

(2005) 07 GAU CK 0011

In the Gauhati High Court

Case No : WP (C) No's. 2594 of 2005 and 5033 of 2004

Deboranjan Saikia and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 19-07-2005

Acts Referred:

Assam Transport Service Rules, 2003 — Rule 10, 11, 12, 13, 13(3)
Constitution of India, 1950 — Article 309

Citation : (2005) 3 GLR 659

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : P.K. Goswami, A. Borboara, S.S. Goswami, D. Goswami, P.K. Baruah and K. Agarwal, for the Appellant; H. Roy, P. Bora and K. Goswami, for the Respondent

Final Decision : Allowed

Judgement

Ranjan Gogoi, J.—Both the writ petitions having raised common questions of law on more or less identical facts were heard together and are being answered by this common judgment and order.

2. The facts are somewhat long and a detail narration thereof will be necessary to understand the issues arising in the two cases under consideration. The facts being largely similar the court finds it convenient to recite the facts of W.P.(C) No. 2594/2005 and thereafter answer the issues arising in the said writ petition. The decision of the court in the aforesaid writ petition, i.e., W.P.(C) No. 2594/2005 will provide an effective answer to the issues arising in the connected writ petition, i.e., W.P.(C) No. 5033/2004.

W.R(C)No. 2594/2005

3. The writ petitioners, who are 17 in number, are presently working on ad hoc basis either as Assistant Enforcement Inspectors or as Enforcement Checkers. Their present tenure of service is upto such time that regular appointments in

the said posts are made and it is the process initiated by the State for making such regular appointments which have been called into question in the present writ petition.

An earlier selection process was initiated by the State Government for filling up the posts in question in the year 2002. The same, would not be relevant, save and except for the fact that the said process was challenged before this Court and the matter eventually reached the Hon'ble Supreme Court. The Apex Court by order dated 4.8.2003 set aside the selection held in the year 2002 and directed for fresh examination/selection to be held to fill up the posts in question. The Apex Court further, directed that the ad hoc appointees would continue to hold the posts in question till regular appointment is made without, however, creating any equitable rights in such ad hoc appointees on account of the service rendered by them.

After the aforesaid order of the Apex Court dated 4.8.2003 was passed, a set of Rules, i.e., the Assam Transport Service Rules, 2003 (hereinafter referred to as the Rules of 2003), was framed in exercise of the power conferred by the proviso to Article 309 of the Constitution, regulating the recruitment and conditions of services of persons appointed to the Assam Transport Service. The relevant features of the aforesaid Rules may be taken note of at this stage.

Rule 2(a) of the Rules of 2003 defines the appointing authority to be the Commissioner of Transport in respect of Class-III non-gazetted cadres of the service with which posts the present writ petition is concerned.

Rule 2(b) of the Rules defines Selection Board to mean the Board constituted under Rule 13.

Rule 3(d) of the Rules defines Class-III service to include the cadre of Assistant Enforcement Inspector and Enforcement Checker.

Under Rule 5(v) of the Rules, 75% of the posts in the cadre of Assistant Enforcement Inspector are to be filled up by direct recruitment in accordance with the Rules 7, 8, 9 and 10 whereas under Rule 5(vi), all posts in the cadre of Enforcement Checker is to be filled up by direct recruitment., Rule 6 would be of particular significance. Under Rule 6(1) direct recruitment is to be made on the basis of recommendations made by the Commission (State Public Service Commission) or the Board, as the case may be, in accordance with the procedure prescribed. Under Rule 6(1)(a), before the end of each year the appointing authority is required to make an assessment with regard to the likely number of vacancies to be filled up by direct recruitment during the next year and intimate the same to the Commission/Board together with the details regarding reservation. Under Rule 6(1)(b), the appointing authority is to request the Commission/Board to recommend a list of candidates for direct recruitment in order of preference, whereas, under Rule 6(1)(c) the Commission/Board is required to make a selection in accordance with the scheme of selection prescribed by the Government. Rule 6(1)(c) empowers the Commission/Board to

held such test or interview and undertake scrutiny of the particulars furnished by the candidates, as may be necessary. Rule 6(1)(d) provides that after completion of the selection process the Commission/Board is to prepare and furnish a list of candidates found suitable for appointment in order of preference. The number of candidates in the said list is required to be double the number of vacancies. Under Rule 16, appointment is required to be made from the aforesaid list prepared and forwarded by the Commission/ Board.

Rule 11 of the Rules deals with recruitment by way of promotion to the various posts in the service to be made in accordance with the other provisions of the Rules. Rule 13 of the Rules, which would be of significance, prescribes the composition of the Board contemplated by Rules 11 and 12 for recommending suitable candidates for promotion, Rule 13(3) prescribes that for promotion to the cadre of Assistant Enforcement Inspector, the Board is to be constituted by the Commissioner of Transport as the Chairman and the Deputy/Under Secretary to the Government of Assam, Transport Department, as a Member; the Joint Commissioner of Transport is to act as the Member- Secretary.

Rule 28 has the effect of repealing all earlier Rules in force immediately before commencement of the Rules of 2003.

4. The Rules of 2003 was published in the official gazette on 10th October 2003.

Thereafter, by an office order dated 4th November, 2003, the Principal Secretary to the Govt. of Assam, Transport Department, constituted an Examination Committee consisting of a Chairman and three other members to assist the Commissioner of Transport in conducting the written test and viva voce test to fill up the posts in question.

Specific and elaborate duties commencing with the printing of application forms, issuance of advertisement and the holding of the written test including laying down of modalities for evaluation and finalisation of the merit list for the viva voce test has been visualized for the Examination Committee in the order dated 4th November, 2003.

Thereafter, an advertisement dated 21.12.2003 was issued by the Commissioner of Transport inviting applications for filling up 32 number of vacant posts of Assistant Enforcement Inspector and 32 number of vacant posts of Enforcement Checker. The advertisement dated 21.12.2003, apart from laying down the norms for eligibility had stipulated, that the selection process will consist of a written examination of 100 marks and candidates who qualify in the written examination will be called for viva voce test which will consist of 50 marks. The standard of the written examination to be conducted and the subjects in which the candidates will be tested were also specified in the advertisement issued.

5. The advertisement issued in the newspapers on 21.12.2003 received wide response and over 50 thousand candidates had applied for the posts in question. Thereafter, written examinations were held on 26.6.2004 and the petitioners

after participating in the said written examination has instituted the present writ application wherein an interim order was initially passed by this Court on 1.4.2005 prohibiting publication of the results of the written test. The said interim order was subsequently modified by this Court on 13.4.2005 permitting the results of the written examination to be declared and also granting leave to the authority to hold the viva voce tests. This court, however, restrained the respondent authority from publishing the final select/merit list of candidates. Pursuant to the aforesaid interim order passed by this Court on 13.4.2005 the list of candidates selected for the viva voce tests was published by the authority and viva voce test were held on different dates with effect from 27.5.2005 to 7.6.2005. It is the validity of the aforesaid selection held till date which is the subject matter of challenge in the present writ application.

Two significant facts in this regard must be taken note of at this stage. One is the constitution of a Selection Committee for selection of candidates for recruitment to the two posts in question made by the Notification dated 18.12.2004 and the other is the scaling down of the marks for the viva voce segment of the selection process from 50 to 15.

The composition of the Selection Committee constituted by Notification dated 18.12.2004, it must be noticed, is same and similar to the Selection Board for promotion as contemplated by Rule 13(3) of the Rules.

6. I have heard Sri P. K. Goswami, learned senior counsel appearing for the writ petitioners and Mr. H. Roy, learned senior counsel appearing for the official respondents.

7. The arguments advanced on behalf of the petitioners, notwithstanding the several grounds taken in the writ petition, has been short and precise, the broad features of which may now be noted. It is argued that under Rule 6 of the Rules of 2003, appointment by way of direct recruitment can only be made on the basis of the recommendations of the Selection Board. The Selection Board, by virtue of the definition contained in Rule 2(b) of the Rules, is the same Selection Board as contemplated by Rule 13(3) for promotion. Under Rule 16, appointment by way of direct recruitment is required to be made from the list recommended by the Selection Board. The provisions contained in the various sub-rules of Rule 6 contemplate a distinct role for the Selection Board in the holding of the written test/viva voce test in order to determine the suitability of the candidates who may have applied for the posts in question. The Rules do not contemplate any examination committee as has been constituted by the office order dated 4th November, 2003. Admittedly and evidently, the Selection Board did not come into existence until 18.12.2004 when, for the first time, the Selection Board was constituted. By that time the written examination consisting of 100 out of the total 115 marks was already over. The written examination was held under the auspices, control and supervision of the Examination Committee and the Selection Committee had no role to play in the said examination. On the aforesaid basis it is contended that the provisions of the Rules with regard to the

holding of selection by the duly empowered body have been violated and, therefore, there will be little sanctity in the selections held till date. Arguing that the Rules have empowered a specific body to hold the selections and, in the instant case, the said body being not yet born on the date/dates when the written test was held, learned Counsel has further argued that, it was not open to the respondents to depart from the mode and manner prescribed by the statutory Rules. Reference in this regard is placed on a series of decisions of the Apex Court in support of the proposition that when the statute prescribes the exercise of power in a particular manner and by a prescribed authority no departures there-from can be permitted. Of the cases referred, the decisions of the Apex Court in the case of *The Purtabpore Co., Ltd. Vs. Cane Commissioner of Bihar and Others*, in the case of *Hukam Chand Shyam Lal Vs. Union of India (UOI) and Others*, and in the case of *Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others*, would be of particular significance. To obviate any argument with regard to the right of the petitioners to challenge the selection after having participated in the same, Mr. Goswami, learned senior counsel for the writ petitioners, has placed before the court another decision of the Apex Court in the case of *Raj Kumar and Others Vs. Shakti Raj and Others*, It is argued by Sri Goswami, learned senior counsel, that the Apex Court in its earlier cases on the point particularly in the decision rendered in *Madan Lal and Others Vs. State of Jammu and Kashmir and Others*, had not laid down any inflexible rule or principle that a candidate who had taken part in a selection would, in all situations, be stopped from challenging the same. The said principle, according to Sri Goswami, learned senior counsel for the petitioners, will not apply where there has been a breach of the procedure prescribed by the Rules in holding an impugned selection.

8. Controverting the arguments advanced on behalf of the writ petitioners, Sri H. Roy, learned senior counsel appearing for the official respondents, has argued that in the present case the writ petitioners having participated in the selection process, it would not be open for them to turn around and challenge the said process. A decision of the Apex Court in the case of *Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others*, as well as the decision in *Madan Lal and Ors.* (supra) together with a decision of "the Apex Court in the case of *Chandra Prakash Tiwari and Others Vs. Shakuntala Shukla and Others*, has been relied upon in this regard. Arguing further, Sri Roy, learned Counsel for the official respondents, has submitted that Rule 6, though visualises a Selection Board for recommending candidates for direct recruitment, the composition of the Board is not specified anywhere in the Rules. The Board referred to in Rule 13(3) is the Selection Board for promotion. In such circumstances, according to Sri Roy, the provisions of Rule 6(1)(c) requiring the holding of the written and viva voce test by the Selection Board must be understood by the court to be directory provisions of the statute. Sri Roy has further argued that in the present case there has been a substantial compliance with the requirement of Rule 6(1)(c) of the Rules, inasmuch as after the Selection Committee was constituted by

Notification dated 18.12.2004, the said body, on due satisfaction reached after a thorough investigation of the manner of holding of the written test, had approved the same and thereafter- proceeded to hold the viva voce segment of the selection process. The recommendations contemplated by Rule 6, according to Sri .Roy, will now follow and appointment will be made on the basis of the said recommendations. It is the mere holding of the written test where the Selection Committee did not have a role to place. However, the said " requirement has been substantially met by the subsequent proceedings of the Selection Committee which proceedings, in original, have been placed before the court for its scrutiny. The said proceedings which is dated 2.5.2005, convey the approval of the Selection Committee to the written examination held on 26.6.2004 after an evaluation of the questions set and a random scrutiny of over 1000 answer scripts. The Committee also fixed a minimum of "75% marks as the cut off/ qualifying marks for being called for the viva voce test.

Sri Roy has further argued that though, in the writ petition filed, the petitioners have pleaded a case of large scale anomalies in the holding of the written examination, arguments on the aforesaid score have not been forthcoming and, therefore, this Court must understand that the petitioners have no subsisting grievance with regard to any alleged irregularity or illegality in the holding of the written test. Sri Roy, learned Counsel for the official respondents had, at the same time, offered all the relevant records maintained by the official respondents in this regard for scrutiny of the court, if so desired, in order to satisfy itself that the written test, though held with the assistance of the Examination Committee constituted by office order dated 4.11.2003, was free from any irregularity or illegality. Lastly, it has been argued by Sri Roy, learned Counsel for the official respondents, that no prejudice has been caused to the petitioners in the holding of the written test in slight departure of what has been prescribed by Rule 6(1) (c) inasmuch as. several of the petitioners have been selected in the said written test and some of them have qualified even in the viva voce test and would, therefore, be eligible for appointment.

9. The arguments advanced on behalf of the rival parties have received the due and anxious consideration of the court.

The composition of any of the Selection Boards contemplated by Rule 6 for the purposes of recommending candidates for direct recruitment to the different posts in the service has not been specifically prescribed by the Rules. Rule 2(b), however, defines the Selection Board to mean the Selection Board constituted under Rule 13. Rule 13, though, deals with the Boards for promotions, by virtue of the definition clause, the Board(s) for direct recruitment for any particular post(s) must be understood to be the same Board as for promotion to the said post(s). This is also the manner in which the State has understood the Rules inasmuch as by Notification dated 18.12.2004 the State had constituted a Selection Board for direct recruitment to the posts in question having the same composition as the promotion board contemplated under Rule 13(3). Rule 6(1)

(c) having contemplated the holding of written/viva voce test by the Selection Board for determining the suitability of candidates to be recommended for appointment and the Rules not having visualised any Examination Committee, there can be little doubt that it is the Selection Board alone who would be competent to hold the written test. Instead, what had happened in the present case is that the Selection Board was not even in place on the date when the written examinations were held. Who had held the written examinations and in what manner, issues on which much debate had taken place, would be of little significance and what would be of primary concern for the court is the fact that the Selection Board under Rule 6 had not even been constituted on the date when the written examinations were held.

The next question that the court has to address is whether the holding of the written examination by any such authority which is not the prescribed authority under the Rules would vitiate the selection so far held and whether the petitioners will have the right to challenge the said selection, they having participated in the same.

10. Notwithstanding the order in which the questions arising have been arranged in the previous paragraph, it may be appropriate to deal with the question relating to locus of the writ petitioners to maintain the present challenge in the first instance. The rule that a candidate who had participated in a selection would not be entitled to challenge the same as laid down by the Apex Court in *Om Prakash Shukla* (supra) and *Madan Lal and Ors.* (supra) must be understood by the court, in view of certain subsequent pronouncements of the Apex Court, not to be an inflexible or absolute principle of law. It may be that a candidate who had knowingly participated in a selection cannot turn around at a later stage and challenge the award of marks given to him in the selection held or challenge the composition of the Selection Committee, as the case may be. But this Court cannot understand the law to be one which debars a candidate, who had participated in a selection, from challenging the selection process in all circumstances. Exception to the above principle could be in a situation where there has occurred large scale illegalities in the selection held or in a situation where the selection has been held in a manner which is not prescribed by the statute. The above principles can be carved out by this Court from a later decision of the Apex Court in *Raj Kumar and Ors.* (supra). That apart, the circumstances in which a candidate had appeared in the selection held must also be taken note of by the court. In the present case the advertisement in question had clearly mentioned that the ad hoc appointees in service, like the petitioners, must appear in the examination, if they desire that their service should continue. Above all, the challenge made in the present writ application being with regard to the selection being held contrary to the provisions of the Rules, I am of the view that the present is not a case where the petitioners are aggrieved by the award of low marks or the petitioners have espoused such individual grievances which should be considered by the court as debarring them from challenging the selection already held.

11. There is no manner of doubt that in the present case the Selection Board constituted under Rule 6 did not hold the written examination. As already noted, in the aforesaid situation which authority had held the said selection and in what circumstances, would be of little significance. But this Court must observe that, even, on the aforesaid aspect of the matter, the materials placed before the court by the official respondents are not sufficiently clear save and except that the Examination Committee constituted by the office order dated 4.11.2003 had a significant role to play in this regard. That the question papers were set and evaluated by renowned academics would be of little significance unless the norms governing the said matters had been laid down by the duly authorised body, the determination of the identity of which body is the next question that the court has to address.

Whether an authority not contemplated by the statute could have held the written examinations is a question that would depend on whether the prescriptions contained in the statute are mandatory or directory requirements. The principles on which a statutory provision is to be understood by the court to be mandatory or directory will not require a detailed elaboration. In the final analysis it is the legislative intent or the intention of the Rule making authority that has to prevail. It is the object and scheme of the statute or the statutory rules which would be determinative of the matter and in holding whether a particular provision is mandatory or directory, the court must resort to such an interpretation which will effectuate the object of the statute and in doing so the emanating consequences must also be carefully balanced by the court. Applying the above test, what this Court finds is that Rule 6 has contemplated that a particular Selection Board having a definite composition would have the overall responsibility of conducting the written examination/viva voce tests in which the suitability of the intending candidates are to be tested. On the basis of an objective determination made by the Selection Board, the list of candidates is to be recommended for appointment by the appointing authority. Rule 6(1)(c) of the Rules of 2003 intended that the duty and responsibility of conducting the selection is to be vested in the specified Selection Board. This has been done in order to end all uncertainties and possible fluctuations from year to year in the matter of holding of the selections so as to obviate all subjective elements in the selection process. Rule 6, therefore, incorporates a principle which seeks to achieve known and fixed parameters of conduct by public bodies in the matter of recruitment to public service. It is the Selection Board visualised by Rule 6 which has been intended to be the duly constituted authority for holding of selections. In such a situation, it will be difficult for this Court to hold that the provisions of Rule 6 are directory and not mandatory and, therefore, a substantial compliance with the requirements of the said Rule will suffice. In the present case a total of 115 marks has been earmarked for the entire selection process. The written examination, which consisted of 100 marks, has been held without the Selection Board being, even, brought into existence. In the above situation, the holding of the written examination by any other authority, other than the statutory

Selection Board, cannot have the court's approval. The test of the fairness of the selection process or lack of prejudice, as argued by the learned Counsel for the respondents, are questions, on which the court does not feel it necessary to express any opinion. The said questions, in any case, cannot override the mandatory requirements spelt out by the provisions of the statute or the statutory rules in force.

The net result of the above discussion is that for the reasons assigned, this Court is inclined to hold that the selection held till date is vitiated in law being contrary to the provisions of the Rules of 2003. It would, therefore, be appropriate to interfere with the said selection and allow this writ petition accordingly.

W.P.(C) No. 5033 of 2004 :

11. Though the writ petitioners in this case are fresh candidates who had applied pursuant to the advertisement dated 21.12.2003 and had taken part in the selection process, in view of the fact that the W.P.(C) No. 2594 of 2005 has been allowed and the selections held till date has been set aside, this writ petition also has to be accordingly allowed which I hereby do.

12. Both the writ petitions are, accordingly, allowed. The selection held till date pursuant to the advertisement dated 21,12.2003 are hereby set aside.