
(2008) 12 GAU CK 0012

In the Gauhati High Court

Case No : Writ Petition (C) No"s. 2228 of 2007 and 431 of 2008

Dr. Mahesh Gogoi

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Citation : (2009) 1 GLD 177 : (2010) 6 GLR 147 : (2009) 3 GLT 212

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Advocate : G.P. Dhowmik and R. Hazarika S.S. Roy, for the Appellant; M.K. Mishra, SC, Education Department, for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—By this common judgment and order, I propose to dispose of both these writ petitions inasmuch as both these writ petitions are closely inter-linked and the decision, in any of the two writ petitions, may have a bearing on the outcome of the other writ petition, and, hence, both these writ petitions have been heard together.

2. The material facts, which are not in dispute, and have given rise to the present writ petition, may, in brief, be set out as under:

(i) The Assam Tribune, a local English daily, in its issue, dated 3.12.2006, and the Dainik Janambhumi, a local Assamese daily, in its issue, dated 7.12.2006, carried advertisement inviting applications to fill up, for a period of two years, a post of lecturer, in the Department of Botany, Dibrugarh College, Dibrugarh. The post, though sanctioned, was to carry fixed pay of Rs. 5,000/- and the applicants were to submit their respective applications within fifteen days from the date of publication of the advertisement. The Petitioner, who held requisite educational qualifications, applied for selection and appointment to the said post. The Petitioner was accordingly invited, for interview, which was held on 27.3.2007. Following the interview, the Selection Committee prepared a merit list. The

names, figuring in the merit list, read, in order of merit, thus:

(1) Dr. Mahesh Gogoi-1st nominee

(2) Sri Pranab Paul-2nd nominee

(3) Miss Monmi Baruah-3rd nominee

(ii) On the ground that the Petitioner, whose position in the merit list was first, had crossed the maximum upper age limit required for the post of lecturer in college, the Governing Body of the said college, in its meeting, held on 23.4.2007, resolved to recommend the name of Pranab Paul, who was placed second, in the merit list, to the Director of Higher Education, Assam, for obtaining prior approval for appointment of the said candidate as a lecturer. The relevant extracts of the proceedings of the Governing Body read as under:

The principal i/c placed before the Governing Body meeting held on 23.4.2007 the recommendation of duly constituted Selection Committee for the selection of lecturer in Botany along with the Government Circular dated 4th January, 2006 (Memo No. AAP 115/72/PT-1/152). The merit list prepared by the Selection Committee is as follows-

1. Dr. Mahesh Gogoi

2. Sri Pranab Paul

After going through the recommendation and the above circular, the Governing Body resolved as follows:

Resolution No. 4(iii).-The Governing Body resolved that as the 1st nominee in the merit list in the subject Botany has already attained the age over 37 years, on the date of selection, i.e., on 27.3.2007, the name of the 2nd nominee in the merit list Sri Pranab Paul be sent to the Director of Higher Education, Assam, with documents for prior approval of appointment.

Sd/- P. Majhi President Governing Body Dibru College, Dibrugarh Countersigned by

Sd/- 2.8.2007 Principal, Dibru College, Dibrugarh.

(iii) Having learnt about the fact that though the Petitioner, in WP(C) No. 2228/2007, namely, Dr. Mahesh Gogoi, had been placed, in the merit list, in the first position, by the Selection Committee, the Governing Body had declined to recommend his name to the Director of Higher Education, Assam, for the purpose of appointment and had, instead of his name, recommended the name of the candidate, namely, Pranab Paul, whose position was second in the merit list, the Petitioner (whose position was first in the merit list) has come to this Court, with this writ petition, seeking, inter alia, a direction to the Governing Body of the said College to recommend, for approval to the Director, Higher Education, Assam, the name of the writ Petitioner for appointment to the said post of lecturer of Botany.

(iv) So far as the Petitioner in WP(C) No. 431/2008, namely, Miss Monmi Baruah, is concerned, her case is that the Selection Committee and the Governing Body were predetermined to appoint Pranab Paul in order to deprive her (i.e., the Petitioner in WP(C) No. 431/2008) and it was for this reason that the name of Dr. Mahesh Gogoi (i.e., the Petitioner in WP(C) No. 2228/2007) was placed as the first nominee. The selection in Pranab Paul is, according to the Petitioner, mala fide.

3. I have heard Mr. A.M. Mazumdar, learned senior counsel, for the Petitioner in WP(C) No. 2228/2007, and Mr. G.P. Bhowmik, learned Counsel, for the Petitioner, in WP(C) No. 431 of 2008. I have also heard Mr. M.K. Mishra, learned standing counsel, Education Department, for the Respondent Nos. 1, 2 and 4 in WP(C) No. 2228/2007 and for the Respondent Nos. 1 and 2 in WP(C) No. 431/2008, Mr. P. Gogoi, learned Counsel, for the Respondent No. 3 in WP(C) No. 2228/2007, Mr. A.K. Goswami, learned senior counsel, for the Respondent Nos. 5 and 6 in WP(C) No. 2228/2007 and for the Respondent Nos. 3 and 4 in WP(C) No. 431/2008, and Mr. N. Choudhury, learned Counsel, for the Respondent No. 7 in WP(C) No. 2228/2007.

4. There is no dispute that in terms of the Government's circular bearing Office Memorandum No. AAP. 115/72/PT.I/152-A, dated 4.1.2006, the upper age limit for entry into the State Government services was increased from 36 to 37 years. Thus, the upper age limit for entry into the State Government services is 37 years. This upper age limit is, admittedly, relaxable up to the age of 45 years.

5. Bearing in mind the above undisputed facts, let me, first, deal with the case of Dr. Mahesh Gogoi (i.e., the Petitioner in WP(C) No. 2228/2007).

WP(C) No. 2228/2007

6. Drawing attention to the provisions of Assam College Employees (Provincilisation) Act, 2001, Assam Non-Government College Management Rules, 2001, Assam Civil Service Rules, 1998, Assam Education Service Rules, 1982, Assam State Council of Educational Research and Training Service Rules, 2005, Mr. Mazumdar has contended that the provisions of the various Acts and rules, which govern State Government's services, make it clear that a candidate's upper age limit has to be determined for the purpose of recruitment to be made to the Government service on the basis of his or her age on 1st of Tanuary of the year in which the advertisement is published.

7. What is, now, of paramount importance to note is that I have perused the Act and the Rules, which Mr. Mazumdar has relied upon, and, on a pointed query made by this Court, Mr. Mazumdar could not specifically point out to any of the provisions of the Act and/or the Rules, governing the service conditions of a lecturer of a college, which specifically lays down that for the purpose of recruitment of a lecturer of a college, the age has to be reckoned from the first day of January of the year in which the advertisement was published. In a case of present nature, what one has to, therefore, decide is as to what will be the

cutoff date in respect of the upper age limit of a candidate for the purpose of making appointment to the post of lecturer of a college. It is worth pointing out that having considered a number of authorities on the question as to what shall be treated to be the cut-off date in respect of the age of a candidate for recruitment to a given service, the Supreme Court has, in *Shankar K. Mandal and Others Vs. State of Bihar and Others*, , culled out the principles governing determination of the cut off date as under:

(1) The cut-off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules.

(2) If there is no cut-off date appointed by the rules then such date shall be as appointed for the purpose in the advertisement calling for applications.

(3) If there is no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received by the competent authority.

8. From the principles, which have been culled out by the Apex Court, in *Shankar K. Mandal (supra)*, what become clear is that if the relevant service rule fixes a date for the purpose of computing the age of a candidate eligible for appointment, such a date would be treated as the cut-off date in respect of the service to which such service rules apply. If no cut-off date is prescribed by the rules, then, such date as may be appointed, in the advertisement, calling for applications. If, in this regard, the service rules and also the advertisement are silent, then, the eligibility criteria shall be applied by referring to the last date appointed by which applications were to be received by the competent authority.

9. No service rules and/or specific Government instruction could be shown to apply to a case of present nature, wherein selection of a lecturer of a Government-in-aid College of Assam is involved. This apart, even the advertisements were silent as regards the cut-off date on the basis of which upper age limit would be considered, in the present case, therefore, the cut-off date would be the last date appointed for making applications as per the advertisements. The advertisement was published, in *The Assam Tribune*, on 3.12.2006, and in *The Dainik Janambhumi*, on 7.12.2006, and the applications were to be submitted within fifteen days from the date of publication of the advertisement.

10. Thus, the last day for making of applications was 24.12.2006. As the present Petitioner's date of birth is 1.11.1969, he was 37 years 1 month and 22 days on the last day fixed for submission of the applications. When this Petitioner was interviewed, his upper age limit had not been relaxed. In fact, he had not even applied for relaxation inasmuch as he has made the application for relaxation as last as on 28.3.2007, i.e., after he had already appeared in the interview and, interestingly enough, till today, his upper age limit has not been relaxed. Thus, the Petitioner was not even eligible to participate in the interview or be

interviewed.

11. Coupled with the above, what needs to be noted is that a candidate has to be eligible for selection at the time, when he or she appears, in the written test, interview and/or viva voce, for selection. The mere fact that the candidate has appeared in a written test, interview or viva voce will not make a candidate eligible if he or she was, otherwise, ineligible unless such disqualification or ineligibility is removed or relaxed before he or she appears in the written test, interview and/or viva voce unless, of course, the relevant recruitment rules provide otherwise. Relaxation of age by the Government, after an interview is completed, cannot be treated, in the absence of any specific rules or Government policy, a valid ground for making the candidate eligible.

12. Hence, when the Petitioner, in WP(C) No. 2228/2007 (i.e., Dr. Mahesh Gogoi), was, admittedly, ineligible for being considered for appointment, he could not have been interviewed by the Selection Board on 27.3.2007. This apart, when it came to the notice of the Governing Body, (as the proceedings of the Governing Body meeting, held on 23.4.2007, reflect) that the Petitioner was over-aged and his age had not been relaxed, the Governing Body was wholly within the ambit of its authority not to recommend the Petitioner's name as indicated hereinabove. The mere fact that the Petitioner, in WP(C) No. 2228/2007 (i.e., Dr. Mahesh Gogoi), had been allowed to appear in the interview or had been interviewed by the Selection Board does not vest, in the Petitioner, any right to either demand appointment or to contend that his name ought to have been recommended. Even if, subsequent to his interview, the Petitioner has applied for relaxation of his age to the Government and even if the Petitioner's upper age limit is, now, relaxed by the Government, it would not clothe the Petitioner with a right, far less an indefeasible right, to demand that his name be recommended to the Director, Higher Education Assam, for the purpose of obtaining approval for appointment to the said post of lecturer in the Department of Botany.

13. A reference, with regard to the above aspect of law, may be made to *T. Jayakumar v. A. Gopu* and Anr. reported in AIR 2008 SCW 6620, wherein the Supreme Court has observed and held:

10. We are not aware of any principle of law under which once a candidate is allowed participation in the selection process the selection authority is precluded from examining whether his application was complete, in order, within time or otherwise acceptable. A defect in the application form that renders the candidate ineligible might be overlooked in the initial screening and as a result he may be called for interview and may get a chance to take part in selection process but that alone does not mean that the candidate cannot be held ineligible for selection at a later stage once the defect in the application comes to light. It is surely open to the Tribunal to examine whether the reason assigned by the selection authority for holding a candidate ineligible for selection was valid or unreasonable and arbitrary. If the reason for excluding a candidate from the selection process is found to be unreasonable or arbitrary the Tribunal may

certainly intervene but if the reason itself is valid the Tribunal cannot interfere simply because the candidate was allowed participation in the selection process by being called for interview. The principle of estoppel has no application in such a case.

14. From the observations made, in T. Jayakumar (supra), what becomes clear is that when a candidate, who was ineligible to participate in a selection process, is allowed to participate by mistake or otherwise, he or she cannot be treated to have become eligible, or his/her eligibility cannot be treated to have been waived, merely because of the fact that he has participated in the selection process. Thus, the mere fact that there has been precedent, in the past, where upper age limit, for the purpose of appointment, has been relaxed after a candidate stood selected, who was, otherwise, not eligible to even participate in the selection process without relaxation of his/her age, cannot be made a valid ground for obtaining appointment. Hence, in the present case too, the fact that the Petitioner, Dr. Mahesh Gogoi, has applied for relaxation of his upper age limit and even if the Petitioner's upper age limit is, now, relaxed by the Government, it would not cure the ineligibility with which Petitioner's candidature, on the date of making of the application or on the date of interview, suffered from. In short, the relaxation of the Petitioner's age, even if granted, will not relate back to the date of the interview.

15. It has been further contended by Mr. Mazumdar that in the present case, since the Petitioner had stood first in the interview, his name ought to have been recommended by the Governing Body to the Director of Higher Education, Assam, and it was for the Director to decide as to whether the Petitioner can be appointed or not. I find absolutely no force in this submission inasmuch as the fact remains that on the date, when the Petitioner was interviewed, he was ineligible for being interviewed. Hence, the Governing Body could not have recommended, for obtaining approval for the purpose of making appointment, the name of such a person, who was not even eligible to participate in the selection process.

16. What is also of immense importance to note is that the Petitioner was interviewed, on 27.3.2007, and he applied for relaxation of his age on 28.3.2007. This clearly shows that there was not even an application for relaxation of age on the date, when the Petitioner had been interviewed. In such circumstances, merely because of the fact that the Petitioner has subsequently applied for relaxation of his age as late as on 28.3.2007, the decision of the Governing Body in its meeting, held on 23.4.2007, cannot be said to be illegal and cannot be interfered with.

17. Because of what have been discussed and pointed out above, I find absolutely no merit in this writ petition, i.e., WP(C) No. 2228/2007, and this writ petition must, therefore, fail.

WP(C) No. 431/2008

18. Let me, now, turn to the case of the Petitioner in WP(C) No. 431/2008. The grievance of this Petitioner, namely, Smt. Monmi Baruah, is that in the selection process, in question, this Petitioner secured higher marks in respect of her academic results and teaching experience compared to Pranab Paul (i.e., Respondent No. 5 in WP(C) No. 431/2008), but in the interview, which was to carry 30 marks, while Respondent No. 5, namely, Pranab Paul, was given 26.11 marks, the Petitioner was given 9.2 marks only. Making the accusation that she was not given as much marks in the interview as she had deserved, the Petitioner has challenged the selection of Respondent No. 5, namely, Pranab Paul. As far as Respondent No. 6 to this writ petition, namely, Dr. Mahesh Gogoi, is concerned, his writ petition, which gave rise to WP(C) No. 2228/2007, has already been held, as mentioned above, wholly without merit.

19. While considering the case of this Petitioner, Smt. Monmi Baruah, it needs to be noted that with regard to the selection of candidates for appointment to the post of lecturers in deficit grant-in-aid colleges of Assam, the Government of Assam, Education (Higher) Department, Dispur, Guwahati, has already published guidelines under Office Memo No. B(2)H 242/2002/240 dated Dispur the 20th February, 2003. As per these guidelines, the marking system for the candidates, in respect of lecturers, has been prescribed as follows:

Marking system on different counts will be as follows:

Academic Teaching Knowle- Inter Total qualificat experience dge of the view ions
subject Mxm 65 Mxm 5 (1 pt. for 15 15 100 complete year of the teaching in
Govt./Deficit colleges only)

20. In the case at hand, the selection process has taken place in terms of the guidelines aforementioned. The vires, justification and/or legality of these guidelines have not been challenged. In such circumstances, the mere fact that the Petitioner has received, in the interview, marks, which are lesser than the marks secured by the Respondent No. 5, can be really of 110 significant consequence.

21. Coupled with the above, one can also not ignore that the guidelines aforementioned have been in force since the year 2003 and this Petitioner knew that the selection would be processed in terms of the said guidelines. She still chose to appear without protesting against the justification of the guidelines; but after she had found that she has not been selected, she has come to this Court. In such circumstances, I do not find that this Petitioner has been able to make out any case for granting her relief, which she has sought for. It may be mentioned, while considering this aspect of the case, that it has been the consistent view of law that a candidate, who has fully participated in a selection, process and failed to qualify the same, cannot turn around and challenge the legality of the selection process on the ground that the procedure followed was not proper and fair. A reference, in this regard, may be made to the case of Madan Lal and Others Vs. State of Jammu and Kashmir and Others, , wherein the

Supreme Court has held:

Before dealing with this contention, we must keep in view the salient fact that the Petitioners as well as the contesting successful candidates being Respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The Petitioners also appeared at the oral interview conducted by the members concerned of the Commission who interviewed the Petitioners as well as the contesting Respondents concerned. Thus the Petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well-settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of *Om Prakash Shukla v. Akhilesh Kumar Shukla* it has been clearly Laid down by a Bench of three learned Judges of this Court that when the Petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a Petitioner.

22. I am also guided to adopt the above view from the law Laid down in *Om Prakash Shukla Vs. Akhilesh Kumar Shukla and Others*, , wherein it has been Laid down as follows:

moreover, this is a case where the Petitioner in the writ petition should not have been granted any relief. He had appeared for the examination without protest. He filed the petition only after he had perhaps realized that he would not succeed in the examination. The High Court itself has observed that the setting aside of the results of examinations held in the other districts would cause hardship to the candidates who had appeared there. The same yardstick should have been applied to the candidates in the District of Kanpur also. They were not responsible for the conduct of the examination.

23. Situated thus one has no option, but to hold that this writ petition too, namely, WP(C) No. 431/2008, is wholly without merit and must fail.

24. Because of what have been discussed and pointed out above, both the writ petitions, namely, WP(C) No. 2228/2007 and 431/2008, are hereby held to be without merit and shall accordingly stand dismissed.

25. No order as to costs.