
(2009) 11 GAU CK 0049

In the Gauhati High Court

Case No : Writ Petition (C) No's. 3054, 3218, 3382 and 3702 of 2009

Hamen Bharali (Dr.) and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 06-11-2009

Acts Referred:

Constitution of India, 1950 — Article 162, 19(1), 19(2), 309
Right to Information Act, 2005 — Section 2, 6(2), 8(1)

Citation : (2010) 4 GLT 522

Hon'ble Judges : Ranjan Gogoi, J;B.P. Katakey, J

Bench : Division Bench

Advocate : S.N. Sarma, B. Buragohain, K. Phukan, K.N. Choudhury, S. Shyam, C. Baruah, M. Mahanta, A. Dhar, A.M. Mazumder, A. Choudhury, F.K.R. Ahmed, S. Islam, A. Ali, S. Borthakur, U.K. Deka and M. Phukan, for the Appellant; K.N. Choudhury, C. Baruah, S.N. Sarma, B. Buragohain and K. Phukan, for the Respondent

Final Decision : Dismissed

Judgement

Ranjan Gogoi, J.—All the writ petitions having raised common questions of law on similar facts were heard together and are being disposed of by this common judgment and order.

2. The sole grievance raised in the writ petitions and the entitlement claimed by the Petitioners is with regard to their right to receive photocopies of the answer scripts in the concerned subjects for which they had applied under the provisions of the Right to Information Act, 2005 (hereinafter referred to as the Act). The examination in question in which the Petitioners had appeared is the Combined Competitive Examination, 2006 held by the Assam Public Service Commission (hereafter referred to as the Commission) for recruitment to vacant posts in the Assam Civil Service, Class-I (Junior Grade) and allied services. According to the Petitioners, on the strength of an order dated 3.7.2009 passed by the State Information Commissioner, Assam, in a proceeding initiated by three other persons (the Petitioner No. 2 in W.P. (C) 3054/2009, Sri. Nilav Deka Goswami

was a party to the said proceeding) the State Information Commissioner had issued directions to the Commission to furnish Xerox copies of the answer scripts to the candidates as and when applications are made by any candidate. The Petitioners have stated and averred that pursuant to the said order dated 3.7.2009 they had applied for answer scripts of the papers in which they have been shown to have secured low marks in the statement of marks supplied to them by the Commission. However, the Commission had not furnished photocopies of the answer scripts applied for by the Petitioners leaving them with no option but to move this Court by way of the present writ petitions.

3. In W.P. (C) No. 3218 of 2009 wherein the Commission is the writ Petitioner the challenge is in respect of Anr. order, also dated 3.7.2009, passed in the case of one Swaraj Kumar Das who was also a candidate in the aforesaid examination. By means of the order dated 3.7.2009 the Commission while issuing similar directions, as noted above, had reviewed its earlier order dated 2.4.2009 rejecting the claim of the applicant before it i.e. Swaraj Kumar Das for being furnished with photocopies of the answer scripts. According to the writ Petitioner-Commission, the initial order dated 2.4.2009 rejecting the claim of the applicant was passed on the basis of an order dated 23.4.2007 of the Central Information Commission. However, subsequently the order dated 2.4.2009 was reviewed by the Assam State Information Commissioner by means of the impugned order dated 3.7.2009. In this regard, it is the broad contention of the Commission before this Court that the State Information Commissioner being an authority under the statute had not been vested with any power of review so as to enable the said authority to recall its earlier order dated 2.4.2009. It is the further contention of the Assam Public Service Commission in the writ petition filed before this Court that the exercise by way of review was without any notice to the Public Service Commission.

4. The above being the broad features of the cases under consideration, recital of which is considered sufficient for an effective adjudication thereof, the Court has considered it unnecessary to burden this order with any other specific details, particularly those pertaining to the marks secured by the candidate in the papers, photocopies of which have been applied for. The Court may now proceed with the required adjudication after briefly noticing the rival contentions advanced.

5. The writ Petitioners contend that the answer scripts constitute information within the meaning of Section 2(f) of the Act and the right to receive such information, within the meaning of Section 2(j) of the Act, extends to a right to be furnished with the photocopies of the answer scripts. It is also contended that the Public Service Commission is a public authority within the meaning of Section 2(h) of the Act obliging the said authority to make available the required "information" which has been denied in the present case. The Respondent Public Service Commission, who is also the writ Petitioner in W.P. (C) No. 3218/2009, contends to the contrary. According to the Commission, the evaluation of the

answer scripts of the candidates in the Combined Competitive Examination, 2006 constitute information received in a fiduciary capacity and therefore, the exemption contained in Section 8(1)(e) of the Act dispenses the obligation to make available photocopies of the answer scripts to the candidates who had appeared in the said examination. According to the Commission, the right to information is a facet of the freedom of speech and expression contained in Article 19(1)(a) of the Constitution and such right is subject to reasonable restrictions that may be imposed under Article 19(2). Referring to several judgments of the Apex Court, particularly in the cases of (1) Union of India (UOI) Vs. Bhagwan Das, (2) Dinesh Trivedi, M.P. and Others Vs. Union of India (UOI) and Others, (3) People's Union for Civil Liberties and Another Vs. Union of India (UOI) and Others, (4) Pramod Kumar Srivastava Vs. Chairman, Bihar Public Service Commission and Others, (5) Board of Secondary Education v. Pravas Ranjan and Anr. reported in (2004) 13 SCC 383 ; and (6) The Secretary, West Bengal Council of Higher Secondary Education Vs. Ayan Das and Others, it is the contention of the Commission that to make available the answer scripts to a candidate is to permit him to make a self assessment/evaluation of the answers given by him which is not contemplated by law. According to the Commission, such a course of action would inevitably delay the finalisation of the results making the system unworkable. According to the Commission, as public policy demands a finality to the process of any examination it will be in public interest not to acknowledge the claimed right in favour of the candidates. The preamble to the Act has also been referred to lay stress on the fact that the right to receive information should be understood in a balanced manner when such right is likely to come in conflict with different facets of public interest including efficient operations of the authority. That apart, it is the case of the Commission that in the writ petition filed no foundation has been laid to substantiate the right claimed and therefore, the principles of law enunciated by the Supreme Court in the cases referred to, the core of which have been noticed above, would also apply in the case of a public examination conducted by a statutory or a constitutional body like the Public Service Commission while adjudicating claims under the Right to Information Act, 2005.

6. The Right to Information Act, undoubtedly, is one of the most potent attempts in recent years to promote democratic norms and principles. The definition of "information" contained in Section 2(f) is in the widest of terms and must be understood in the light of the objects sought to be achieved by the legislation in question. Section 6(2) of the Act even dispenses with the requirement of locus standi; in any case the Petitioners (candidates) in the present case do not suffer from any absence thereof. The right to receive information vested by the Act enable the decisions taken as well as the decision making process involved at different levels of the Govt. to be scrutinized by a citizen. The object of the Act, therefore, is to enable citizens to scrutinize all Government acts (except what has been specifically exempted by the Act) so as to ensure greater accountability and transparency in governmental functioning. The reasonable restrictions

contemplated by Article 19(2) or the balancing act between the right to receive information and public interest as reflected in the preamble finds manifestation in Section 8(1) of the Act which exempts a public authority from the obligation of disclosure in cases covered by Sub-clauses (a) to (j) of Section 8(1) of the Act.

7. Having outlined the broad features of the Act and having identified the object that the Act seeks to achieve the Court may now proceed to analyse and understand the specific stand taken by the Commission that it is absolved from the obligation to furnish photocopies of the answer scripts to the candidates as the same is exempted u/s 8(1)(e) of the Act.

8. Section 8(1)(e) of the Act is in the following terms:

8. Exemption from disclosure of information - (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen.-

(e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information.

9. The expression "fiduciary relationship" is defined in the Black's Law Dictionary to mean:

A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships - such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client-require the highest duty of care. Fiduciary relationships usually arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

On the other hand, the word "fiduciary" has been defined in the same Dictionary (Edition) to mean:

1. One who owes to another the duties of good faith, trust, confidence, and candor the corporate officer is fiduciary to the shareholders, 2. One who must exercise a high standard of care in managing another's money or property.

10. From the above it is clear that a fiduciary relationship comes into existence when one person places his complete confidence in another in regard to any particular matter. In the present case under the Regulations pertaining to holding of examinations by the Commission and the practice followed (noticed in the order dated 1.9.2009 passed in W.P. (C) No. 2755/2009) answer scripts of the candidates are required to be evaluated by examiners out of a prepared panel or list of such examiners. On completion of the examination of the answer scripts

the evaluated answer scripts are again required to be scrutinized by moderators, and if so required, finally, by a head examiner. Given the scheme of the examination of answer scripts as laid down in the Regulations in force and the procedure followed in practice it is difficult to understand how any fiduciary relationship between the Public Service Commission and the examiners can be understood to have come about so as to justify invocation of the exemption from disclosure contemplated by Section 8(1)(e) of the Act.

11. Who amongst the persons that are assigned the task of evaluating the answer scripts of the candidates by the Commission i.e. that the initial examiner, the moderator or the head examiner is the person in whom the Public Service Commission had placed its Utmost trust and confidence is not known, in a given case the marks awarded by the initial examiner may be the final award of marks. In Anr. , the marks given by the same examiner may be superseded by those awarded by the moderator and in the third case it may be the marks as finally awarded by the head examiner which may be the final determination. Under the Regulations of the Public Service Commission and the practice followed there is no hard and fast rule to ensure that every answer script undergoes the aforesaid process i.e. scrutiny by the initial examiner, then by the moderator and finally by the head examiner. Much would depend on the facts of a given case. The person whose award of marks is final in any given case, therefore, remains uncertain. If that be so, the identity of the repository of the trust requiring reciprocal duty of utmost good faith is absent. T Tiat apart, keeping in view the objective that the Act seeks to achieve, the Court will have no hesitation in holding that the spirit of the Act enjoins disclosure of information as the general rule and exemption therefrom as an exception. In such a situation, making available the answer scripts without disclosing the identity of the person (s) whose award of marks has been construed to be the final determination in any given case, a situation contemplated by Section 8(1)(g) of the Act, can easily take care of the situation. If the requirement of disclosure of information can be met by adequately taking care that the identity of the examiner is not disclosed such an interpretation must be adopted and the more drastic course of action i.e. to recognize an exemption must be avoided.

12. An argument has been advanced on behalf of the Public Service Commission that leaving aside the specific exemptions enjoined by the provisions of the Act the requirement of disclosure can still be balanced by the authority on a fine scale wherein competing public interests can be weighed along with the necessity of the disclosure. We are afraid we cannot subscribe to the aforesaid proposition. In B.N. Nagarajan and Others Vs. State of Mysore and Others, the Constitution Bench of the Apex Court had observed:

We see nothing in the terms of Article 309 of the Constitution which abridges the power of the executive to act under Article 162 of the Constitution without a law. It is hardly necessary to mention that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot in exercise of

the executive power under Article 162 of the Constitution ignore or act contrary to that rule or act.

If the rights of the citizen to receive information and the situations in which the obligation to furnish such information has been dispensed with by the provisions of a comprehensive statute, we do not see how the respective rights and obligations of the State vis-a-vis its citizens can be measured by any other yardstick except by reference to the provisions of the statute. On the above conclusion that we have reached it will not be necessary for us to refer to the details of the cases cited by the learned Counsel for the Public Service Commission in support of the plea that furnishing of answer scripts of the candidates would not be in public interest.

13. The above would require the Court to consider the specific plea advanced on behalf of the Public Service Commission that the order dated 3.7.2009 passed by the State Information Commissioner in the matter of Swaraj Kr. Das will not be authorized in the absence of any power of review vested in the said authority by the provisions of the Act. While the learned Counsel for the Commission may be correct in raising the issue, yet, in our considered view, the question has become largely academic in view of the fact that irrespective of the order dated 3.7.2009 passed by the State Information Commissioner in the matter of Swaraj Kr. Das, the views recorded therein finds manifestation in Anr. order of the same date i.e. 3.7.2009 passed by the State Information Commissioner in a separate proceeding involving other candidates including the Petitioner No. 2, Sri. Nilav Deva Goswami in W.P. (C) No. 3054/2009. It is on the basis of the views recorded in the said independent proceeding that the direction has been issued to the Commission to furnish to all candidates in the public examinations held by it xerox copies of the answer scripts that may have been or may be applied for. Even if we are to technically set aside the review order dated 3.7.2009 passed by the State Information Commissioner in the case of Swaraj Kr. Das, on the conclusions that we have reached, the views recorded by the State Information Commissioner in the order of the same date passed in the case of other candidates and the consequential directions issued by the said authority will not be liable to any interference.

14. We, therefore, allow the Writ petitions i.e. W.P. (C) Nos. 3054/2009, 3382/2009 and 3702/2009 and dismiss W.P. (C) No. 3218/2009 filed by the Assam Public Service Commission leaving the parties to bear their own costs.