

**(2008) 09 GAU CK 0050**  
**In the Gauhati High Court**

Anup Kumar Shyam

APPELLANT

Vs

State of Assam and Others

RESPONDENT

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**Date of Decision :** 30-09-2008

**Acts Referred:**

Assam Public Service Commission Regulations, 1951 — Regulation 3  
Constitution of India, 1950 — Article 226

**Citation :** (2009) 3 GLR 7 : (2009) 1 GLT 578

**Hon'ble Judges :** Jasti Chelameswar, C.J;I.A. Ansari, J

**Bench :** Division Bench

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## Judgement

I.A. Ansari, J.—By this common judgment and order, we propose to dispose of this set of twelve writ petitions, filed under Article 226 of the Constitution of India, assailing the legality and validity of the order, dated 7.10.2005, passed by the Registrar of Co-operative Societies, Government of Assam, in exercise of powers conferred on him under Para 4(1)(b)(I) of the Assam Sub-ordinate Co-operative Societies (Recruitment and Conditions of Services) Orders, 1989 ("the Service Order, 1989"), promoting thirty three Lower Divisional Assistants (LDAs), under the Co-operation Department, Government of Assam, to the posts of Junior Inspector/Auditor of Co-operative Societies.

2. The material facts and various stages, which have led to the present set of writ petitions, may be set out as under:

(i) Under the Service Order, 1989, 10% of the total strength of the cadre of Junior Inspector/Auditor of Co-operative Societies is reserved for promotion from the posts of LDA, in the Department of Co-operation, Government of Assam. For a person to become eligible for promotion to the post of Junior Inspector/Auditor of Co-operative Societies from its feeder post, i.e., the post of LDA, he must have put in, at least, 5 years of continuous service as an LDA in the said Department and must not have crossed the age of 45 years in the case of General categories and the age of 48 years in the case of candidates of reserved categories like Scheduled Castes, Scheduled Tribes and Other Backward Classes.

(ii) A Selection Committee for consideration of promotion of the LDAs to the post of Junior Inspector/Auditor of Co-operative Societies was constituted with the Registrar Co-operative Societies, Assam, as Chairman, and the Deputy Secretary to the Government of Assam, Department of Co-operation, and the Additional Registrar of Co-operative Societies (Administration) as members. Interviews were accordingly held on 3rd and 4th of February, 2005. Altogether 114 LDAs appeared, in the interview, for consideration of their promotion as aforesaid. The present petitioners had also participated in the said interview. d

(iii) Acting upon a merit list, which was claimed to have been prepared on the basis of the performance of the candidates, at the said interview, the impugned order, dated 7.10.2005, promoting thirty three LDAs to the post of Junior Inspector/Auditor of Co-operative Societies was made and it is this order, which stands impugned in this writ petition.

3. We have heard Mr. B.D. Konwar, learned Counsel for the petitioners, and Mr. A.C. Buragohain, learned Additional Advocate General, Assam, appearing on behalf of the State respondents. We have also heard Mr. M.K. Choudhury, learned senior counsel, appearing on behalf of the respondent Nos. 11 to 40, Mr. S.K. Medhi, learned Counsel for the respondent No. 42, and Mr. M. Sarania, learned Counsel for the respondent No. 44 in WP(C) No. 789 of 2005.

4. We may pause here to point out that the additional ground of challenge to the appointment of the respondent No. 44 in WP(C) No. 789/2005 is that his name had not appeared at all in the select list and he is, thus, alleged to have promoted dehors the scheme of promotion, which governs the parties concerned.

5. Before proceeding further, we may point out that though the Service Order, 1989, was challenged in the writ petitions, this challenge has not been pursued at the time of hearing and has, thus, remained not pressed. We are, therefore, not called upon to decide the question as to whether the Service Order, 1989, is valid or not.

6. Before proceeding further, we may also point out that this Court's attention has also been drawn to the fact that one Shri G.P. Phatowali was Registrar, Co-operative Societies, who, on 28.5.2008, made several appointments to the posts of Junior Inspector/Auditor of Co-operative Societies by taking recourse to Regulation 3(f) of the Assam Public Service Commission Regulations, 1951, and when the appointees reported for joining their duties, an enquiry was conducted by the Government and the categorical finding of the enquiry, which was so held, was that all these appointments had been made by Shri Phatowali in his personal capacity and not in his official capacity as Registrar. As the said appointees were not allowed to join their respective posts, they came to this Court by way of a writ petition, which gave rise to WP(C) No. 2072/2005. By judgment and order, dated 25.5.2005, the said writ petition was dismissed. In the judgment and order aforeMentioned, it was observed that unable to join their duties, the appointees had come to this Court with a writ petition, made under Article 226, which had

given rise to WP(C) No. 1511/2005, and by order, dated 25.2.2005, passed therein, this Court had directed the respondents/authorities concerned to consider the cases of the petitioners for appointment to the post of Junior Inspector/Auditor of Co-operative Societies along with other similarly situated candidates. It was a finding of this Court, in WP(C) No. 2072/2005, that since 26.2.2005 and 27.2.2005, were holidays, being 4th Saturday and Sunday respectively, the appointments were issued on 28.2.2005. Thus, this Court took notice of hot haste with which the appointments had been made by Shri G.P. Phatowali, though this Court had never issued any direction for appointment of those, who had, as petitioners, come to this Court in WP(C) No. 1511/2005. This Court further noted, in its judgment and order aforeMentioned, that 28.2.2005 was the last day of service of the then incumbent holding the post of Registrar of Co-operative Societies, Assam, namely, Shri Phatowali. While dismissing the writ petition, the learned Single Judge of this Court held that it is not only desirable but also mandatory to take action against the said Registrar, who was instrumental in making the said illegal appointments; hence, the learned Single Judge of this Court recommended to the Government to take action, in accordance with law, against Shri Phatowali.

7. Pointing out the manner in which Shri Phatowali aforeMentioned as Registrar of Co-operative Societies Assam had acted, it has been contended, on behalf of the petitioners, that the entire process of selection, in the present case too, was manipulated and the select list, which had been acted upon, is a manipulated one.

8. In the light of the facts indicated above, when this Court made pointed query from the learned Additional Advocate General, Assam, as to what steps had been taken against Shri Phatowali, the learned Additional a Advocate General, Assam, upon getting fervent search made, placed before this Court materials to show that a disciplinary inquiry was initiated against Shri Phatowali and during the course of inquiry, the Inquiry Officer had pointed out that the activities of Shri Phatowali warranted criminal proceeding. Though these facts were pointed out as far back as on 21.9.2007 by the said Inquiry Officer, no action was taken against Shri Phatowali and it was only on 10.9.2008 that when this Court made an inquiry from the learned Additional Advocate General, Assam, as to what action had been taken against the said Shri G.P. Phatowali that the learned Advocate General has informed this Court that the Government has, now, decided to lodge an FIR against Shri Phatowali.

9. In the backdrop of the above facts, when we look into the case at hand, we find that it is the admitted case of the State Government that the contemporaneous records of the selection process, i.e., of the interview, in question, are not available. In fact, the State Government concedes that the relevant materials are missing from the office. In the absence of any contemporaneous record showing that the merit list, which has been acted and relied upon by the present Registrar of Co-operative Societies, Assam, to appoint/

promote the private respondents in these writ petitions, this Court has no option but to treat the said selection process as a mere hoax, particularly, when the State respondents have not been able to point out that the name of the respondent No. 44 had ever figured in the said select list. Thus, the respondent No. 44 has been promoted to the post of Junior Inspector/Auditor despite the fact that his name had never appeared even in the select list, which stands challenged in the present case.

10. Though the learned Additional Advocate General has pointed out that the two members of the Selection Committee have averred, in their affidavit, that the select list, in question, has been properly prepared, the fact remains that the contemporaneous records are not available and no explanation has been offered as to what efforts were made to trace out the records, in question, nor is there any explanation discernible from the materials on record in this regard except that the State respondents contend that the entire contemporaneous records are missing. It could not, however, be explained as to how the select list still survives if this select list was also a part of the records, which has vanished. Situated thus, this Court has no option but to hold that the selection process was, as rightly contended by the petitioners, wholly manipulated and a select list, the basis whereof is not known and cannot be ascertained, could not have been, and ought not to have been, acted upon by the State respondents for the purpose of issuing appointment letters. The records of the selection process ought to have been scrupulously maintained. Far from this, no record was, in fact, maintained.

11. The Apex Court has made it clear, in *Dr. J.P. Kulshreshtha and Others Vs. Chancellor, Allahabad University and Others*, that when the court is b skeptical, record of the selection proceedings, including the notes regarding the interviews may have to be made available. In the case at hand, it is claimed that the records existed, but the same has disappeared. It is not even asserted by the State respondents that any attempt was made to find out as to how the records had disappeared. c Thus, the entire selection process stands clouded in obscurantism's and appointments, which have been made on the strength of such selection process, cannot be sustained. [See also *Sunder Singh v. D.G. of Police*, 1994 Supp (3) SCC 81 ].

12. It has been pointed out by Mr. M. Sarania, learned Counsel for the petitioner, that in the case of the respondent No. 44, in WP(C) No. 789/05, promotion has been accorded by Karbi Anglong Autonomous Council, as empowered by the Memorandum of Understanding of the Karbi Anglong Autonomous Council with the State Government. For us, it is immaterial as to whether the promotion has been accorded by the said Autonomous Council or by the State Government inasmuch as the fact remains that the promotion could not have been accorded to the respondent No. 44 without holding proper proceedings with regard to such promotion. In fact, we have already pointed out above that as far as respondent No. 44, in WP(C) No. 789/05 is concerned, the select list, in question, does not even include the name of respondent No. 44. Thus, the case of the respondent

No. 44 stands on a footing worse than that of the remaining respondents.

13. Because of what have Discussed and pointed out above, we are firmly of the view that in the facts and attending circumstances of the present case, appointments of respondent Nos. 11 to 44, in this set of writ petitions, cannot be allowed to stand good on record and must, therefore, be set aside and quashed.

14. In the result and for the foregoing reasons, the impugned order, dated 7.8.2005, whereby the private respondents have been promoted to the post of Junior Inspector/Auditor of Co-operative Societies, is hereby set aside and quashed.

15. With the above observations and directions, these writ petitions shall stand disposed of.

16. No order as to cost.