(2016) 08 GAU CK 0032

In the Gauhati High Court

Case No : Writ Petition (C) No. 1262 of 2013

Gopesh Ch. Sarma APPELLANT

Vs

State of Assam RESPONDENT

Date of Decision : 24-08-2016

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2016) 5 GauLJ 500 : (2016) 4 GauLT 758

Hon'ble Judges : Mr. Manojit Bhuyan, J.

Bench : Single Bench

Advocate : Mr. U.K. Nair, Advocate, for the Petitioner; Mr. B. Gogoi, Standing Counsel, Finance Department and Mr. R.K. Talukdar, Standing Counsel, Assam Public Service Commission, for the Respondents

Final Decision : Dismissed

Judgement

Mr. Manojit Bhuyan, J.—The petitioner is an Audit Officer working at Guwahati Circle in the office of the Assistant Director of Audit (Local Fund), Assam. Issue arises with the Advertisement dated 1.12.2010, inviting applications in the prescribed form for appearing in the Departmental (Promotion) Examination, to be held by the Assam Public Service Commission (APSC), made open to the members belonging to the cadre of (i) Assam Accounts Service, (ii) Assam Local Fund Audit Service, (iii) Assam Treasury (Estt.) Service Personnel, towards filling up of 37 posts in Class-I Grade-III cadre of the Assam Finance Service. The eligibility conditions prescribed were that members belonging to the either of the cadres above, must not have crossed 50 years of age as on 1.1.2010, is a graduate from a recognised University and has rendered at least 5 years of service in his/her cadre. In proof of having completed the 5 year period, a Certificate issued by the Appointing Authority was required to be furnished along with the application, which was to reach APSC on or before 31.12.2010. Serial No. 4 of the Form of Application given in the Advertisement is in respect of the date of continuous appointment as Accounts

Officer/Auditor of Local Fund Department and it specified that the Certificate that is to be furnished must contain the date of appointment.

2. To enable himself to apply and appear in the Departmental (Promotion) Examination, the petitioner had made application dated 15.10.2010 to the Respondent No. 4 for issuance of experience Certificate as an Audit Officer. Certificate dated 23.12.2010 was issued under the signature of the Joint Secretary to the Government of Assam, Finance (Estt.-B) Department, certifying that the petitioner have served as Audit Officer since the year 2006 under the Directorate of Audit (Local Fund), Assam and have completed more than 5 (five) years of service in the said capacity. The Certificate dated 23.12.2010 also made mention that the Department has no any objection to the petitioner appearing in the examination. Thereafter, petitioner submitted his application in the prescribed form on 28.12.2010. As against the Serial No. 4 of the Application Form, petitioner enclosed the Certificate in original received from the Finance Department.

3. By the APSC letter dated 29.9.2011, the petitioner was provisionally allowed to appear in the examination, however, subject to his furnishing certain documents as specified therein, which included an attested copy of the experience Certificate in proof of 5 years service, issued by the appropriate authority. This was followed by another letter of the APSC dated 14.10.2011, informing the petitioner that the experience Certificate enclosed to the application was not very clear, as the date of joining did not find mention. The petitioner was asked to furnish a clear experience Certificate mentioning the exact date of joining, issued by the Appointing Authority, on or before 31.10.2011. Accordingly, another Certificate dated 14.10.2011 came to be issued by the Finance (Estt.-B) Department, certifying that the petitioner has served as Audit Officer since 1.6.2006 in the concerned Directorate and has completed more than 5 (five) years of service in the said capacity.

4. The departmental examination for promotion was conducted by the APSC on 6.11.2011, as envisaged under the provisions of sub-rule (2) of Rule 7 of the Assam Finance Rules, 1963, as amended (hereinafter called the Rules of 1963), and prepared the list of candidates who qualified in the examination. To this end, Notification dated 28.2.2012 was issued, wherein the name of the petitioner figured at serial no. 22 against the category of Assam Local Fund Audit Service. Copy thereof with all original applications of the qualified candidates were made over to the Finance (Estt.-B) Department and to all concerned.

5. Petitioner''s promotion did not come by and instead he was served with the Show-Cause Notice dated 6.6.2012, as per Rule 9 of the Assam Services (Discipline and Appeal) Rules, 1964 read with Article 311 of the Constitution of India, asking him to explain why his selection for appointment in the Assam Finance Service should not be cancelled and why appropriate action should not be taken for submitting false information regarding his eligibility conditions as per Rules. For better appreciation, the Show-Cause Notice dated 6.6.2012 is

reproduced hereunder:

"Government of assam

Finance (establishment-B) department

Block "f", 2nd floor, dispur, guwahati-06.

Dated Dispur the 6th June, 2012

No. FEB.44/2003/Pt.-1/17

From : Shri P.K. Borthakur, IAS

Commissioner & Secretary to the Govt. of Assam

Finance (Establishment-B) Department.

To :

Shri Gopesh Ch. Sarma, Audit Officer

C/o Asstt. Director, Audit (L.F.), Assam

Guwahati Circle, Camp-Guwahati Municipal Corporation,

Panbazar.

Sub : Show Cause

You are required to show cause under Rule 9 of the Assam Services (Discipline and Appeal) Rules, 1964 read with Article 311 of the Constitution of India why your selection for appointment in Assam Finance Service shall not be cancelled and why appropriate action shall not be taken against you for submitting false information regarding eligibility conditions as per Rule.

While you had submitted an application, applying for a "five years completion certificate" as Audit Officer to apply in the Departmental (Promotion) Examination to the cadre of Assam Finance Service, vide your application dated 15.12.2010 it reveals that you did not complete 5 years of continuous service as "Audit Officer" which is not permissible as per provision under Rule 7(2) of the "Assam Finance Service Rules, 1963" (as amended).

You are, therefore asked to submit your written statement in defence within 7 (seven) days from the date of receipt of this notice provided you do not intend to inspect the documents. If, you intend to inspect the document, you may inform in writing to the undersigned for the same within 7(seven) days from the date of receipt of the notice and submit your explanation thereafter within 10(ten) days from the date of completion of inspection.

Commissioner & Secretary to the Govt. of Assam

Finance Department, Dispur, Guwahati. "

6. The gist of the Show-Cause Notice dated 6.6.2012 was in respect of tendering false information, in that, while submitting application on 15.12.2010 he did not complete 5 years of continuous service as Audit Officer, which is not permissible as per provision under sub-rule (2) of Rule 7 of the Rules of 1963. The petitioner made reply on 4.7.2012 and eventually by Notification dated 7.8.2012, issued under the hand of the Commissioner & Secretary to the Government of Assam, Finance (Estt.-B) Department, it was made known to all concerned that the Experience Certificates that had been issued on 23.12.2010 and 14.10.2011 stood cancelled as the same were found not to be in conformity with the actual facts of the case. A further Notification was issued on 7.8.2012 by the Finance (Estt.-B) Department, listing out the names of Officers who had qualified in the Departmental (Promotion) Examination held by the APSC, for undergoing attachment training in various Treasuries so indicated, prior to their appointment under Rule 13 of the Rules of 1963. Apparently, the name of the petitioner was not included therein. As regards the steps initiated by the Show-Cause Notice dated 6.6.2012 and the reply made thereto, the petitioner was cautioned to be careful in future. To this end, the order dated 31.8.2012 was issued. Appointment of the other qualified candidates, who had successfully completed the attachment training, was made vide Notification dated 10.12.2012.

7. On the above facts, prayer in the writ petition is for setting aside the Notification dated 7.8.2012 with direction to the state respondents to appoint the petitioner pursuant to the Advertisement dated 1.12.2010 and in terms of his merit position as per the APSC select list issued vide Notification dated 28.2.2012.

8. Mr. U.K. Nair, learned counsel for the petitioner, submits that the petitioner''s date of entry into the present post as Audit Officer is 24.5.2006, which is evident from the Provisional Gradation List of Audit Officers under the concerned Directorate. It is argued that while making the application dated 15.10.2010 for grant of the experience certificate, the petitioner had never projected that he had completed 5 years of service as Audit Officer and, therefore, there could not be any allegation of having submitted false information regarding his experience in the said Application dated 15.10.2010. Also, since he had joined as Audit Officer on 24.5.2006, therefore, on the date when the Departmental (Promotion) Examination was held by the APSC i.e. 6.11.2011, the petitioner had duly completed five years service experience as an Audit Officer. Further argument is that consequent upon his application dated 15.10.2010, it was the departmental authorities, who on processing the petitioner''s application, had issued the Certificate showing completion of five years of service as an Audit Officer. This, according to Mr. Nair, would go to show that the departmental authorities themselves were given to understand that as time would be required to complete the recruitment exercise in pursuance to the Advertisement dated 1.12.2010, the petitioner would by then complete five years of service. The said position was also accepted by the APSC, and, accordingly, the petitioner was allowed to participate in the selection process. Further contention is that no fault can be attributed to the petitioner on grounds of having made any misrepresentation

with regard to the period of his service as an Audit Officer. There is no violation of the provisions under clause (b), sub-rule (4) of Rule 6 of the Rules of 1963, in as much as, he had completed five years of service as Audit Officer on a date prior to the commencement of the Departmental (Promotion) Examination, which was held on 6.11.2012. Mr. Nair also alleged discrimination on the part of the state respondents as some of the persons who had not completed five years of service as Audit Officer as on 1.1.2010, had been appointed by the Notification dated 10.12.2012. On the submissions above, Mr. Nair contends that the impugned Notification dated 7.8.2012 cannot stand the scrutiny of law and is liable to be set aside and/or be quashed.

9. The respondent no. 4 as well as respondent Nos. 1 and 2 have filed respective affidavit-in-opposition. Mr. B. Gogoi, learned counsel representing the said respondent Nos. 1 and 2 submits that the writ petition requires to be dismissed in limine, having regard to the terms and conditions of the Advertisement dated 1.12.2010 and that of the relevant provisions under the Rules of 1963. Mr. Gogoi submits that the case projected by the petitioner that his candidature could not have been rejected as he had completed more than five years of service as Audit Officer on the date when the Departmental (Promotion) Examination was held by the APSC on 6.11.2011, is an extreme and far-fetched proposition without any factual or legal basis. To this end, Mr. Gogoi refers to the stipulation in the Advertisement as to how and when application for appearing in the said examination was required to be made. The certificate of experience enclosed with the petitioner''s application in the prescribed form made to the APSC on 28.12.2010 did not contain the date of joining as Audit Officer and, therefore, the APSC had asked the petitioner to furnish another experience certificate, to be issued by the Appointing Authority, mentioning his exact date of joining. On receipt of the said letter dated 14.10.2011 from the APSC, the petitioner made an application on the same date i.e. 14.10.2011 to the Finance Department requesting issue of the experience certificate. The said application dated 14.10.2011 was jointly made by two officers and in so far as the petitioner is concerned he had himself indicated in the said application that his date of joining is 1.6.2005. According to Mr. Gogoi, even the said application dated 14.10.2011 was fret with deliberate misrepresentation, in as much as, the petitioner''s date of joining as Audit Officer, as per service records, is 24.5.2006 and certainly not 1.6.2005. Further contention is that under no circumstances the petitioner''s experience as Audit Officer could go beyond 1.1.2010 for the purpose of appearing in the examination as because even if an extreme view is taken that it can be extended to 6.11.2011, there would have been many other candidates acquiring eligibility by then to appear in the said Departmental (Promotion) Examination. Mr. Gogoi also contends that the cancellation of the experience certificates dated 23.12.2010 and 14.10.2011 together with the caution given to the petitioner had been so done after complying with natural justice. Lastly, Mr. Gogoi contends that the order dated 31.8.2012, whereby the petitioner was cautioned to be careful in future, is not the subject matter of challenge in the

present proceedings, save and except the Notification dated 7.8.2012 which pertains to cancellation of the certificates.

10. I have heard the learned counsels for the parties and have perused the materials on record. The primary point for determination is as to whether the petitioner was eligible to offer his candidature against the Advertisement dated 1.12.2010 and whether the provisions under clause (b), sub-rule (4) of Rule 6 of the Rules of 1963 operated as a complete embargo disentitling the petitioner for making application to appear in the Departmental (Promotion) Examination in terms of the said Advertisement dated 1.12.2010. The issue with regard to cautioning the petitioner to be careful in future is not taken up for discussion and determination, as the order dated 31.8.2012 is not under challenge in this writ petition. The findings and decisions is confined to the terms and conditions of the Advertisement dated 1.12.2010 read with the relevant provisions of the Rules of 1963 and on the Notification dated 7.8.2012 relating to cancellation of the two experience certificates.

11. The APSC Advertisement dated 1.12.2010 clearly laid down the eligibility conditions entitling one to appear in the examination. It prescribed that an aspirant must not cross the age of 50 years as on 1.1.2010 and must be a graduate of a recognised University with at least five years of service in his/her cadre. A Certificate showing completion of five years of service was required to be furnished along with the application and the said Certificate was to be issued by the Appointing Authority. The last date for sending the application in the prescribed form was shown to be on or before 31.12.2010. The requirement that the Certificate was to be furnished along with the application gains utmost significance as it expressly and impliedly goes to show that a candidate must be a person who has completed five years of service by the time when application in the prescribed form is sent to the APSC, which was to be on or before 31.12.2010. Apparently, on the date i.e. 28.12.2010 when the petitioner had submitted application in the prescribed form to the APSC, he had not completed five years of service as an Audit Officer. In other words, the petitioner was not eligible to offer his candidature for appearing in the Departmental (Promotion) Examination in terms of the Advertisement dated 1.12.2010. Also to be noticed is that the application submitted by the petitioner in the prescribed form was not complete in all respects, in that, Serial No. 4 of the application was not adequately answered.

12. Clause (b), sub-rule 4 of Rule 6 of the Rules of 1963, being the relevant provision for adjudication of this case, the same is reproduced hereunder:

Rule 6(4)(b)

" A member belonging to the cadres of Superintendent, Accountant, Senior Accounts Assistant of the Treasury, Accounts Officer, Audit Officer, who does not cross the age of 50 years on the Ist January of the year in which the Departmental Examination under Rule 7(2) is held, and is a graduate of a

University and has rendered at least 5 years of service in his cadre shall be eligible for promotion under sub-rule (3) of Rule 6".

Going by the aforesaid provision, one of the eligibility conditions prescribed is that a member belonging to any of the cadres, as mentioned therein, must have rendered at least five years of service in his cadre. On a harmonious reading of the aforesaid provision, this five year period of service has to be reckoned as on the 1st January of the year in which the Departmental Examination under Rule 7(2) is held. Selection by the APSC in terms of Rule 7(2) of the Rules of 1963 was held in the year 2011 and, therefore, the five year period of service can only be reckoned until the 1st of January, 2011. On this date, the petitioner did not complete five years service as Audit Officer. On this aspect also, the petitioner was not eligible to offer his candidature to appear in the Departmental (Promotion) Examination held in the year 2011.

13. According to the Provisional Gradation List of Audit Officers under the Directorate of Audit (Local Fund), Assam, the petitioner entered into his present post of Audit Officer on 24.5.2006. Going by the said date of entry, the petitioner was in no way eligible to appear in the Departmental (Promotion) Examination held in the year 2011 by the APSC. In this respect, the initial experience Certificate dated 23.12.2010 had absolutely no meaning. Under what circumstances or on what consideration the authority concerned had issued the experience Certificate dated 23.12.2010 is a matter which is difficult to comprehend. But what stands clear is that the said Certificate dated 23.12.2010 is, ex facile, illegal and not capable of being acted upon as on the date of issuing the said Certificate, the petitioner obviously did not have five years service as Audit Officer to his credit. To reiterate, the petitioner became an Audit Officer on 24.5.2006 and the experience Certificate issued under the hand of the Joint Secretary to the Government of Assam, Finance (Estt.-B) Department is dated 23.12.2010. Clearly, the period from 2006 to December, 2010 do not cover a period of five years, not to speak of the Certificate dated 23.12.2010 being rendered in complete derogation to the terms of the Advertisement and that of Rule 6(4)(b) of the Rules of 1963. In so far as the subsequent experience Certificate dated 14.10.2011 is concerned, the date of joining of the petitioner as Audit Officer shown therein until the date of issue of the Certificate may, numerically, cover five years, but the same has to be read as per the terms of the Advertisement and that of Rule 6(4)(b) of the Rules of 1963. The said Certificate dated 14.10.2011 is not a document that could be acted upon to entitle or render eligibility to the petitioner to appear in the Departmental (Promotion) Examination as per the Advertisement dated 1.12.2010. In any view of the matter, both the Certificates dated 23.12.2010 and 14.10.2011 were issued de hors the terms of the Advertisement dated 1.12.2010 and that of the provisions under Rule 6(4)(b) of the Rules of 1963. Accordingly, the Notification dated 7.8.2012 cancelling the above two Certificates do not suffer from any illegality and irrationality.

14. The contention of the petitioner that the benefit of his selection by the APSC could not be denied to him as he had completed five years of service as Audit Officer by 6.11.2012 i.e. the date on which the Departmental (Promotion) Examination was held, the same if accepted, would not only militate against the mandatory rules under Rule 6(4)(b) of the Rules of 1963 but would also go to make the said provisions otiose. The said contention is utterly far-fetched and cannot have any legal basis.

15. The foregoing discussions leads to the inevitable conclusion that no case is made out by the petitioner warranting interference of this Court to the Notification dated 7.8.2012. As a necessary corollary, there cannot be any question for directing the respondents to appoint the petitioner in terms of his merit position as per the APSC Select List, issued vide Notification dated 28.2.2012. The writ petition being devoid of merits, stands accordingly dismissed. The parties are left to bear their own costs.