

(2020) 10 GAU CK 0019
In the Gauhati High Court
Case No : Writ Appeal No. 64, 70 Of 2020

Bharat Chandra Talukdar

APPELLANT

Vs

Anupama Devi And 4 Ors

RESPONDENT

Date of Decision : 21-10-2020

Acts Referred:

Assam Secondary Education (Provincialised) Service Rules, 2003 — Rule 13, 13(1)
Constitution Of India, 1950 — Article 14, 16, 309

Citation : (2020) 10 GAU CK 0019

Hon'ble Judges : Manash Ranjan Pathak, J; Prasanta Kumar Deka, J

Bench : Division Bench

Advocate : K N Choudhury

Final Decision : Dismissed

Judgement

M.R. Pathak J

1) Heard Mr. Kamal Nayan Choudhury, learned Senior counsel, assisted by Mr. Rajarshi Malla Deka, learned counsel for the appellants in both the appeals. Also heard Mr. Shyamal Kumar Goswami, learned counsel for the respondent No. 1 in Writ Appeal No. 64/2020 (Petitioner in W.P.(C) No. 5213/2019), Mrs. Ami Bujarbaruah, learned counsel for the respondent No. 1 in Writ Appeal No. 70/2020 (Petitioner in W.P.(C) No. 5109/2019), Mr. Narayanjyoti Khataniar, learned Standing Counsel, Secondary Education, Assam and Mr. Santanu Bora, learned Standing Counsel, BTC for the State respondent No.2 and 3 & 4 respectively, in both the appeals.

2) Both the appeals have arisen out of a common order dated 06.03.2020 passed by Hon'ble Single Judge in W.P.(C) No. 5213/2019 (Anupama Devi -Vs- State of Assam and 6 others) and W.P.(C) No. 5109/2019 (Tulashi Rava -Vs- State of Assam and 6 others), wherein the present appellant was the private respondent Nos. 5 and 7 respectively.

3) In both the Writ Petitions, W.P.(C) No. 5213/2019 and W.P.(C) No. 5109/2019,

the petitioners, namely, Anupama Devi and Tulashi Rava respectively, challenged the appointment of the appellant Bharat Chandra Talukdar as the Principal of Barama Higher Secondary School on the ground that his appointment was made without undergoing the due process required under the Rule 13 of the Assam Secondary Education (Provincialised) Service Rules, 2003, which requires that the post must be advertised.

4) Hon'ble Single Judge after deliberation of the matters in those two writ petitions noted above, found that the authority concerned appointed the appellant to the post of Principal of Barama Higher Secondary School, de hors the Rule, without issuing any advertisement as required under the provisions of the said 2003 Rules.

5) Holding that non-advertisement of the post of Principal of Barama Higher Secondary School is not mere infraction of Rule 13 of the said 2003 Rules, but also violative of Article 16 of the Constitution of India, which provides that there shall be equal opportunity of all citizens in matters relating to employment or appointment to any office of the State and reiterating the law laid down by the Hon'ble Supreme Court of India in the case of State of Bihar -Vs-Upendra Narayan Singh and Others, reported in (2009) 5 SCC 65, the Hon'ble Single Judge by the impugned order dated 06.03.2020 set-aside the appointment of the appellant as the Principal of said Barama Higher Secondary School directing the respondent authorities to initiate fresh recruitment process for appointment to the post of Principal in that School by adhering to the procedure prescribed under the 2003 Rules.

6) Being aggrieved with the said order dated 06.03.2020, passed by Hon'ble Single Judge in the above noted two writ petitions - W.P.(C) Nos. 5213/2019 and 5109/2019, setting aside his appointment as the Principal of Barama Higher Secondary School, the appellant has preferred these appeals.

7) Brief facts of the cases are that in compliance of the Notification No. ASE 82/2014/Pt/6 dated 06.06.2016 of the Government of Assam, the Secretary, Bodoland Territorial Council (in short, BTC), Kokrajhar constituted the BTC Level Committee for selection of Principal/Vice-Principal of Provincialised Higher Secondary Schools under BTC area consisting of (i) Secretary or his nominee not below the rank of the Deputy Secretary as the Chairman, (ii) Director of Education, BTC as the Member Secretary and (iii) Inspector of Schools of the respective districts of Kokrajhar/Chirang/Baksa/Udalguri as its Member, with the observation that the terms and conditions as notified by the Government of Assam in its said Notification dated 06.06.2016 shall remain same. It is to be noted herein that Education from Lower Primary to Higher Education is a transferred subject to the BTC. However, the Acts and Rules of the State regulating the recruitment and conditions of service of the persons appointed to the Provincialised/Government Elementary, Secondary and Higher Education Service are applicable to the BTC.

8) The Director of Education, BTC by letter No. DE/BTC/Apptt-360/2017/ 15 dated 27.06.2018 under the Subject - "Principal of Provincialised Higher Secondary Schools" while forwarding the Office Memorandum that he received from the Commissioner and Secretary, Government of Assam, Secondary Education Department under No. ASE.82/2014/Pt/100 dated 01.08.2017, the Guideline for selection of Principals of Provincialised Higher Secondary Schools to the Inspectors of Schools of the districts of Kokrajhar, Chirang, Baksa and Udalguri. The Director of Education, BTC by the said communication dated 27.06.2018, requested the Inspectors of those four districts to take necessary action as per the Government instruction and also asked them to submit the particulars of qualified Graduate Teachers / Post Graduate Teachers of Higher Secondary Schools (School wise) in the Format enclosed therewith, both in Hard and Soft copy in Excel, along with ACR's for last three years and other necessary relevant papers for selection of Principal before three months of retirement of the existing Principal, informing that the selected Principal will be appointed as regular Principal as and when the existing Principal of the school retires.

9) The petitioners of both the Writ Petitions W.P.(C) Nos. 5213/2019 and 5109/2019, namely, Anupama Devi and Tulashi Rava as well as the appellant Bharat Chandra Talukdar are Subject Teachers/Post Graduate Teachers of Barama Higher Secondary School. The Director of Education, BTC by order dated 28.03.2018 promoted the petitioner Anupama Devi to the post of Vice-Principal of the said school and since then she is serving in that capacity. Both the writ petitioners as well as the appellant, being eligible, submitted their applications in Standard Forms before the Inspector of Schools, Baksa District Circle, Mushalpur for the post of Principal of said Barama H.S. School.

10) As per the telephonic instruction of the Director of Education, BTC and as per his aforesaid communication dated 27.06.2018, the Inspector of Schools, Baksa by his letter No. IS/BDC/Appt-2/SEL/PL/VPL/HM/AHM/2013-14/3055 dated 25.10.2018 submitted the particulars of Graduate Teachers/Post Graduate Teachers of Barama Higher Secondary School in the prescribed format along with the relevant documents for selection of Principal before the said Director.

11) The Director of Education, BTC by his letter No. DE/BTC/Appt-330/ Prin/ Selection/Pt.I/2018/19 dated 22.02.2019 submitted his proposal before the BTC Level Selection Committee forwarding the names of teachers for the post of Principals of the Provincialised Higher Secondary Schools under the BTC, including the Barama H.S. School. The BTC Level Selection Committee in its meeting held on 20.02.2019 recommended the names of three teachers for promotion to the post of Principals of three Higher Secondary Schools under the BTC, one each in Sidli-Kashilotra H.S. School, Sidli, District-Chirang; Paneri H.S. School, Paneri, District-Udalguri and Barama H.S. School, Barama, District-Baksa which includes the name of the appellant as the Principal of said Barama H.S. School.

12) The BTC Level Selection Committee on 20.02.2019 recommended the names

of the candidates for promotion to the post of Principals in the provincialised Higher Secondary Schools in the BTC area including the name of the Petitioner and forwarded the same to the BTC authorities, which was accordingly approved by the BTC authorities. By communication No. BTC/EDN (HS)-01/2019/7 dated 04.03.2019 the BTC authorities informed the Director of Education, BTC about its said approval and directed him to take necessary steps for promotion to the post of Principal in provincialised Higher Secondary Schools in the BTC area by observing all formalities as per Rule. Pursuant to the same, the Director of Education, BTC by his order under No.DE/BTC/Apptt-330/Prin/ Selection/Pt-I/2018/25 dated 27.05.2019 appointed the appellant as the Principal of Barama Higher Secondary School, District-Baksa on regular basis with effect from the date of his taking over charge of that school in the vacant post Sri Gadadhar Baro, its earlier Principal who retired from service on 31.03.2019.

13) Both the petitioners in their respective writ petitions challenged the said order of the Director of Education, BTC dated 27.05.2019 by which the appellant was appointed to the post of Principal in Barama Higher Secondary School, contending that the same is not in conformity with the provisions of the Assam Secondary Education (Provincialisation) Service Rules, 2003 as amended, that regulates the recruitment and conditions of service of the persons appointed to the Assam Secondary Education (Provincialised) Service, which includes the procedure and selection to the post of Principals in provincialised Higher Secondary Schools in the State. Relying on the Rule 13 of said 2003 Rules, the petitioners contended that the post of Principal in provincialised Higher Secondary Schools can be filled up only after inviting applications from the intending eligible candidates through an advertisement to be published at least in two widely circulated local newspapers, which was not followed while appointing the appellant as the Principal of said Barama H.S. School by the order dated 27.05.2019 issued by the Director of Education, BTC. Petitioners contended that the said appointment order of the appellant dated 27.05.2019 was in violation of the Constitutional provisions guaranteed to the citizens of the country.

14) On the other hand, the appellant herein being the respondent in those two writ petitions, filed his affidavits and brought to the notice of the Court that both the petitioners filed applications for the post of Principal of said Barama H.S. School along with him, which they suppressed in their writ petitions filed before the Court. Since they participated in the selection process for the post of Principal in said Barama H.S. School by filing their respective applications, the appellant, relying on the decision of the Hon'ble Supreme Court in the case of Dhananjay Malik -Vs- State of Uttaranchal, reported in (2008) 4 SCC 171, urged before the Hon'ble Single Judge that both the writ petitioners are estopped from challenging his said selection and appointment. The writ petitioners refuted said contention of the appellant and relying on the decision of the Hon'ble Supreme Court in the case of Post Master General, Kolkata & Others -Vs- Tutu Das (Dutta), reported in (2007) 5 SCC 317, they submitted before the Single Judge that no appointment can be made contrary to the statutory provisions governing

recruitment or the rules framed in that behalf under a statute or the proviso appended to Article 309 of the Constitution of India. It was also urged by them that the said 2003 Rules is also a statutory Rule framed under Article 309 of the Constitution of India.

15) After hearing the parties and considering the provisions of selection to the post of Principal in provincialised Higher Secondary Schools of the State as provided in the said 2003 Rule the Hon'ble Single Judge came to the finding that impugned order dated 27.05.2019 of the Director of Education, BTC appointing the appellant to the post of Principal in Barama H.S. School was without any advertisement. As reiterated by Hon'ble Supreme Court in State of Bihar -Vs- Upendra Narayan Singh & Others, reported in (2009) 5 SCC 65, the Hon'ble Single Judge came to the conclusion that non-advertisement of the post of the Principal of Barama Higher Secondary School is not mere infraction of Rule 13 of the 2003 Rules, but also violative of Article 16 of the Constitution of India, which provides that there shall be equal opportunity of all citizens in matters relating to employment or appointment to any office of the State.

16) The appellant in the present appeals amongst others, contended that the petitioners in their writ petitions deliberately suppressed the fact that they applied for the post of regular Principal in said Barama H.S. School and also about their participation in the selection process for the said post and thereby, they mislead the Court by trying to draw a picture that the entire selection process was conducted behind their back. Appellant contended that as the petitioners participated in the selection process, without any protest, they are estopped from challenging his selection and appointment to the post of Principal of the said School.

17) In this regard Mr. Choudhury, learned Senior counsel relied on the decision of the Hon'ble Supreme Court in the case of Dhananjay Malik (supra) and submitted that as the writ petitioners took a calculated chance and participated in the selection process and since the results in the selection was not in their favour, the petitioners cannot now turn around and say that process of selection was unfair. Mr. Choudhury, relying on the said decision also submitted that since the petitioners participated in the said selection process without any protest, now they are estopped from saying that the selection process was not in accordance with the Rules as they could have challenged the said selection process immediately, but they awaited long till appointment of the appellant as the Principal of the School and in that way they took a chance. Mr. Choudhury therefore submitted that the impugned common order dated 06.03.2020 passed by Hon'ble Single Judge should be set aside and quashed and the appellant should be reinstated in service as the Principal of said Barama H.S. School.

18) The respondent BTC authorities in their affidavit filed in the writ petitions stated that the School Managing Committee of Barama H.S. School prepared the statement of particulars in respect of Graduate Teachers and Post Graduate Teachers of Barama H.S. School containing a list of seven teachers of that School

and submitted the same before the Inspector of Schools, Baksa, which the later forwarded it to the Director of Education, BTC by his communication dated 25.10.2018. The same was placed before the BTC Level Selection Committee constituted for the purpose of consideration for selection of candidate for the appointment against the vacant post of Principal of the School. The said Selection Committee following the Office Memorandum dated 26.12.2018 of the State Government regarding selection and appointment of Principal of provincialised schools, considering the leadership skill, administrative ability, integrity and personality, academic career, experience etc. of all those candidates selected the appellant in the list of candidates from the said School for the post of its Principal who secured highest mark of 17, whereas petitioner Anupama Devi secured only 16 marks. Following the said selection the BTC Level Selection Committee recommended the appellant which was approved by the BTC on 04.03.2019 and thereafter, the Director of Education, BTC, Kokrajhar by order dated 27.05.2019 appointed the appellant as the regular Principal of said Barama H.S. School. However, the respondent BTC in its affidavit remained silent regarding the requisite advertisement pertaining to the post of regular Principal in said Barama H.S. School.

19) The Assam Secondary Education (Provincialisation) Service Rules, 2003 as amended, is a statutory Rule under Article 309 of the Constitution of India that regulates the recruitment and the conditions of service of the persons appointed to the Assam Secondary Education (Provincialised) Service. Rule 13 of the said 2003 Rules relates to the "Procedure of selection of Principals" in provincialised secondary schools of the State. Rule 13(1) of said 2003 Rules specifically provides that the Member Secretary of the School Selection Committee shall invite applications from the intending eligible candidates through an advertisement to be published at least in two widely circulated local newspapers. Post of regular Principal in any provincialised or Government Higher Secondary School is a public post as the said post should have necessary sanction of the State in its Finance Department, salary to the person holding the said post is paid from the public exchequer.

20) Article 14 of the Constitution provides for equality of opportunity. It forms the cornerstone of our Constitution. It is well settled that Article 14 is an integral part of our system and that each and every State action is to be tested on the touchstone of equality. Any appointment made in violation of mandate of Articles 14 and 16 of the Constitution is not only irregular but also illegal and cannot be sustained.

21) With regard to appointment to a post under the State to which deserving candidate is not deprived of the right to be considered for appointment, a three Judge Bench of the Hon'ble Supreme Court in the case of Excise Superintendent - Vs- K.B.N. Visweshwara Rao, reported in (1996) 6 SCC 216, have held that - the requisitioning authority or establishment or the appropriate department or undertaking not only to intimate the employment exchange, but they should also

call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins; and then consider the cases of all the candidates who have applied as by adopting the said procedure, fair play would be subserved and the equality of opportunity in the matter of employment would be available to all eligible candidates.

22) In a case of selection and recruitment to the post of police constable, being governed by a set of Rules formed under the relevant Act where there was no requirement of making any public advertisement inviting applications nor was there any requirement to intimate the employment exchange with regard to the vacancies likely to be filled up, the Hon'ble Supreme Court in the case of Suresh Kumar -Vs- State of Haryana, reported in (2003) 10 SCC 276, upheld the judgment of the Punjab and Haryana High Court which struck down the said selection and recruitment holding that said process stood vitiated because there was no advertisement and due publicity for inviting applications from the eligible candidates at large.

23) Article 16 of the Constitution of India, a fundamental right, provides equal opportunity in matters relating to public employment. It is well settled that any action taken by the Government or its instrumentalists in violation thereof will render such action illegal. The Hon'ble Supreme Court in the case of Union Public Service Commission -Vs- Girish Jayantilal Vaghela & Others, reported in (2006) 2 SCC 482, have held that -

"Article 16 which finds place in Part III of the Constitution relating to fundamental rights provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The main object of Article 16 is to create a constitutional right to equality of opportunity and employment in public offices. The words "employment or appointment" cover not merely the initial appointment but also other attributes of service like promotion and age of superannuation, etc. The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution."

24) The Constitution Bench of the Hon'ble Supreme Court in the case of State of Karnataka -Vs- Umadevi (3), reported in (2006) 4 SCC 1, held that - any appointment made in violation of the statutory rules as also in violation of Articles 14 and 16 of the Constitution would be a nullity.

25) In the case of State of Orissa -Vs- Mamata Mohanty, reported in (2011) 3 SCC 436, the Hon'ble Supreme Court have held that -

"Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the notice board, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit".

26) Another three Judges Bench of the Hon'ble Supreme Court in the case of Renu -Vs-District & Sessions Judge, reported in (2014) 14 SCC 50 have held that -

Another important requirement of public appointment is that of transparency. Therefore, the advertisement must specify the number of posts available for selection and recruitment. The qualifications and other eligibility criteria for such posts should be explicitly provided and the schedule of recruitment process should be published with certainty and clarity. The advertisement should also specify the rules under which the selection is to be made and in absence of the rules, the procedure under which the selection is likely to be undertaken. This is necessary to prevent arbitrariness and to avoid change of criteria of selection after the selection process is commenced, thereby unjustly benefiting someone at the cost of others.

27) All the above decisions prescribe the precincts regarding making appointment against public posts in terms of the Articles 14 and 16 of the Constitution. It is also settled that issue relating to point of law can be raised at any point of time.

28) A three Judges Bench of The Hon'ble Supreme Court in the case of Managing Director, Army Welfare Housing Organisation -Vs- Sumangal Services (P) Limited, reported in (2004) 9 SCC 619 have held that - There is no estoppel against a statute. In the case of Prashant Ramachandra Deshpande -Vs- Maruti Balaram Haibatti, reported in 1995 Supp (2) SCC 539 have held that - Remedy under the Constitutional right including extraordinary jurisdiction cannot be taken away by legislation much less by invoking principle of election or estoppel or the principle

of "approve and reprobate."

29) It is seen that no advertisement as required under Rule 13(1) of said 2003 Rules was ever issued either by the respondents in the BTC or by the School Managing Committee of said Barama H.S. School pertaining to the selection of regular Principal in the said School. On being enquired Mr. Santanu Bora, learned Standing Counsel, BTC submitted that no such advertisement to the said post of Principal in Barama H.S. School could be found in the record. On instruction Mr. Bora further submitted that pursuant to the order dated 06.03.2020 passed in W.P.(C) Nos. 5213/2019 and 5109/2019, the BTC authority has cancelled the appointment of appellant as the principal of Barama H.S. School and reverted him back to the post of Subject Teacher in that School. Mr. Bora further submitted that since Model Code of Conduct is in force in the BTAD area for General Council Election, 2020, therefore the Inspector of Schools, Baksa has hold the charge of Principal of the said School, in addition to his official duty until further order. He further submitted that School in terms of said order of the Court dated 06.03.2020 regarding fresh recruitment to the post of Principal in Barama H.S. School, Director of Education BTC has already been asked to submit necessary proposal and that such recruitment shall be made following the relevant recruitment Rules.

30) Even if the writ petitioners submitted their applications for consideration of their candidature for the post of Principal of Barama H.S. School, though no advertisement was made for the said post, but they can always approach the Court regarding redressal of their grievances in case violation of any statutory and Constitutional provisions and rules pertaining to appointment of any one to the public post in violation of the provisions of the Articles 14 and 16 of the Constitution of India as well as statutory provisions. The decision cited on behalf of the appellant is not applicable to these appeals as in the said case there was proper advertisement and the same did not decide the issue regarding appointment to a public post in violation of the provisions of Article 16 of the Constitution of India.

31) Since the appointment of the appellant as the regular Principal of Barama Higher Secondary School, Baksa, a public post, without inviting any applications from the intending eligible candidates and without issuing any advertisement by publishing the same in two widely circulated local newspapers, which was in violation of the provisions of the relevant statutory recruitment Rules as well as in violation of the Article 16 of the Constitution of India, we do not find any valid reason to interfere with the impugned finding of the learned Single Judge dated 06.03.2020 passed in W.P.(C) Nos. 5213/2019 and 5109/2019.

32) As such these appeals being devoid of merit are dismissed.

33) Before parting with the case, we made it clear that the Assam Secondary Education (Provincialisation) Service Rules, 2003, order, notifications corresponding to the said Rules have been repealed and the State Government in

the Secondary Education Department have brought into force the Assam Secondary Education (Provincialised Schools) Service Rules, 2018, which came into force w.e.f. 10.10.2019, the date of its publication in the Assam Gazette. Said 2018 Rule is a statutory Rule under Article 309 of the Constitution of India that regulates the recruitment and the conditions of service of teaching and non-teaching employees appointed to the Assam Secondary Education (Provincialised Schools) Service. Rule 12 of said 2018 Rules relates to Recruitment of Principal and Procedure thereof in the provincialised Higher Secondary Schools and provincialised Senior Secondary Schools (erstwhile Junior Colleges).

34) Said 2018 Rules that came in to force w.e.f. 10.10.2019 was not brought to the notice of the Hon'ble Single Judge while passing the impugned order dated 06.03.2020, noted above.

35) As such, while upholding the decision of the Hon'ble Single Judge in setting aside the appointment of the appellant as the principal of Barama Higher Secondary School, we modify the relevant direction of the Hon'ble Single Judge to the extent that the respondent authorities shall initiate the fresh recruitment process for appointment to the post of Principal of Barama Higher Secondary School by adhering to the procedure prescribed under the said 2018 Rules.