

GAHC010185572014



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

Case No. : WP(C)/3007/2014

PULAKESH BARUAH
S/O SRI KUMUD MALLA BARUAH, R/O VILL. and P.O. NIZPAKOWA, P.S.
NALBARI, DIST- NALBARI, ASSAM

VERSUS

THE STATE OF ASSAM AND 4 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, DEPARTMENT OF SPORTS and YOUTH WELFARE, DISPUR,
GHY-6

2:THE DIRECTOR OF SPORTS AND YOUTH WELFARE
ASSAM

3:THE DIBRUGARH UNIVERSITY
DIBRUGARH-786004
DIST- DIBRUGARH
ASSAM
REPRESENTED BY ITS REGISTRAR

4:THE ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
KHANAPARA
GHY-22
REPRESENTED BY ITS SECRETARY

5:MONURAMA DAS
D/O LT. BORA DAS
W/O SRI BHABEN HAZARIKA
R/O BHUYANHAT GOAN
P.O. BHUYANHAT
DIST- JORHAT

ASSAM
PIN-785680
PRESENTLY R/O CHURCHURI
HAZARIKAPARA
P.O. BANAGRAM
P.S. BELSOR
DIST- NALBARI
ASSAM
PIN-78130

Advocate for the Petitioner : MRS.J M KONWAR

Advocate for the Respondent : MR.S BHUYAN

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 04.06.2024

Heard Ms. S. Jain, learned counsel for the petitioner, who is all throughout supported by Mr. B.D. Konwar, learned senior counsel. Also heard Mr. C.K. Sarma Baruah, learned Govt. Advocate for respondent nos. 1 and 2; Mr. R. Goswami, learned counsel for the respondent no.2; Mr. T.J. Mahanta, learned senior counsel, assisted by Ms. P. Sarma, learned counsel for respondent no.4 and Mr. D. Choudhury, learned counsel for respondent no.5.

2) On the ground that though the respondent no.5 did not possess the requisite educational qualification, she was selected by the Assam Public Service Commission and appointed to the post of District Sports Officer, under the Department of Sports and Youth Welfare, Assam, the appointment of the respondent no. 5 is assailed in this writ petition filed under Article 226 of the Constitution of India.

3) The Government of Assam, in its Gazette Extraordinary dated

13.11.2002, had published a notification no. SYW.111/89/62 dated 24.01.2002, issued by the Sports and Youth Welfare Department, by which pending finalization of the Service Rules to be framed under Article 309 of the Constitution of India, issued a "service order", called the Assam Sports and Youth Welfare (Recruitment and Promotion) Service Orders, 2001, which was to come into force on the date of its publication. Under the provision of Clause 8 of the said Service Order, the educational qualification prescribed for direct recruitment for the post of District Sports Officer was – "Graduate in Arts/Science/ Commerce from a recognised University with a Bachelor degree or Diploma in Physical Education (B.P.Ed.) from a recognized Physical Training Institute".

4) The Assam Public Service Commission (APSC) had issued an advertisement dated 04.07.2007, for filling up 6 (six) posts of District Sports Officer under the Department of Sports and Youth Welfare, Govt. of Assam, which was published in a section of newspapers on 10.07.2007. The advertised educational qualification was that *"a candidate must be a degree holder in Arts/Science/ Commerce from a recognised University along with 3 (three) years degree in B.P.E. or Diploma in NIS from a recognized Physical Training Institute/ University/ National Institute of Sports."*

5) Thereafter, by issuing a corrigendum dated 24.07.2007, the advertised educational qualification for the post of District Sports Officer was to be read as *"A candidate must be a degree holder in Arts/Science/ Commerce from a recognised University with a Bachelor degree or Diploma in Physical Education (B.P.Ed.) from a recognized Physical Training Institute or three years degree in Bachelor of Physical Education (B.P.E) from a recognised Physical Training Institute."* Thus, the advertised educational qualification was altered to

meet the prescription of the herein before referred Service Order.

6) Heard the learned counsel for all sides and perused (a) the writ petition; (b) affidavit-in-opposition filed by respondent no.2; (c) affidavit-in-opposition filed by respondent no.3; (d) affidavit-in-opposition filed by respondent no.5; (e) affidavit-in- reply filed by petitioner; (f) affidavit-in-opposition filed by respondent no.5; (g) affidavit-in-opposition filed by respondent no.4; (h) affidavit-in- reply filed by petitioner.

7) As per APSC recommendation order dated 08.05.2008, amongst others, the name of respondent no. 5 was also recommended for appointment as District Sports Officer. Although respondent no. 5 belonged to reserved SC category, her name was recommended under unreserved category. Thereafter, the Government of Assam, Sports and Youth Welfare Department, vide notification dated 05.01.2009, appointed the respondent no. 5 to the post of District Sports Officer, and her place of posting was at Darrang, in Mangaldai District. The petitioner, who had also applied for the said post was not selected.

8) On 12.06.2014, the petitioner has filed this writ petition. It has been projected in the writ petition that one Dhiman Bhattachariya submitted a RTI application dated 28.09.2013 to the Director, Sports Authority of India, Netaji Subhas National Institute of Sports, Eastern Centre Kolkata (NSNIS, Kolkata for short), and in reply, the RTI applicant was provided with a copy of the Permanent Record of Coaches Trained, concerning the respondent no. 5. In column no. 7 in respect of "Higher personal performance/ participation", it is mentioned that "All India Intervarsity Athletic Meet (East Zone) held at B.I.T. Ranchi in December, 91, throwing events." However, the Dibrugarh University (respondent no.3) in its affidavit-in-opposition, had annexed a certificate signed by Retired Director of Sports, Dibrugarh University, stating therein that a four

Athletic members, whose names were mentioned therein, had represented the Dibrugarh University Team in East Zone Inter-Varsity Athletic Meet which was held at Birla Institute of Technology, Ranchi (Bihar) now in Jharkhand in the year 1991-92 (December '91). The name of the respondent no. 5 is not mentioned in the said certificate.

9) The respondent no.5, in para-4 of her affidavit-in- opposition, had stated that in Annexure-8 of the writ petition, the Director of Sports, Dibrugarh University had not stated that the respondent no. 5 had participated in the All India Inter-Varsity Athletic Meet (East Zone) held in December, 1991 at B.I.T., Ranchi. The respondent no. 5 had further admitted that she had not participated in the said meet. Thus, there is no doubt that the record provided by NSNIS, Kolkata under RTI reply contains an erroneous declaration in column no. 7 regarding higher personal performance/ participation by the respondent no.5.

10) Be that as it may, the Diploma earned by the respondent no. 5 from NSNIS, Kolkata is "Diploma in Sports Coaching in Athletics." The said Diploma was issued on attending the Diploma Course in Sports Coaching from July, 1999 to June, 2000. The copy of the said Diploma in Sports Coaching has been annexed by the respondent no. 5 to her affidavit-in-opposition.

11) There is no document to show that the Diploma in Sports Coaching, earned by the respondent no. 5 has been declared to be equivalent to "*Diploma in Physical Education (B.P.Ed.)* from a recognized Physical Training Institute", which was the educational qualification prescribed in the employment advertisement dated 04.07.2007, as amended/ modified/ corrected vide corrigendum dated 24.07.2007, issued by the APSC.

12) The learned senior counsel for the APSC had submitted that the respondent no. 5 had produced the copy of her Diploma along with her affidavit-in- opposition. Therefore, the same could not be responded to by the APSC. Moreover, it was submitted that as the selection process related to the year 2007-2008, the records could not be readily retrieved for being produced before the Court.

13) The learned counsel for the respondent no. 5 had submitted that the respondent no. 5 had not made any false declaration and did not forge or tampered with any document. It was submitted that the candidature of respondent no. 5 was processed and she was selected by the APSC in the year 2008 and her appointment was made vide notification dated 05.01.2009. However, the writ petition has been filed after an inordinate delay of 5 years five months on 12.06.2014, but there is no worthwhile explanation of inordinate delay in filing this writ petition. It was submitted that belated submission of RTI application by the petitioner or any third party cannot be a cogent and admissible explanation for inordinate delay. It was also submitted that on the date when this writ petition has been heard, the respondent no. 5 has rendered about 15 years of continuous service without any blemish and to the best satisfaction of all concerned.

14) It is also seen that the Deputy Director of Sports and Youth Welfare, Govt. of Assam, on behalf of Director of Sports and Youth Welfare, Assam (respondent no.2) in their affidavit- in- opposition, had admitted in para- 5 thereof that the respondent no. 5 does not have the requisite qualification as per the Assam Sports and Youth Welfare (Recruitment and Promotion) Service Orders, 2001. Thus, the competent authority under whom the respondent no. 5 is serving, has also not found the respondent no. 5 to be equipped with

requisite qualification.

15) Therefore, notwithstanding that the respondent no. 5 have served the Office of the Directorate of Assam Sports and Youth Welfare, Assam for about 15 years from January, 2009 till date, but she does not possess the educational qualification as prescribed under the Assam Sports and Youth Welfare (Recruitment and Promotion) Service Orders, 2001, as the respondent no. 5 does not possess the prescribed "*Diploma in Physical Education (B.P.Ed.)*" from a recognized Physical Training Institute.

16) Therefore, as it is established that the respondent no. 5 was appointed as District Sports Officer in the establishment of the Directorate of Assam Sports and Youth Welfare, Assam without having the prescribed qualification of holding a *Diploma in Physical Education (B.P.Ed.)* from a recognized Physical Training Institute, the Court is of the considered opinion that the initial appointment of the respondent no. 5 vide notification issued on 05.01.2009 by the Govt. of Assam, Department of Sports and Youth Welfare is a nullity. Therefore, though the challenge to the appointment of the respondent no. 5 is with a delay of about 5 years 5 months, such delay cannot be said to be fatal. A nullity of appointment cannot be cured and held to be lawful owing to long delay in making a challenge.

17) The Supreme Court of India, in the case of *State of Orissa v. Mamata Mohanty, 2011 STPL 9512 (SC)*, had held as follows"-

37. *It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which*

he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. [vide: Upen Chandra Gogoi v. State of Assam & Ors., AIR 1998 SC 1289; Mangal Prasad Tamoli (Dead) by L.Rs. v. Narvadeshwar Mishra (Dead) by L.Rs. & Ors. , AIR 2005 SC1964; and Ritesh Tiwari & Anr. v. State of U.P. & Ors., AIR 2010 SC 3823].

* * *

54. This Court has consistently rejected the contention that a petition should be considered ignoring the delay and laches in case the petitioner approaches the Court after coming to know of the relief granted by the Court in a similar case as the same cannot furnish a proper explanation for delay and laches. A litigant cannot wake up from deep slumber and claim impetus from the judgment in cases where some diligent person had approached the Court within a reasonable time. [See: M/s Rup Diamonds & Ors., v. Union of India & Ors., AIR 1989 SC 674; State of Karnataka & Ors. v. S.M. Kotrayya & Ors., (1996) 6 SCC 267; and Jagdish Lal & Ors. v. State of Haryana & Ors., AIR 1997 SC 2366].

18) In the writ petition, the petitioner has stated that one Sri Dhiman Bhattachariya had obtained information under RTI regarding information provided by the respondent no. 5, which is contained in the record of Sports Authority of India, NSNIS, Kolkata, Eastern Centre. Thereafter, one Harmohan Kalita had submitted a RTI application before Dibrugarh University regarding names of University athletics who had participated in the Inter-Varsity Athletic Meet held at B.I.T., Ranchi in December, 1991, but information could not be provided, for which a RTI appeal was filed and the University RTI appellate authority by a reply dated 08.05.2014, provided names of four persons who had participated in the said Meet, which does not include the name of the respondent no.5. Thereafter, this writ petition was filed on 12.06.2014. Thus, it cannot be said that the delay in filing the writ petition is unexplained.

19) One of the submissions of the learned counsel for the respondent

no. 5 was that two other persons, similarly situated to her, were also appointed by the same appointment order and their names have been disclosed by the respondent no. 5 in her affidavit-in- opposition, and yet the petitioner has not assailed their appointment and thus, the present writ petition was *mala fide*. In the said context, it is well settled legal proposition that the Court has the power to mould reliefs, but it must exercise judicial restraint from granting relief not prayed by the petitioner. Moreover, under the facts of the present case in hand, the Court does not find the respondent no. 5 is entitled to take a plea of negative equality on the ground that her appointment cannot be set aside when appointment of two other similarly situated persons were not questioned. The said plea as urged by the learned counsel for the respondent no. 5 cannot be accepted.

20) In this case, the APSC is the recruiting agency, which is a Constitutional/ statutory body. It cannot be expected by an ordinary citizen that the said body will recommend appointment of respondent no. 5 who did not hold educational qualification as prescribed by their own corrigendum dated 24.07.2007. The Diploma earned by the respondent no. 5 is not the prescribed *Diploma in Physical Education (B.P.Ed.)* from a recognized Physical Training Institute. Therefore, the recommendation dated 08.05.2008, made by the APSC in respect of the respondent no. 5 is not found to be in consonance with the educational qualification provided by APSC in its corrigendum dated 24.07.2007.

21) Resultantly, the appointment of the respondent no. 5 made vide impugned notification no. SYW.69/2008/29, dated 05.01.2009, issued by the Commissioner and Secretary to the Government of Assam, Sports and Youth Welfare Department, only in respect of Smt. Monurama Das (respondent no. 5), is liable to be and is accordingly, declared to be *void ab initio* and is hereby set

aside and quashed. It is clarified that this judgment and order shall have no adverse impact/ affect to appointment offered to any other persons whose names are contained in the said notification dated 05.01.2009.

22) The Director of Assam Sports and Youth Welfare Department, Govt. of Assam (respondent no.2) shall pass all necessary and consequential orders that may be necessary and/or be required to give effect to this judgment and order. The said exercise shall be done within a period of one month from the date on which a certified copy of this order is furnished by the petitioner to the office of the Directorate of Assam Sports and Youth Welfare, Assam.

23) In this writ petition, the petitioner has made prayer no. (II) for a direction to the respondent no. 1 to offer appointment in the said post to the next eligible and willing candidate. In the said regard, the Court is of the considered opinion that once the selected candidates were appointed vide the herein before referred notification no. SYW.69/2008/29, dated 05.01.2009, issued by the Commissioner and Secretary to the Government of Assam, Sports and Youth Welfare Department (respondent no.1), the appointment process that was initiated by the APSC vide employment advertisement no. 3/2007 dated 04.07.2007, had come to an end. Thereafter, it cannot be said that the recommendation list dated 08.05.2008, issued by APSC survives at this point of time. Therefore, the Court is inclined to refuse the prayer no. (II), made by the petitioner.

24) Hence, this writ petition is partly allowed to the extent of setting aside and quashing of the impugned notification no. SYW.69/2008/29, dated 05.01.2009, issued by the Commissioner and Secretary to the Government of Assam, Sports and Youth Welfare Department (respondent no.1) in so far as it relates to the respondent no. 5, namely, Smt. Monurama Das only, without

affecting the appointments offered to any other persons whose names are contained therein. Prayer no. (II), as indicated herein above, is refused.

25) There shall be no order as to cost.

JUDGE

Comparing Assistant