
(2007) 03 GAU CK 0011
In the Gauhati High Court

Hemshree Talukdar and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 09-03-2007

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2007) 3 GLT 469

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Amitava Roy, J.—The petitioners similarly situated, feel aggrieved by the suppression of the select list dated 13.2.2003 for appointment as Staff Nurse under the Respondent-State and initiation of a fresh process therefor. They claim to have figured in the select list. The impugned action having annihilated all prospects of their appointment as such, they are before this Court for redress. There being an evident homogeneity in the related facts and the legal issues seeking adjudication, the petitions have been analogously heard for disposal by a common decision.

2. I have Mr. P.P. Baruah, learned Counsel for the petitioner and Mr. D. Saikia, learned State counsel for the official respondents.

3. The factual account provided by the petitioners deserves to be noted in nutshell. They affirm to be qualified nurses having obtained necessary diploma in nursing and midwifery under the Assam Nurses' Midwives and Health Visitors' Council (hereinafter after also referred to as the "Council") and are thus qualified to hold the post of Staff Nurse in the different Hospitals of the State of Assam. Pursuant to an advertisement published under the authority of the Director of Health Services, Assam for training in General Nursing in Community Health Nursing and Midwifery course in the year 1993, they being eligible, applied therefor, for the session 1994-1998, after observing all necessary formalities. A

regular selection process followed being conducted by the concerned respondent authority for selection of candidates for such training. The petitioners having been selected, were detailed for such training in various Institutes/Hospitals/Medical Colleges in the State of Assam, having the essential facilities. They were also awarded necessary stipend for undergoing such training. In due course, they successfully completed their training from respective institutes, in the year 1998. According to the petitioners, on completion of such training, they were entitled to be appointed as Staff Nurse in various Hospitals under the State on the basis of batch seniority in training. To put it differently, candidates, who obtained diploma in such training earlier, were to be appointed before those earning such diploma later in point of time. Due to a ban on appointments subsisting in the year 1998, no appointment of Staff Nurse, was made resulting in accumulation of qualifying candidates therefor. Having received the diploma on successful completion of the training, the petitioners also got themselves registered with the Council.

4. While the petitioners were thus waiting in expectation to be appointed as Staff Nurse, the Government in the Family & Welfare (A) Department, by communication No. HLA.751/95/303, dated 25.10.2002, conveyed the clearance of the State Level Empowered Committee (hereafter for short as the "SLEC"), for filling up amongst others 59 vacant posts of Staff Nurse by direct recruitment, subject to observance of all necessary formalities as required. Subsequent thereto, the Director of Health Services, Guwahati, Assam, on 27.11.2002, constituted the following Committee to consider the cases for promotion of nursing staff to the higher post, as well as for appointment of Staff Nurse from candidates, who had passed the General Nursing and Midwifery Course.

i. Director of Health Services, Assam --Chairman. ii. Additional Director of Health Services (R) --Member. iii. Joint Director of Health Services (N) --Member iv. Joint Director of Health Services (HQ) --Member

5. The petitioners have maintained that the --Committee had been structured as per the order and direction of the Minister of Health, Government of Assam, contained in the communication No. MH & FW/3/2000 dated 18.11.2000 and addressed to the Secretary to the Health & Family Welfare. The said selection committee, thereafter examined the cases of the eligible candidates for appointment as Staff Nurse on seniority basis. It also considered all the applications of the qualified candidates, who had successfully undergone the diploma course in nursing as State sponsored candidates in different nursing schools and possessed of necessary diploma issued by the Council. On a threadbare scrutiny of all relevant facts, the Selection Committee prepared a list of 5.1 candidates for appointment as Staff Nurse. The select list was prepared taking note of the 21 points roster for reservation and contained the names of the petitioners. This was on 13.2.2003.

6. While the matter rested at that, the Under Secretary to the Government of Assam, Health & Family Welfare (A) Department by notification No. HLA.843/95/24-A, dated 28.2.2003, notified another Selection Committee for

selection of candidates for appointments as Staff Nurse. The notification disclosed that the Committee would take immediate steps to select and recommend candidates for appointment of Staff Nurse after observing all necessary rules and procedures as laid down. The composition of the Committee was as hereunder:

i. Joint Secretary, Health & Family Welfare --Chairman
iii. Director of Health Services, Assam --Vice Chairman
ii. Additional Director of Health Services (R) Lower Assam --Member.
iii. Joint Director of Health Services (HQ) --Member
iv. Joint Director of Health Services (Nursing) --Member Secretary.

7. By notification No. HLA-843/95/27, dated 7.5.2003, Smti. Niverani Doley (Pegu), the Deputy Director of Health Services (N), was nominated as the Member Secretary in the aforesaid Committee, modifying the constitution as notified earlier. This Committee also conducted a purported interview totally disregarding the earlier process and the select list dated 13.2.2003. In the interview that was held on 26.5.2003 and subsequent dates, all the petitioners were not called to appear therein. On the other hand, candidates, who had undergone the training after them in 1999, 2000 and 2001, were allowed to participate. In course of the interview, however only the testimonials of the candidates were scrutinized and no endeavour was made to assess their comparative merit. Soon, thereafter, the petitioners came to learn that appointments as Staff Nurse would be made at random from amongst the junior candidates. On this they made necessary inquiries in the concerned offices but were extended a lukewarm response. No copy of the first select list though, sought for by the petitioners was furnished to them.

8. The petitioners have alleged that the respondent-authorities, however, started making appointments without publishing any select list or adhering to seniority and merit. The petitioners have cited instances of such appointments asserting that the appointees were junior to them in taking training. This the petitioners have contended to be illegal, arbitrary and influenced by extraneous and political considerations for accommodating persons of choice. They have insisted that they being fully eligible to be appointed as Staff Nurse, the respondent-authorities could not have in law resorted to a fresh process without cancelling the earlier exercise and the select list dated 13.2.2003.

9. The State respondents in their counter have averred that appointments are provided to candidates, who had successfully completed B.Sc.(N)/G.N.M./ANM courses against available vacancies on seniority-cum-merit followed by an interview adhering to 20 points roster of reservation. The answering respondents stated that on successful completion of training, the qualified candidates are graded on the basis of the aggregate marks secured in the training programme as per the guidelines in the Indian Nursing Council Syllabi and Regulations for the General Nursing and Midwifery Course. According to them, the Government on deciding to fill up the vacancies of Staff Nurse and other categories of Nurse by direct recruitment, as well as departmental promotion, obtained the

necessary clearance of the State Level Committee for the posts earmarked for the purpose. They pleaded that the committee constituted by the Director of Health Services, Assam on 27.11.2002, did not meet the Government approval and was therefore, not valid. The so called selection that was held by the said Committee was, therefore, void. They maintained that before direct recruitment, the promotional process had to be completed. However, the said Committee violated the said sequence and selected candidates without first pursuing the process of promotion. In the said premise, the Government constituted a new Committee by the notification dated 28.2.2003. However, as the Joint Director of Health Services (Nursing) faced certain allegations in the matter of selection of candidates for General Nursing Midwifery Training, she was replaced by the Deputy Director of Health Services (Nursing) in the said Committee vide notification dated 7.5.2003.

10. The duly appointed Committee after completing the selection published the panel of selected candidates. The answering respondents contended that as the earlier Committee had not been legally constituted, its list was neither authenticated nor approved by the Government and, therefore, the question of publishing the same did not arise. According to them, the Assam Nursing Service Rules 1991 (hereinafter also referred to as the "Rules"), had been framed by the Government to regulate the recruitment and conditions of service of persons to be appointed to the Assam Nursing Service. In terms of Rule 5 & 6 thereof, the Commission or the Board, as the case may be, is to hold such tests and interview as it may consider necessary and thereafter, furnish to the appointment authority a list of candidates recommended by it in order of preference for direct recruitment. While contending that it, was not the obligation of the Government to provide each and every candidate completing the General Nursing Midwifery Course with appointment as Staff Nurse, they stated that in view of the ban on appointment imposed in the year 1998 due to financial constraint, there was no recruitment and, therefore, all eligible candidates since 1998 had to be accorded an opportunity for appointment subject to their suitability to be assessed by a duly constituted selection committee. The answering respondents denied the petitioners' claim for appointment on the basis of batch seniority in training. They also denied the allegation of political as well as extraneous considerations.

11. Mr. Baruah, has urged that the Rules not having empowered any particular authority to constitute the Committee for selection for direct recruitment for Staff Nurses, the impugned action of superseding the earlier process by constituting a new committee without cancelling the earlier select list is patently illegal, arbitrary, unreasonable and unjust. A Committee with the same composition having been constituted again for selecting candidates for admission into different institutions to undergo General Nursing and Midwifery (GNM) training for the session 2005-06, it clearly belies the respondents' plea that the Committee drawn up by the notification dated 27.11.2002, was invalid. The learned Counsel also referred to Rule 13(1) and (2) and the Rules in this regard. He strenuously argued that the impugned action of setting up a new committee

and initiating a fresh exercise for selection during the subsistence of the first select list, was obviously illegal and without any authority of law. No justifiable reason having been assigned to depart from the earlier process or the select list, the same survives. He dismissed the plea of completion of the promotional process as a condition precedent for direct recruitment of Staff Nurse as misconceived and untenable. According to the learned Counsel, as the respondents had without any conceivable reason failed to provide appointment to the petitioners on the basis of the first select list, they were entitled to a writ of mandamus to provide them therewith and all consequential service benefits. Mr. Baruah, to reinforce his arguments placed reliance on the decision of the Apex Court in *Vinodan T. and Others Vs. University of Calicut and Others*,

12. Mr. Saikia, per contra has argued that as the earlier process had not been initiated by any advertisement reciting the conditions of eligibility and the particulars of reservation in posts, the same was repugnant to the fundamental essentials for valid appointment in public office. As the Committee formed by the notification dated 27.11.2002, had no approval of the Government, it had no competence to make any selection, he urged. The Government being empowered to constitute selection committees in all departments for appointments, this Committee without its ratification was nonest in law. The list dated 13.2.2003, was thus not recognizable in law and, therefore, no separate order was necessary to cancel the same. Mr. Saikia, therefore, urged that the challenge to the impugned action, is misconceived and the petition is liable to be rejected. The learned State counsel produced the relevant records to substantiate the stand of the respondents.

13. Mr. Baruah, in reply maintained that as the petitioners had been selected for training following an advertisement and a drill based thereon, the appointments were to be made out of the trained candidates only and, therefore, publication of the process eliciting public participation was not warranted. The plea of want of fresh advertisement was thus not tenable, he insisted.

14. In *Vinodan T. and Ors. (supra)*, the Apex Court, while reiterating that a person merely selected for a post, does not acquire a right to be appointed thereto, held that the appointing authority could not scrap the panel of the selected candidates during the period of its validity, except for well founded reasons.

15. The rival submissions have been duly appreciated. Noticeably, the respondents have not questioned the eligibility of the petitioners" for being considered for direct recruitment as Staff Nurse under the Rules. That a selection was held for the said post by a Committee constituted on 27.11.2002, in which the petitioners had participated, is also not disputed by them. They have construed the process to be void, as according to them, the said Committee constituted by the Director of Health Services, Assam, was ineffectual in absence of the Government approval. Moreover, though required, the process for promotion in terms of the communication dated 25.10.2002 (Annexure F to the

State affidavit), was not undertaken before pursuing the exercise for direct recruitment.

16. The Rules under Article 309 of the Constitution of India, have been framed for regulating the recruitment and the conditions of service of the persons appointed to the Assam Nursing Service (for short as "Service"). The post of Staff Nurse is encadred in Class-III of the service. Rule 5 (b) mandates that recruitment to the said post amongst others, would be by direct recruitment. Rule 6, lays down the procedure for direct recruitment. It is provided that the same would be on the basis of the recommendation made by the APSC or the Board constituted under Rule 13 thereof. It stipulates that before the end of each year, the appointing authority would make an assessment regarding the likely number of vacancies to be filled up by direct recruitment during the next year and would intimate the same to the commission or the board, as the case may be, with the details about reservation for candidates belonging to SC, ST or any other categories as specified by the Government. The appointing authority would similarly request the Commission or the Board to recommend a list of candidates for direct recruitment in order of merit. The Commission or the Board as the case may be, would make the selection in accordance with the scheme prescribed by the Government. In doing so, it may hold such tests or interview as considered necessary. The list to be drawn up by the Commission or the Board, would be approximately double the number of the vacancies and would be published in the Assam Gazette or in any other manner as considered proper. The list so prepared would remain valid from a period of 12 months from the date of recommendation.

17. The procedure for promotion under the Rules has been separately provided. Rule 13 prescribes the makeup of the Selection Board for direct recruitment as hereunder:

i. Director of Health Services or Director of Health Services (FW) (as the case may be) --Chairman
iii. Joint Director of Nursing --Member
iii. Director of Nursing --Member Secretary

The composition of the Board for promotion is differently provided.

18. Admittedly, the Rules governed the recruitment to the post of Staff Nurse. It has not been submitted at the Bar that the Rules have undergone any change by amendment or otherwise. The constitution of the Selection Board/Committee made vide the communication dated 27.11.2002 of the Director of Services, Assam, is not in conformity with the one mandated by the Rules. The Committee set up by the notification dated 28.2.2003, also does not match with the one stipulated by the Rules. No explanation is forthcoming from the deviation in the composition, the Rules notwithstanding. It is really intriguing as to how the authorities of the Health & Family Welfare Department could suggest the Committee, the composition whereof, does not accord with the prescription of the Rules to that effect. The Rules having enjoined a formation of the Selection Committee to conduct the direct recruitment thereunder, further approval of the

Government cannot be a condition precedent therefor, if the body is in conformance therewith. However, if the composition is different from the one prescribed by the Rules, any action or decision taken by it, would not be cognizable in law, more particularly, if the Rules do not save the same.

19. The records produced before this Court, being File No. HLA.753/2003, HLA.843/95 and NS/148/2003/Part/I, do not disclose the reason for cancellation of the earlier selection process conducted by the Committee formed on 27.11.2002. It transpires therefrom, that out of the candidates selected in the second pursuit following the interview held between 26.5.2003 and 18.6.2003, for 59 posts of Staff Nurse, in difference to the order dated 22.5.2003 of this Court in Civil Rule No. 3796 of 2003, 49 were appointed in August, 2003, and thereafter, a fresh process was initiated for the remaining 10, as well as other vacancies occurring in the meantime. The notices for the interview as above, were published in the local dailies, namely "The Sentinel" and "Dainik Janambhumi".

20. In view of the prescription of the Rules, vis-a-vis, the constitution of the Selection Board and the procedure to be adhered to, for direct recruitment as envisaged therein, the impugned decision of abandonment of the earlier selection process cannot be denounced as illegal, arbitrary or highhanded. The Committee constituted on 27.11.2002, being incompatible with the one enumerated in the Rules, the same is non-existent in law. Moreover, as the selection is required to be made on the touchstone of merit, the omission on its part to hold any test or interview after due publication of the notice, for, eliciting public participation renders the exercise flawed and invalid. The petitioner's assertion for being appointed as Staff Nurse on the basis of the select list dated 13.2.2003, drawn up on the earlier process, thus cannot be upheld.

21. Though, the Committed dated 28.2.2003, also suffers from the same vice, in view of the efflux of over three years by now, I am not inclined to interfere with the appointments of 49 candidates inducted in the service in August, 2003. However, no further appointments therefrom would be made. The respondents, however, are directed to be meticulously vigilant of the imperatives of the Rules in conducting the subsequent processes lest any deviation therefrom warrants annulment thereof. This Court parts with the issue, directing the Commissioner & Secretary, Government of Assam, Health and Family Welfare Department, Guwahati, to inquire into the reasons for constitution of Committee in departure from the Rules and apporoving the list prepared by it for appointments as Staff Nurse, as disclosed by the records produced before this Court and take appropriate action against the erring officials so that the same do not recur in future. The said authority would complete the enquiry within two months herefrom and cause submission of a report thereof and the action taken thereon before this Court.

The petitions, in view of the above determination, are hereby dismissed. No