.08.2016 and the respondent No. 5 also participated in such hearing. There is no reflection in the order dated 09.09.2016 as regards the existence of or submission of the birth certificate dated 10.03.2011 issued by the Directorate of Health Services, Assam and accordingly, the Director Social welfare also held that the respondent No. 5 did not attain the minimum age on the last date of submission of the application. Reason is also not disclosed why the respondent No.5 did not rely on such certificate at the time of hearing on 17.08.2016. The certificate has also been issued after more than 20 years of birth of the respondent No. 5 i.e. on 10.03.2011. Thus at the time of last date of submission of application in respect of the post in question or at the time of selection, such certificate was not available. That being the position, this Court cannot in exercise of power of judicial review shall not re-appreciate and determine the actual date of birth on the basis of the birth certificate issued in the year 2011 in favour of the respondent No. 5 certifying the date of birth of the respondent No. 5 to be 01.01.1991. The fact also remains that the date of birth reflected in the Admit Card has also not been corrected till date. The respondent No. 5 is also silent as regards date and year of seeking correction of the Admit Card.

16. Therefore, in the totality of the matter, to come into a just decision as regards the date of birth of the respondent No. 5 on the basis of the additional material brought on record by the respondent No. 5 by way of the additional affidavit, in the considered opinion of this court, the matter needs to be relegated to the

Director for taking a fresh decision as regards the actual date of birth of the respondent No. 5 and thereafter, to determine the validity of the appointment of the respondent No. 5 in terms of the determination made hereinabove.

17. Accordingly, for the reasons recorded herein above, the present writ petition stands disposed of by setting aside and quashing the speaking order dated 09.09.2016 passed by the Director, Social Welfare Department, Assam, with a further direction to the said Director to determine the age of the respondent No. 5 taking note of the birth certificate relied on by the respondent No. 5. The Director shall also verify the authenticity of the birth certificate relied on by the respondent No. 5. The Director shall also verify from the Education Board as well as from the Directorate of Health Services, Assam as regards the basis of recording the date of birth of the respondent No. 5 in the Admit Card and Birth Certificate. After considering the aforesaid, the Director shall pass a fresh speaking order taking note of the determination made hereinabove. The entire exercise be carried out within a period of six months from the date of receipt of a certified copy of this order to be furnished by the respondent No. 5.

18. Accordingly, this writ petition stands disposed of. Parties to bear their own cost.

JUDGE

Comparing Assistant