
(2002) 02 GAU CK 0042

In the Gauhati High Court

Case No : Writ Appeal No's. 27 and 32 of 2001

Dr. Khagendra Narayan Baruah

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 26-02-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2002) 1 GLT 285

Hon'ble Judges : R.S. Mongia, C.J;A.H. Saikia, J

Bench : Division Bench

Advocate : S.S. Dey, M. Nath and C. Bhattacharjee, in WA 27 of 2001 and N.M. Lahiri, N. Choudhury and S.C. Keyal, in WA 32 of 2001, for the Appellant; A.K. Phukan, A. Hazarika, T. Chutia, G. Uzir and J.P. Sharma, for the Respondent

Judgement

A.H. Saikia, J.—Both these appeals having raised a common question of law on largely identical facts are being taken up for consideration together and are being disposed of by this common judgment.

2. This matter relates to the selection and appointment to the post of Principals in the three Medical Colleges in Assam by the Assam Public Service Commission (for short the "Commission"). The select list prepared by the Commission is under challenge in the related writ petitions. The learned Single Judge upon careful consideration of the same set aside the entire select list holding that some of the candidates selected and recommended by the Commission were found to be ineligible.

3. The moot question requires to be answered in these Writ Appeal is :-

"Whether the entire select list prepared by the Commission needs be quashed and set aside when some of the recommended candidates in the said select list were found by the learned Single Judge to be ineligible owing to over-age ?"

4. Before adjudicating upon the issue involved, the material facts relevant for the purpose of determination of issue are briefly outline here-in-below :-

5. An advertisement being No. 7/97 was issued by the Commission for filling up 3 (three) posts of Principal-cum-Chief Superintendent in the Medical Colleges of the State of Assam under the Health & Family Welfare (B) Department making the provision for reservation of one post each for Scheduled Tribes (Plains) and Scheduled Caste candidates with the age limit of 40 years to 54 years of age as on 1.1.1997, The said advertisement is extracted hereunder :-

2. 3 (Three) posts of Principal-cum-Chief Superintendent in the Medical Colleges of the State of Assam under Health & Family Welfare (B) Department -

Reservation - ST(P) - 1 No.

- SC - 1 No.

Scale of pay - Rs. 3825 to 5000 p.m.

Qualification and experience :-

Recognised and registered MBBS under relevant Act with recognised post Graduate Degree. Person holding the post of Prof, preferably Head of Department and 10 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 as on 1.1.1997."

6. Pursuant to the said advertisement, the appellant in W.A. No. 27/ 2001 as well as Respondent No. 4 in (W.P. (C) No. 5095/99, Respondent No. 5 and Respondent No. 6 in W.P. (C) No. 3945/99) applied for those posts. But the Commission did not act on the basis of the said advertisement and accordingly by another advertisement being No. 6/99 again invited application for filling up those three posts of Principal-cum-Chief Superintendent in the three Medical Colleges of Assam. The said advertisement No. 6/99 is quoted below :-

(1) 3 (three) posts of Principal-cum-Chief Superintendent in the Medical Colleges of the State under Health & Family Welfare (B) Department Govt. of Assam (Re-advertisement) 1 (one) post reserved for ST(P)

Scale of pay :-Rs. 10,050 p.m. to Rs. 15,575p.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 Department and 10 (ten) years teaching experience as Professor/Associate Professor out of which 5 (five) years should be as Professor in a Department of 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 has applied earlier need not apply again)".

7. In this fresh advertisement only one post of ST(P) was reserved and no reservation was made for Scheduled Caste Candidates as done in earlier advertisement with a specific note that this advertisement cancelled the earlier advertisement being No. 7/97 (item No. 2) and the candidates who had applied earlier pursuant to advertisement No. 7/97 need not apply afresh. The age limit in the new advertisement was shown as :- minimum 40 years and maximum 54 years of age as on 1.1.1999. It is to be noted that in both the advertisements no provision was made for either relaxation of age or qualifications and experience.

8. The Commission conducted an interview and ultimately prepared a selected list of Six candidates on 23.9.1999. The select list prepared by the Commission is quoted hereunder :-

"SELECT LIST.

Extract of Commissions Recommendation, No. 71 PSC/DR-3/ 1/97-98 dated 23.9.1999.

Position Sl. No. Name Category

1. 6. Dr. Khagendra Narayan Baruah.
2. 16. Dr. Sujit Nandi Purkayastha.
3. 20. Dr. Ratneswar Swargiary ST(P)
4. 18. Dr. Dilip Kr. Sarkar SC
5. 3. Prof. (Dr.) Surendra Rana Patgiri.
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 & Family Welfare (B) Department in order of preference."

9. After publication of the said list, 3 (three) sets of Writ Petitions had been preferred before this Court challenging the said select list which may be noticed as under :-

(a) In W.P. (C) No. 5095/99 Dr. Munindra Mohan Deka (Respondent No. 4 and 5 in the instant Writ Appeal No. 27/2001 and 32/2001 respectively) sought for a Writ of Mandamus restraining the respondents not to appoint any candidate from the select list above-mentioned on the ground that the recommended candidates were not at all eligible due to various deficiencies in respect of eligibility criteria, namely experience, age etc.

(b) The Writ Petition being No. W.P. (C) 3945/99 had been filed by Dr. Dilip Kr. Sarkar, a Scheduled Caste candidate and being arrayed as Respondent No. 6 and 9 W.A. No. 27/2001 and W.A. No. 32/ 2001 respectively seeking for recalling the second Advertisement being No. 6/99 and for further direction to hold the

interview as per earlier Advertisement No. 7/97 making provision for reservation for Scheduled Caste candidates.

(c) The appellant in the instant Writ Appeals - Dr. Khagendra Narayan Baruah and Dr. Surendra Nath Rana Patgiri through their Writ Petitions No. WP (C) 2323/2000 and W.P. (C) No: 2294/2000 prayed for issuance of a writ of Mandamus directing the respondents to appoint them as Principal-cum-Chief Superintendent in the Gauhati Medical College on the basis of the Select list dated 23.9.1999 by discontinuing the ad hoc appointment of Dr. Mahendra Mohan Deka, Writ Petitioner in W.P. (C) No. 5095/99 working as Ad hoc Principal in Gauhati Medical College and one Dr. Farque Uddin Ahmed working as Ad hoc Principal in Assam Medical College, Dibrugarh.

10. The learned Single Judge upon consideration of the materials available on record including the pleadings of the parties and having heard the rival contentions advanced by the learned counsel for the parties, by his impugned judgment and order dated 10.1.2001, allowed the W.P. (C) No. 5095/99 presented by Dr. Munindra Mohan Deka (Respondent No. 4 and 5 in W.A. No. 27/20.01 and W.A. No. 32/2001 respectively) and quashed the select list dated 23.9.1999 disposing of all other Writ Petitions above mentioned with a direction to the State-Respondents to initiate selection process afresh in the light of the observation made in the common judgment itself.

11. The learned Single Judge while deciding all these Writ Petitions has taken up the following questions for adjudication :-

(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 the 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 alternately 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 ?

12. As regards the question No. (a) the learned Single Judge answered the same in affirmative holding that the impugned select list prepared by the Commission has its enforceability. As the validity point of select list has not been agitated in these appeals, we are also of the same view as of the learned Single Judge in this regard and accordingly the said question need not detain this Court any further.

13. Insofar as the question No. (b) and (c) is concerned, the learned Single Judge having found the candidates ineligible on the ground of over age and less experience, quashed the entire Select list dated 23.9.1999 by allowing W.P. (C)

No. 5099/99 filed by Mr. Munindra Mohan Deka and directed the State Respondents to initiate selection process afresh. Now challenge has been, primarily made against the said quashing of the entire select list.

14. For better appreciation of the requisite qualifications and experience of all the candidates who appeared in the interview, we would like to rely on the following comparative table showing the merit-cum-experience of each of the selected candidates that had been placed before the learned Single Judge.

"Name Position as per select Sl. No. Dt. of apptt. as Associated Prof. Dt. of apptt. and joining as. Prof & Head of Deptt. upper age limit 1.1.97 Remarks.

1 2 3 4 5 6 7

Dr. Khagendra Narayan Baruah. I 6 19.6.87 17.2.92 Prof. of withing 54 yrs. Dermatology G.M.C. Gauhati not a Head of Depatt.

Dr. Surjit Nandi Purkayastha Principal, I/C Silchar Medical College.

II 16 Not known Not known Above 54 yrs. as on 1.1.97

Crossed age limit Principal I/C Silchar Medical College.

Dr. Ratneswar Swargiary. S/T(P) III 20 -do- 11.3.93 Above 54 yrs. as on 1.1.97.

(1) By Govt. Notification HLB 3S7/92/ 654 dt. 30. 12.97 condoned over age by 9 months. (2) By Govt. Notification HLB 3S7/92/ 89 dt. 7.3.98 Govt. relaxed teaching experience by 2 months. (3) Crossed upper age limit.

Dr. Dillp Kr.Sarkar . (SC) Prof. & Headof Deptt. Of Surgery, Silchar Medical College.

IV 18 12.3.93 22.9.95 Above 54 as on 1.1.99

(1) Crossed Upper age limit. (2) Have far below merit cum experience as per advertisement

Dr. S.N. Rana Patgiri, Prof. & Head of Gynaec logy, Dibrugarh Medical College

V 3 Not known Not known Above 54 as on 1.1.99 Crossed upper age limit.

Dr. (Mrs.) Nandi Choudhury, Prof. & Head of Department of Nephrology, G.M.C.

VI 2 19.2.85 1.5.91 within minimum and maximum age limit.

Dr. Munindra Mohan Deka, Prof. & Head of Department of Radiology, G.M.C. , current charge of Principal-cum-Chief Superintendent G.M.C. on 22.9.99.

Petitioner 14. (17.6.87) joined on 6.7.87 (8.4.88 16.5.88 47 yrs. 8 month as on 1.1.97

Have full qualifications and experience being with age limit as motified."

15. A plain reading of the aforesaid comparative table transpires that the

selected candidates namely, Dr. Surjit Nandi Purkayastha, Dr. Ratneswar Swargiary S/T(P), Dr. Dilip Kr. Sarkar (S/C) and Dr. S.N. Rana Patgiri whose positions have been shown in the select list as 2nd, 3rd, 4th and 5th respectively are shown to be over aged. Insofar as Dr. Surjit Nandi Purkayastha and Dr. Ratneswar Swargiary are concerned, both of them were shown above 54 years as on 1.1.1997. On the other hand so far Dr. Dilip Kr. Sarkar (S/C) and Dr. S.N. Rana Patgiri are concerned, they were shown to be above 54 years as on 1.1.1999. More so the teaching experiences of Dr. Ratneswar Swargiary and Dr. Dilip Kr. Sarkar (SI. No, 3 and 4 of the select list) have also been relaxed. As already noted above, there is no mention in either of the advertisements as regards relaxation of age as well as teaching experience.

16. Admittedly, Dr. Munindra Mohan Deka, the Writ petitioner in W.P. (C) No. 5095/99 and respondents 4 and 5 in W.A. No. 27/2001 and 32/ 2001 respectively, is not a selected candidate and presently has been holding the post of Principal in Gauhati Medical College on ad hoc basis.

17. Assailing the impugned common judgment, Mr. S.S. Dey, learned counsel for the appellant strenuously contended that as regards the appellant Dr. Khagendra Narayan Baruah who stood first in the merit list, as reflected from the comparative table showing merit-cum-experience and age of selected candidates as mentioned above, there was no whisper of allegation against him questioning his suitability and eligibility in the writ petition preferred by the private respondent. According to him, when the learned Single Judge in his findings clearly stated that the selected candidates holding 2nd, 3rd, 4th and 5th position in the select list were found to be ineligible being over aged, cancellation of the select list ought to have only been confined to them without disturbing the entire select list. That too, the select list had been set aside on the basis of the allegations inter alia put forth by a non selected candidate, i.e., Dr. Munindra Mohan Deka, the writ petitioner in W.R (C) No. 5095/99.

18. Mr. N. Choudhury, learned counsel appearing on behalf of the appellant in W.A. No. 32/2001 and Dr. Dilip Kr. Sarkar Respondents No. 6 and 9 in these writ appeals (the writ petitioner in W.P. (C) No. 3945/99) forcefully pleaded that Dr. S.N. Rana Patgiri secured 5th position in the select list but though he crossed 54 years of age as on 1.1.1999, his age was condoned by the competent authority. The learned counsel argued that since there had no rule prohibiting condonation of age and qualifications prescribed, the condonation or relaxation of age in question made by the competent authority cannot be questioned on the ground of violation of non existent Rules.

19. Referring to the case of Dr. Dilip Kr. Sarkar, Mr. Choudhury had drawn our attention to the fact that he was not over aged as shown in the comparative table wherein he was shown as above 54 years as on 1.1.1999. Admitted fact is that he had applied pursuant to the first advertisement No. 7/97 and as per the said advertisement his age was within 40-54 years as on 1.1.1997 which ought to have been shown as on 1.1.1997. Dr. Dilip Kr. Sarkar did not apply again due

to the fact that by the second Advertisement, i.e., Advertisement No. 6/99 it was specifically mentioned that "the candidates who had applied earlier need not apply again". In such a situation, had his age been reckoned as on 1.1.1997 he would have been within the age of 54 years. Therefore, reckoning of age of Dr. Sarkar to be above 54 years as on 1.1.1999 was palpably wrong and incorrect. Moreso, he was a Scheduled Caste candidate and in the first advertisement there was provision for reservation of Schedule Caste candidates but in the second advertisement no such provision for reservation was made for which the petitioner was compelled to move W.P. (C) No. 3945/99 for quashing of the second advertisement, i.e., advertisement No. 6/99 and for holding interview in terms of earlier advertisement No. 7/97. Mr. Choudhury further urged that the teaching experience of Dr. Sarkar was also duly relaxed by the competent authority. It was submitted that in such a situation Dr. Dilip Kr. Sarkar was not at all over aged and less experienced. Having been placed in 4th position in the select list on merit, he was entitled for appointment to the post of Principal.

20. Debunking the claim of the appellants as advanced by the learned counsel mentioned above, Mr. J.P. Sarma, learned counsel appearing on behalf of Dr. Munindra Mohan Deka Respondent No, 4 and 5 in W.A. No. 27/2001 and W.A. No. 32/2001 respectively contended that the learned Single Judge was absolutely justified and wholly correct in quashing the entire select list as it is apparent on the face of the record that entire selection process was illegal and vitiated for recommending the candidates who were already over aged with much less experience. The advertisement in question categorically mentioned and stated what was to be the age as on 1.1.1997 or 1.1.1999. He also claimed that there was no mention at all about any relaxation of age or experience in those advertisements in question. Had those over aged candidates not been recommended for appointment of Principal, according to Mr. Sarma, learned counsel. Dr. Munindra Mohan Deka, would have a fair chance to succeed in the said selection. Mr. Deka could not be selected due to such illegal recommendation of disqualified candidates even as he has possessed all the requisite qualifications, experience and age making him eligible to be considered for selection.

21. After carefully gone through the impugned judgment and order dated 10.1.2001 and on over all consideration of the rival contentions of the parties and upon meticulous perusal of the materials available on record including the pleadings of the parties, we have found that the learned Single Judge has correctly and rightly unseated the candidates recommended in the select list being found them over aged on the cut off date, declaring them to be ineligible. On this count, we are in full agreement with the finding of the learned Single Judge.

22. A bare perusal of the relevant advertisements would clearly go to show that there was no mention of relaxation of age nor has any Rule permitting the authorities to condone the age been placed before us. It is also be noticed that

no provision for relaxation of teaching, experience has also been made in these advertisement, Even though the teaching experience of Dr. Ratneswar Swargiary and Dr. Dilip Kr. Sarkar was relaxed that too after submission of their application pursuant to advertisement No. 7/97. It is settled position that the action on the part of the authority, in any public employment must be transparent, open and reasonable. In the instant case, it is seen that there was no specific provision for relaxation of age or teaching experience mentioned in the related advertisements. These relaxations were made devoid of any prescribed Rules. Situated thus, we have no option but to declare that the selected candidates who were over-aged and below teaching experience as required in terms of advertisement are ineligible and disqualified for recommendation for such selection.

23. Insofar the case of Dr. Dilip Kr. Sarkar is concerned, considering the submission of the learned counsel advanced on his behalf, we are of the view that his age ought to have been shown as on 1.1.1997 being the applicant against Advertisement No. 7/97 in which case he ought to have been within the age limit. But his teaching experience was much less than the prescribed in the advertisement. From the averments made in Paragraph 4 of the W.P. (C) No. 3945/99, it candidly demonstrates that the teaching experience for 2 years 8 months as Associate Professor and 2 years 9 months as Professor was relaxed by the State Respondents vide order dated 15.6.1998 definitely after making the application. We do not find any reason to approve the said relaxation.

24. As regard the power to relax the qualification the learned Single Judge has relied on a decision of District Collector and Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and Another Vs. M. Tripura Sundari Devi, There is no second opinion of the application of the ratio of the said case in the instant case.

We are also tempted to quote the relevant paragraph of the judgment referred by the learned Single Judge.

"6. It must further be realised by all concerned that when an advertisement mentions a particular qualification and an appointment is made is 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 qualification 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 cost should be a party to a perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this fact."

It would really amount to a fraud on the public employment if unqualified persons are appointed by giving some relaxation in the prescribed qualification without being legally authorised to do so. In the instant case, had there been any

earlier information for relaxation of age and other requisite qualification, other similarly situated qualified candidates would have also applied and taken interview. Rule of law does not permit such arbitrariness on the part of the executive action.

25. Now we come to the crux of the matter, i.e., when the selected candidates namely Dr. Surjit Nandi Purkayastha, Dr. Ratneswar Swargiary, Dr. Dilip Kr. Sarkar and Dr. S. N. Rana Patgiri have been declared to be ineligible, should the select list as a whole is required to be set aside. From the record it appears that there is no allegation of disqualification, experience etc. against Dr. Khagendra Narayan Baruah, the appellant in W.A. No. 27/2001 save and except, the remarks "not being Head of Department" which is only a "preferable" requirement after primarily holding the post of Professor as per advertisement and also Dr. (Mrs.) Nandita Choudhury who were placed at 1st and 6th position in the select list. When the aforesaid 2 (two) candidates were found to be eligible, was it correct to set aside the entire select list ? Is it "falsus in uno, falsus in omnibus, meaning hereby, false in one thing, false in everything ? Answer is definitely "no". In the premises of the facts and circumstances of the case, according to our thoughtful consideration, it is permissible to maintain the select list retaining the name of eligible candidates by severing ineligible candidates and in our view, that will not be contrary to the accepted norms of the selection procedure. Applying the doctrine of severability" the list of valid candidates recommended duly by an Expert Body of the Commission shall have the enforceability minus those candidates found to be ineligible due to their over-age or below experience limit prescribed in the advertisement.

26. One has to keep in mind that this selection is made by an "Expert Committee" of the Commission having technical experience and high academic qualifications in the specified field and the Court should be slow in interference with the opinion by those Experts unless there are allegations of malafide or contravention of any statutory or binding rules or Ordinance. In this regard in support of our view one may look into The University of Mysore and Another Vs. C.D. Govinda Rao and Another, Dr. M.C. Gupta and Others Vs. Dr. Arun Kumar Gupta and Others, and Secy. (Health) Deptt. of Health and F.W. and Another Vs. Dr. Anita Puri and Others,

27. In the instant case, recommendation of Dr. Surjit Nandi Purkayastha, Dr. Ratneswar Swargiary, Dr. Dilip Kumar Sarkar and Dr. S.N. Rana Patgiri were manifestly erroneous due to the fact that they were all over-aged and more particularly, the teaching experience of Dr. Ratneswar Swargiary and Dr. Dilip Kr. Sarkar's were relaxed without being duly authorised either by the advertisement or by any rules in force. The learned State Counsel on our pointed query could not satisfy us on this alleged relaxation of age as well as teaching experience.

28. On the other hand, it is also found that there is nothing against the qualification, experience and age of Dr. Khagendra Narayan Baruah and Dr. (Mrs.) Nandita Choudhury as mentioned above. Be it mentioned that as we have

already noted that the remarks column against Dr. Khagendra Narayan Baruah in the comparative table, speaks of "not a Head of the Department" meaning thereby Dr. Khagendra Narayan Baruah was not a Head of the Department as per advertisement in which as regards the qualification and experience it was mentioned that "persons holding the post of Professor preferably Head of Department and 10 (ten) years teaching experience as Professor/Associate Professor out of which 5 (five) years should be as Professor in a Department". In our view, Dr. Khagendra Narayan Baruah, having possessed all the requisite qualifications cannot be said to be disqualified for not being the Head of the Department which is to be taken into consideration only as a preference for his selection amongst others and the same cannot be an embargo on his recommendation.

29. On over all consideration of the facts and circumstances of the case and having regard to the settled position of law above referred and on careful perusal of the impugned judgment and order dated 10.1.2001 and also upon hearing the learned counsel for the parties, we are of the considered view that the select list dated 23.9.1999 ought not to have been quashed in its entirety when Dr. Khagendra Narayan Baruah and Dr. (Mrs.) Nandita Choudhury were duly selected and placed at 1st and 6th position in the merit list on the basis of their performance.

30. Admittedly, there are three posts of Principal-cum-Chief Superintendent in the three Medical Colleges of Assam out of which one is reserved for Scheduled Tribes (Plains). When the candidate of Scheduled Tribes (Plains) is found to be disqualified due to over-aged and less teaching experience, 2 (two) other posts for general candidates may be considered to be filled up.

31. Accordingly, we are of the considered view that ends of justice would be satisfied if the respondents are directed to consider the case of Dr. Khagendra Narayan Baruah and Dr. (Mrs.) Nandita Choudhury having been recommended by the Commission, for their appointments to the post of Principal-cum-Chief Superintendent in any of 3 (three) Medical Colleges of Assam and accordingly-we hereby direct the State Respondent to consider them for such appointment at the earliest preferably not later than 2 (two) months from the date of receipt of this order.

32. It is also directed that the State-Respondents shall take necessary steps to fill up the reserved vacancy (Scheduled Tribes Community) by initiating fresh selection process within a period of 6 (six) months from the date of receipt of the order.

33. For the reasons, discussions and observations indicated above, we allow the W.A. No. 27/2001. On the other hand W.A. No. 32/ 2001 is hereby dismissed.

However, we are not inclined to pass any.