

(2018) 12 GAU CK 0018

In the Gauhati High Court

Case No : Writ Petition (c) 3259, 3415, 3414 Of 2011

Bhaskar Saikia And 9 Ors

APPELLANT

Vs

State Of Assam And Ors

RESPONDENT

Date of Decision : 13-12-2018

Acts Referred:

Assam Public Service (Direct Recruitment to Class III & Class V posts) Rules, 1997 — Rule 5(a), 15, 15(2)
Electricity Act, 2003 — Rule 85(5)
Constitution Of India, 1950 — Article 226

Citation : (2018) 12 GAU CK 0018

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : P Hazarika, S K Talukdar

Final Decision : Allowed

Judgement

1. Heard Mr. P Hazarika in WP(C) No. 3259/2011 and WP(C) No. 3414/2011 and Mr. S K Talukdar in WP(C) No. 3415/2011 appearing on behalf of the petitioners in the respective cases. Also heard Mr. S P Das, learned Standing Counsel Skill, employment and Entrepreneurship Department (earlier Labour and Employment Department) as well as Mr. N Goswami, learned State counsel.

2. In these batch of three writ petitions, challenge have been made two show cause notices dated 15.06.2011 separately issued to the petitioners. By the said impugned notices, the petitioners have been asked to show cause as to why their services rendered in the various ITI under the Directorate of Employment and Craftsmen Training should not be terminated. The grounds of issuing show cause is that the respective appointment of the petitioners made in the year 2009 was not done as per the provisions of Assam Public Services (Direct Recruitment Rules of Clause III & IV post) Rules, 1997 but by following a wrong Rule, namely, the Assam Craftsmen Training Services Rule, 1993 which does not govern the services of Grade-IV employees.

3. The facts of the respective cases may be narrated in the following manner:

The respondent authorities had initiated a recruitment process for appointment to various posts including Grade-IV post under the Directorate of Employment and Craftsman Training, Assam. In this connection, the Government in the Labour and Employment Department vide communication dated 18.02.2009 had conveyed the approval for such appointments for the 6 vacant posts of Dresser, 10 posts of Workshop Attendant and 4 posts of Hostel cook (District). Pursuant to the said approval, an advertisement was published in the Assam Tribune on 10.07.2009 inviting applications for filling up the vacant sanctioned posts. The said advertisement which was published by the Director, Employment and Craftsmen Training, Assam, however did not indicate under which Rules, the recruitment process was undertaken. Be that as it may, the petitioners applied for the respective post and their candidatures were considered.

4. It is the case of the petitioner that for the purpose of recruitment, a Selection Committee was duly constituted on 14.09.2009 and in the recruitment process, the petitioners were duly appointed. The petitioner in WP(C) 3415/2011 was appointed as a Dresser, the petitioners in WP(C)3414/2011 were appointed as Hostel Cooks and the petitioners in WP(C) No.3259/2011 were appointed as Workshop Attendants. The petitioners immediately joined their services and have been discharging their duties diligently. The services of the petitioners were found to be satisfactory and there was no complaint.

5. The case of the petitioners is that pursuant to certain decision, a communication dated 07.06.2011 was issued by the Department to the Directorate of Employment and Craftsmen Training whereby a direction was given to serve show cause notices to the certain employees as to why their services should not be terminated. The said letter pertaining to the petitioners and similar other persons recruited as per the advertisement dated 10.07.2009 also contained the view of the Judicial Department dated 04.06.2011 wherein it was observed as follows:

(i) " The very selection of the candidate being contrary to law, they deserve to be terminated irrespective of the fact that no fault is attributable to them.

(ii) However, it is advisable that the Department shall take steps to release salaries of the incumbents from the date of joining till termination" and

(iii) The Department may proceed in the matter as per advise of Finance Department. However, it must be ensured that no further restrain/stay order has been passed by the Hon'ble Court in pending cases viz: WP(C) 70/2011 or in any other case."

6. The aforesaid letter dated 07.06.2011 also refers to an earlier letter dated 24.01.2011 which is also annexed in the writ petition. The said letter dated 24.01.2011 issued by the Department to the Director indicates that certain irregularities have been noticed with regard to the recruitment process initiated

vide the advertisement dated 10.07.2009. It has been observed in the said letter that a wrong Rule, namely, Assam Craftsmen Service Rule, 1993 has been followed instead of Assam Public Service (Direct Recruitment to Class III & Class V posts) Rules, 1997.

7. It is in terms of these two communications, the impugned show cause notices have been issued to the petitioners. The learned counsel for the petitioners have submitted that a bare look into the impugned show cause notices along with the communications dated 24.01.2011 and 07.06.2011 would make it clear that the impugned show cause notice is a mere formality and pre conceived. It is clear that the decision to terminate the services of the petitioners has already been taken and the present exercise is merely an eye wash. It is the submission of the learned counsel for the petitioners that even assuming that a wrong set of rules have been followed for making the recruitment, they are not be faulted with in any manner and in any case, no role or motive has been attributed upon the petitioners in adopting another Rule. The learned counsel further submits that it is only on the point of constitution of the Selection Committee that there is a slight variation in the aforesaid two Rules and the petitioners have participated in a duly conducted selection procedure following an open advertisement in the Assam Tribune, no illegality has been committed by the petitioners. The petitioners counsel contended that if any aberrations is there in the recruitment process, that may amount to a mere irregularity and cannot be termed as illegal and therefore, the authorities had acted in an unreasonable and insensible manner in purporting to issue the show cause notices which is an empty formality before terminating the services of the petitioner.

8. As regards the recruitment process, it is submitted that since the same was preceded by an advertisement in a widely circulated newspaper, there was a proper selection amongst eligible candidate in which the petitioners were duly selected. The petitioners further contended that their selection in the recruitment process is not questioned otherwise and it is only on the ground of holding the recruitment by adopting a particular Rule that has led the authorities to resort to the impugned action. The further submission is that after the due selection and appointment, the petitioners have altered their position and the authorities are legally estopped from taking any adverse action for no fault on the part of the petitioners. Citing the case of the Hon'ble Supreme Court in the case of Secretary, State of Karnataka & Others Vs Uma Devi and Others reported in (2006) 4 SCC 1, specifically paragraph 53 thereof, the learned counsel has submitted that there is a distinction between illegal appointment and irregular appointment and the selection and appointment of the petitioners can at best termed to be an irregular appointment. Moreover, even in such irregularity, the petitioners had no role.

9. Another decision of the Hon'ble Apex Court reported in AIR 2002 SC 33 In Roshan Deen Vs Preeti Lal has been cited wherein the Hon'ble Apex Court has laid down that the powers under Article 226 should be exercised to advance

justice and not to thwart it.

10. Mr. S P Das, learned counsel for the Department, on the other hand submits that the foundation of the recruitment process initiated vide the advertisement dated 10.07.2009 was erroneous inasmuch as, a wrong Rule was followed. Mr. Das submits that it is the Rules of 1997 which should have been complied and not the Rules of 1993. Mr. Das points out that Rule 1997 specifically states that it is to be followed in a recruitment process where no Rules are prescribed. Though there is a set of recruitment rules for the governing the services of Assam Craftsman Training Services, 1993, the posts in question do not find mention in paragraphs 3 of the said Rules which defines the various cadres under the said Rules. Therefore, there is no doubt that the Rules of 1993 were wrongly followed. He further submits that there is a difference so far as the constitution of Selection Board is concerned. As per the 1993 Rules, Selection Board is define under Rule 15 and in the instant case Selection Board was constituted in accordance with Rule 15(II) of the said Rules. On the other hand, as per the Rules of 1997, Rule 5(a) defines the Selection Committee and there is a substantial difference between the two Rules in the Constitution of the Selection Board. In support of his submission, Mr. S P Das relies upon a decision of the Division Bench of this Court reported in 2003 (1) GLT 57 (Khargeswar Boro vs State of Assam). He further relies upon a decision of the Hon'ble Supreme Court reported in 2013 (1) SCC 501 (Rajesh Awasthi Vs Nand Lal Jaiswal and Others) and a decision reported in (2013) 2 SCC 516 (Bhupendra Nath Hazarika Vs State of Assam and others). Lastly, Mr. Das submits that if at all any interference is made by this Court, the matter may be remanded to the authorities for an appropriate decision on the show cause notices. Mr. Das further submits that issuance of show cause notice has not given rise to any cause of action as the authorities are yet to take a decision passed upon the replies which may be submitted by the petitioners.

11. It is seen that this Court had passed interim orders staying further proceeding of the impugned show cause notices pursuant to which, the petitioners are continuing in their respective services.

12. The submissions made by the respective counsels have been duly considered.

13. It is noticed that the advertisement dated 10.07.2009 was duly published in a widely circulated newspaper in which no indication was made as to under which Rule the said recruitment process was undertaken. The letter dated 10.02.2009 makes it clear that the Government had given its approval for the said recruitment to sanctioned vacant post. It is also not the case of the respondent authorities that the petitioners had any role in adopting a wrong Rule. The advertisement which was issued by the Director was done after due application of mind and after obtaining necessary approval from the Government. It is further not the case of the respondent authorities that there was any illegality in the said selection on merits apart from the reason concerning application of the Rules. The petitioners were duly appointed after the said recruitment process and

have been continuing in their services. After having undertaken the recruitment process, it appears that the respondents have realized that the Rules of 1993 should not have been followed and instead the Rules of 1997 should have been followed. However, it is not the case of the Department that the selection was not made properly. In fact, it is submitted that the selection was done pursuant to the advertisement where many eligible candidate have participated in which the petitioners came out successfully. Though, per se the Rules of 1993 may not be applicable for the post in question, the said Rules lays down the recruitment process and for constitution of a Selection Board under Rule 15(2) which was duly followed in the instant case. A comparison of the Selection Board under the two rules would reveal that only two external members not connected with the Department would have been members of the Committee. No nepotism or favoritism is alleged in the Selection of the petitioners.

14. I find force in the submission of the learned counsel for the petitioner that the impugned show cause notices read with the preceding letters dated 07.06.2011 and 24.01.2011 indicate that the same have been issued only as a formality and the decision of terminating the services of the petitioners was already taken which has been indicated above while referring to the letter dated 07.06.2011.

15. In view of the same, the submission of the Departmental counsel that a cause of action is yet to arise does not appear to be correct. Though, it is a general principal of law that normally Courts would go slow in interfering with a show cause notice wherein a decision is yet to be taken giving rise to a cause of action, in appropriate case interference may be required when the show cause notice appear to be a mere formality and a decision has already been taken.

16. In the instant case, as has been stated above, a decision to terminate the services of the petitioners was already taken and even the views of the Judicial Department before taking such decision was obtained. The case cited by Mr. S P Das are distinguishable on facts. In the case of Rajesh Awasthi (supra) there was violation of Rule 85(5) of the Electricity Act, 2003 which is connected with the credentials of the person to be appointed as the Chairperson or member of the State commission. Such violation would no doubt go to the root of the selection and therefore, the same was approved by the Hon'ble Apex Court. However, in the instant case, as has been stated above, even under the 1993 Rules, a Selection Board has been defined and upon constitution of the same, the said Board had made the recruitment process in which the petitioners came out successfully.

17. On the completion of hearing on 30.11.2018, the learned counsel for the Department was directed to produce the concerned file pertaining to the selection held pursuant to the advertisement dated 10.07.2009. On 10.12.2018, Mr. Das, learned counsel for the Department has produced the said file. Examining the records, it is not discernible as to what were the considerations for initiating the show cause except for the communication dated 24.01.2011. The

said communication dated 24.01.2011 has already been annexed in the writ petition and considered by this Court and there is no other considerations which are noticed in the concerned file.

18. In view of the aforesaid discussion, the impugned show cause notices dated 15.06.2011 are interfered with and are accordingly set aside and quashed. The petitioners would be allowed to continue in their respective services in accordance with law.

19. The writ petitioners are accordingly allowed.

20. No order as to cost.