
(2001) 01 GAU CK 0022

In the Gauhati High Court

Case No : Writ Petition (C) No's. 3945 and 5095 of 1999 and 2294 and 2323 of 2000

Dilip Kumar Sarkar

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 10-01-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2001) 1 GLT 182

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : A.K. Bhattacharjee, N. Choudhury, N.M. Lahiri, G. Uzir and P.C. Borpujari, for the Appellant; N. Dutta, J.P. Sarma and H. Rahman, for the Respondent

Final Decision : Allowed

Judgement

1. By this judgment Writ Petition (C) Nos. 3945/99, 5095/99, 2294/ 2000 and 2323/2000 are being disposed of as they relate to the same subject matter.

2. Writ Petition (C) No. 3945/99 has been filed by Dr. Dilip Kumar Sarkar praying for issue of appropriate directions for recalling the advertisement No. 6/99 dated 5.6.1999 issued for selection of the Principals of three Medical Colleges of Assam and for further direction for holding interview on the basis of advertisement No. 7/97 making provisions for reservation for Scheduled Caste candidates. His grievance is that the ad-hoc appointment should no longer continue and regular appointment be made complying with the reservation policy of the Government. The State in their affidavit-in-opposition justified the impugned advertisement on the ground that it had to be issued to comply with the provisions of the Assam Scheduled Caste and Scheduled Tribe (Reservation of vacancies for Services and Posts) Act, 1978. Respondent No. 4, Dr. K.N. Barua, submitted an affidavit controverting the contentions raised in the petition and further submitted that reservation for appointment in excess of 50% of the total posts or vacancies is

impermissible under the provisions of the Act.

3. Writ Petition (C) No. 5095/99 has been filed by Dr. Munindra Mohan Deka for issue of a writ of Mandamus restraining the respondents from appointing any person from the recommendation dated 23.9.1999 (Annexure-XIII) made by the Commission and also for setting aside the same. The propriety and the validity of the select list has- been challenged on the ground that the candidates recommended by the Commission suffers from various deficiencies in respect of eligibility criteria, namely, experience, age etc. According to Dr. Deka, the candidates without fulfilling the requisite criteria were considered and selected in deviation from the stipulations incorporated in the advertisement.

4. Writ Petition (C) No. 2294/2000 has been filed by Dr. S.N.R. Patglri praying for cancellation of the ad-hoc appointment made to the Post of Principal-cum-Chief Superintendent both at Guwahati Medical College and Assam Medical College, Dibrugarh. Further, direction has also been sought extending the validity of the select list dated 23.9.1999 (Annexure-6).

5. Dr. K.N. Barua, preferred Writ Petition (C) No. 2323/2000 for issue of Writ of Mandamus for discontinuing the ad-hoc appointment of respondent Nos. 4 and 5 as Incharge Principal and for appointing him as the Principal of Gauhati Medical College in pursuance of his selection and position in the select list.

6. It would appear from the pleadings above that the State Authority has been making ad-hoc arrangement to run the three Medical Colleges in the State without appointment of any regular Principal although the Commission forwarded its recommendation to the State long before. The State for reasons best known to them did not go for any appointment from the said list even though interim order has been passed directing the State to appoint regular Principal.

7. Mr. G. Uzir, learned counsel arguing for the writ petitioner (W.P.(C) No. 5095/99) submitted that the select list dated 23.9.1999 is tainted because of selection of ineligible candidates by condonation of age dehor the rules. According to Mr. Uzir, consideration of ineligible candidates and incorporation of their names in the select list has vitiated the entire selection process and, therefore, it is a case fit for a direction to the State to go for selection afresh. Shri Uzir further pointed out that age of over-aged candidate has been condoned without any authority of law in deviation from the terms and conditions of the advertisement. According to Shri Uzir, the list has expired with effect from 23.9.2000 and the court having no power to extend the validity cannot direct the State to appoint any candidate from the said list. Mr. Bhattacharjee, Learned Senior Counsel argued that the selection as a whole cannot be assailed and there cannot be any bar in giving a direction to the State to appoint the eligible candidates recommended by the Commission. Shri Bhattacharjee further submitted that the validity of the select list has been extended during the pendency of the writ petitions and, therefore, there is obviously no bar in complying with the recommendation of the Commission. Shri N.M. Lahiri, learned

sr. counsel for the writ petitioner of W.P.(C) No. 2294/2000 argued in tune with Shri Bhattacharjee and urged that the Government be directed to go ahead with the appointment.

8. A careful scrutiny of the respective submissions would show that the following questions need to be answered in the writ petitions, namely -

(a) Whether the select list prepared more than a year ago could be given effect to in view of the pendency of the writ petition and the direction given by this court extending its validity?

(b) Whether eligibility criteria i.e. age could be condoned by the Government in respect of some candidates and whether inclusion of their names in the select list would vitiate the entire select list; or alternatively whether the select list could be acted upon to the exclusion of ineligible candidates made eligible dehors the Rules?

(c) Whether the candidature of Dr. M.M. Deka, writ petitioner in W.P.(C) No. 5095/99, was duly considered along with other candidates by the Commission.

9. Before we examine the above questions in the context of the argument advanced. It would be of convenience to quote hereinbelow the advertisement No. 6/99 and the select list prepared by the Commission: -

"ADVERTISEMENT"

(1) 3 (three) posts of Principal-cum-Chief Superintendent in the Medical Colleges of the State under Health and Family Welfare (B) Deptt., Govt. of Assam (Re-Advertisement).

1 (One) post reserved for ST(P). Scale of pay: Rs. 10,050 p.m. to Rs. 15,575 p.m.

Qualification and Experience : Recognised and Registered MBBS under relevant Act with recognised post graduate Degree. Persons holding the post of Professor preferably Head of Deptt. and 10(ten) years teaching experience as Professor/ Associate Professor out of which 5(five) years should be as Professor in a Deptt. of a Medical College of the State.

Age : Minimum 40 years and maximum 54 years of age as on 1.1.1999.

(N.B. - This is in cancellation of the earlier advertisement vide Advt. No. 7/97 Item No. 2. However candidates who had applied earlier need not apply again)."

"SELECT LIST"

"EXTRACT OF COMMISSIONS RECOMMENDATIONS.

No. 71 .PSC/DR-3-1-97-98 dated 23.9.1999.

Position Sl. No. Name Category 1. 6 Dr. Khagendra Narayan Barua

2. 16 Dr. Sujit Nandi Purkayastha 3. 20 Dr. Ratneswar Swargiary 4. 18 Dr. Dilip Kr. Sarkar 5. 3 Prof.(Dr.) Surendra Rana Pargiri 6. 2 Dr.(Mrs.) Nandita Choudhury. The candidates are recommended by the Commission for the post of Principal-cum-Chief Superintendent in the Medical Colleges of the State under the Health and Family Welfare (B) Department in order of preference."

10. The advertisement quoted above does not mention of any validity period of the list to be prepared. Shri G. Uzir vehemently argued that the court has no power to extend the validity of the list. According to him, the order dated 19.9.2000 passed by this court in W.P.(C) No. 3945/1999 extending the validity period of the impugned list till disposal of the writ petition is beyond the power of the court. In support of this contention, Shri Uzir also relied upon a decision of the Supreme Court in Rani Laxmibai Kshetriya Vs. Chand Behari Kapoor and Others, IN para-11 of the said Judgment, the Supreme Court observed that the decision of the High Court that the panel remains alive until all the persons in the panel are appointed is wholly erroneous. This observation was made in a different legal context in connection with a panel prepared under the Regional Rural Banks Act, 1976. This decision cannot determine the course of action in the instant case. No provision could be cited at the bar to show that a list prepared by the Commission is valid for one year only. Even, there is no mention of any validity period in the advertisement. If we go by the prevailing norm that a list normally remains valid for a period of one year only, the writ petitions having been filed before expiry of one year would have kept the list valid. This view is drawn from a decision of the Supreme Court in State of U.P. Vs. Ram Sawrup Saroj, The Supreme Court observed as follows:-

"10. Similarly the plea that a list of selected candidates for appointment to the State services remains valid for a period of one year only is primarily a question depending on facts and yet the plea was not raised before the High Court. Secondly, we find that the select list was finalised in the month of November, 1996 and the writ petition was filed by the respondent in the month of October, 1997 i.e. before the expiry of one year from the date of the list. Merely because a period of one year has elapsed during the pendency of litigation, we cannot decline to grant the relief to which the respondent has been found entitled to by the High Court.....".

11. If we go by the above ratio, the writ petition W.P.(C) No. 2323/ 2000 filed by Dr. K.N. Barua on 12.5.2000 being well within the period of one year from the date when the select list was prepared cannot be thrown away if the list is otherwise found to be valid. This answers the question raised by Sri Uzir about the enforceability of the impugned select list.

12. Next comes the question relating to relaxation of eligibility criteria dehors the Rules. It has already been indicated hereinbefore that the selection process has been assailed primarily on the ground that a few over-aged candidates were permitted to take part in the interview and some of them have been recommended. Shri Uzir, learned counsel referred to Annexure - XIV and XV

(Writ Petition (C) No. 5095/1999) in order to show that Dr. R. Swargiary, the third recommendee is over-aged by nine months and lacked teaching experience by two months and that the said deficiencies were removed by the State de hors the Rules. The advertisement quoted above do not include any clause for relaxation of age or any other eligibility criteria. There is also no recruitment Rules for selection of the Principals of the Medical Colleges. No application was placed to show that such relaxation was permissible under any Executive Instruction. It would, therefore, appear that the condonation and relaxation of the eligibility criteria were made without any authority of law. Relaxation of eligibility criteria in a selection process in a given case may not be always wholly irrelevant as the selection means a search for the best available candidate. Here, no special reasons or circumstances are available to inspire this court to approve the impugned action. It was obviously not proper on the part of the State to relax qualification in respect of certain candidates in the absence of any provision that the State may in appropriate cases relax eligibility criteria specified in the advertisement. The advertisement quoted hereinbefore in para-9 clearly prescribes teaching experience of 10 years as Professor/ Associate Professor between the age group of 40 years and 54 years as on 1.1.1999. That being so, condonation/relaxation of eligibility criteria with regard to age and teaching experience in respect of Dr. Swargiary and a few others cannot be approved as an attempt to select the best available candidates. The powers of relaxation should have been reflected in the advertisement itself creating an avenue for many others to apply for consideration of their candidature.

13. To bring home the above conclusion, Shri Uzir, learned counsel assisted the court drawing attention to a number of decisions of the Apex Court, in *Miss Shainda Hasan Vs. State of Uttar Pradesh and others*, the Supreme Court held that in the absence of statutory Rules providing power of relaxation, the advertisement must indicate that the selection committee/appointing authority has the power to relax the qualifications. In *District Collector and Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and Another Vs. M. Tripura Sundari Devi*, the Supreme Court held as follows: -

"6. It must further be realised by all concerned that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court should be a party to a perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this fact."

14. It may be mentioned herein that *Virendra Nath Gupta and another Vs. Delhi Administration and others*, decided a few days prior to *Shainda Hasan (supra)*,

the Supreme Court refused to interfere with the appointment of a teacher since the eligibility criteria was relaxed in accordance with the provisions of the Rules. Even prior to that in *P. Mahendran and others Vs. State of Karnataka and others*, the Supreme Court held that if a candidate applies for a post in response to an advertisement issued by the Commission in accordance with recruitment Rules, he acquires a right to be considered for selection in accordance with the existing Rules. This right cannot be affected by amendment of any Rules unless the amending Rules is retrospective in nature. This observation of the Supreme Court indicates that the selection process once set in motion has to be within the terms and conditions of the advertisement. This alternately suggests that any change of the qualification once prescribed is not permissible unless notice thereof is given to all the intending candidates.

15. The decision of the Supreme Court referred to above clearly supports the contention raised by Shri Uzir, learned sr. counsel that once the advertisement is made, the qualification prescribed therein cannot be altered as the matter is not confined between the appointing authority and the appointee concerned. It emerges that the relaxation of qualification of Dr. Swargiary and a few others and incorporation of their names in the merit list has been contrary to the law in force.

This would be clear from the comparative table showing merit-cum-experience and age of selected candidates available as Annexure-XVI in Writ Petition (C) No. 5095 of 1999 which is quoted below:-

COMPARATIVE TABLE SHOWING MERIT CUM EXPERIENCE AND AGE OF SELECTED CANDIDATES AND THE PETITIONER.

Position as per Select List Sl. No. Date of appointment as Associate Professor
Date of Appointment and joining as Professor & Head of Dept. Upper Age limit
1.1.97/1.1.97 Remarks

Mr. Khageiidra Narayan Barua Professor Dermatology, G.M.C.

I 6 19.6.87 17.2.92 Professor of Dermatology Within 54 GMC. Guwahati not a Head of Department.

Dr. Sujit Nandi Purkayasthra. Principal I/c Silchar Medical College

II 16 Not known Not known Above 54 as on years

Crossed upper age limit. Principal I/c Silchar Medical College

Dr. Ratneswar Swargiary ST(P) III 20 Not known 11.3.93 Above 54 as on 1.1.97

1. By Govt. Notifi-cation HLB. 387/92/64 dtd. 30.12.97 condoned overaged by 9 months

2. By Govt. Notification HLB. 387/92/64 dtd. 7.3.98 Govt. relaxed (each in experience by two months

3. Crossed upper age limit

Dr. Dilip K C Sarkar (SC) Head of Department of Surgery Silchar Medical Collage.

IV 18 12.3.93 22.9.95 Above 54 as on 1.1.99

1. Crossed upper age limit 2. Have far below experience as per advt.

Dr. S. N. Rana Patgiri Professor and Head of Department of Gynaecology, Dibrugarh Medical Collage.

V 3 Not Known Not Known Above 54 as on 1.1.99 Crossed Upper age limit

Dr. Mrs. Nandita Choudhury, Professor and Head of Deptt. of Nephrology. GMC

VI 2 19.2.85 1.5.91 Within Mini-maximum age limit

Dr. Munindra Mohan Deka. Professor and Head of Department of Radiology, GMC
Current charge of Principal cum chief Superintendent, G.M.C. on 22.9-99

Petitloner 14 (17.6.87) Joined on 6.7.87 (8.4.88) 16.5.88 47 years 8 months as on 1.1.97

Have Full Qualification and experience besides being with age limit as notified.

Note: (A) Notification NO. 7/97 (i) Qualification

Persons holding the post of Professor preferably Head of Deptt. and ten years teaching experience as Professor/Associate Professor out of which 5(five) years should be as Professor in a Department.

Age Limit: 40 years to 54 years of age on 1.1.1997.

Reservation: ST(P) 1 No. SC 1 No. (B) Notification published on 14.6.1999

(i) Qualification and experience : Same as 7/97

(ii) Age Limit: 40 years to 54 years as on 1.1.1999.

(iii) Reservation : ST(P) 1 No."

17. It would appear from the comparative table quoted above that Dr. Sujit Nandi Purkayastha who has secured second position crossed the upper age limit. Dr. Ratneswar Swargiary who was also over-aged was given relaxation both in respect of age and experience. Similarly Dr. Dilip Sarkar who had secured fourth position was also over-aged and did not have the experience as required. Dr. Surendra Rana Patgiri was also over-aged. But all of them have been recommended by the Commission. The name of Dr. M.M. Deka, who appears to have all the requisite qualifications, does not appear in the select list. The comparative statement and the select list read together show that ineligible candidates were considered and recommended. Had they been excluded from the selection process. Dr. Deka might have secured a position in the merit list. The impugned select list, therefore, cannot be accepted as an out-come of an

innocent exercise.

18. There is no dispute with regard to the law that those candidates who do not have requisite qualifications have no right to appointment. Some of the candidates who did not have the requisite qualifications were considered by way of relaxation/condonation and recommended. This is contrary to the law and in deviation from the conditions and eligibility criteria as prescribed in the advertisement. As such, the process of the selection as a whole stands tainted. This list prepared by the Commission might have been completely different had the Commission acted in strict compliance with the prescribed qualification. Injustice has been caused not only to the candidates interviewed but also to the candidates who might have applied had the relaxation clause been made known to them. This shows that the selection process was not in tune with the objective sought to be achieved.

19. Next comes the question whether Dr. M.M. Deka, writ petitioner in Writ Petition (C) No. 5095/1999 was duly considered by the Commission. From the comparative table, it appears that Dr. deka had all the qualifications as per advertisement. He was also within the age limit prescribed in the advertisement. I have examined the relevant file produced by Shri N. Dutta, learned sr. counsel for the Commission in order to ascertain whether Dr. Deka was duly considered or not. The apprehension expressed by Shri Uzir, learned sr. counsel that Dr. M.M. Deka was not at all considered by the Commission is not correct. Records available in the file show that he was duly considered along with other candidates. It is obviously not within the powers of this court to embark upon a scrutiny as to the correctness of the marks given to him as it pertains to administrative precision involving expertise in medical science. However, the contention that Dr. Deka was not at all considered by the Commission is not supported by the materials on record.

20. For reasons above, it has to be concluded that the select list cannot be sustained in law and no appointment can be made from this list. This conclusion shall not, however, in any way be construed as an adverse comment to the efficiency and competence of the candidates recommended. Fault is not with them but with the selection process.

21. In the result, the Writ Petition (C) No. 5095/1999 is allowed. The select list dated 23.9.1999 is hereby set aside. Other writ petitions, namely, Writ Petition (C) Nos. 3945/1999, 2294/2000 and 2323/ 232000 are also simultaneously disposed of with a direction to the State to initiate selection process afresh in the light of the observations made hereinabove and in accordance with the provisions of law without further loss of time.