

(2023) 09 GAU CK 0047

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 3457 Of 2017

Madhuri Borthakur

APPELLANT

Vs

State Of Assam And 5 Ors

RESPONDENT

Date of Decision : 25-09-2023

Acts Referred:

Constitution Of India, 1950 — Article 226

Assam Civil Services (Conduct) Rules, 1965 — Rule 13, 13(2)

Citation : (2023) 09 GAU CK 0047

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : R Karim, G Choudhuryr

Final Decision : Dismissed

Judgement

1. The extra-ordinary jurisdiction of this Court conferred by Article 226 of the Constitution of India is being sought to be invoked by means of this writ petition whereby the petitioner has put to challenge the selection and appointment dated 02.05.2017 of the respondent no. 6 as Principal of the Mallow Ali HS School in the district of Jorhat.

2. There is a chequered history in this case and to understand the issue involved, it would be convenient if the background facts are noted in brief.

3. The petitioner is an Assistant Teacher in the Malowali HS School in the district of Jorhat (hereinafter called the school). In the year 2011, when the post of the Principal of the School had fallen vacant, the petitioner was given the charge of the Principal vide an order dated 29.07.2011. However, it is the case of the petitioner that after 43 days, vide an order dated 08.09.2011, she was replaced by the respondent no. 5. The said action was based on a Government Notification dated 29.03.2011 whereby Subject Teachers were to be given priority over Assistant Teachers. This Court has however been informed that the aforesaid notification was interfered with in a writ petition being WP(C)/4836/2011 vide

order dated 21.03.2012, which was filed by another party.

4. Accordingly, the aforesaid order dated 08.09.2011 was the subject matter of challenge in a writ petition WP(C)/4797/2011 by the present petitioner. The said writ petition was disposed of by this Court vide an order dated 22.02.2012 by holding that the respondent no. 5 was senior to the petitioner as the petitioner had joined the present School on transfer. However, this Court had made a further direction to hold regular selection to the post of Principal. It is the case of the petitioner that in spite of such directions, no action was taken for holding any regular selection and consequently, the respondent no. 5 was continuing as In-Charge Principal.

5. Under such circumstances, the petitioner had filed another writ petition in this Court which was registered as WP(C)/5169/2015. The petitioner had also taken the ground of service break of the respondent no. 5 as well as unauthorized leave in which regard, an enquiry was stated to be initiated.

6. Subsequently, there was a notification for selection of regular Principal, pursuant to which, an advertisement was published on 19.06.2016. It is the case of the petitioner that she had submitted her candidature along with that of the respondent no. 6. The petitioner has alleged that the selection was vitiated and the respondent no. 6 was given 12 marks whereas the petitioner was given 11 marks and accordingly the recommendation in favour of the respondent no. 6 was made on 16.11.2016. It has been contended that the constitution of the School Selection Committee was flawed and biased inasmuch as, the respondent no. 5, who was the In-Charge Principal was also a Member of the Committee in the capacity of Member Secretary. The petitioner contends that since there were previous litigations of the petitioner with the respondent no. 5, her presence in the School Selection Committee has resulted in a biased and unfair result. It is also contended that one of the Member of the Committee was not even a Matriculate. The pattern, in which marks have been allotted, is also assailed by the petitioner. The petitioner claims that percentage-wise, she should have been given more marks than the respondent no. 6 but in the leadership skills, equal marks were given so as to make the respondent no. 6 in the first position. A ground of challenge is also structured on the Administrative Ability as according to the petitioner, she has better credentials than the respondent no. 6. It is also contended that the respondent no. 6 is five years junior to the petitioner and had obtained the B.Ed. degree from Deomornoi B.Ed. College, Mangaldoi, in the district of Darrang. It is further contended that it was humanely impossible to pursue a course at Mangaldoi by a person who is employed at Jorhat as the distance is not less than 250 km. It is further contended that at no point of time, any Study Leave was taken by the respondent no. 6.

7. I have heard Shri SK Das, learned counsel for the petitioner. I have also heard Shri NJ Khataniar, learned Standing Counsel for the Education Department whereas the respondent no. 6 is represented by Shri S. Borthakur, learned counsel.

8. Shri Das, learned counsel for the petitioner has submitted that the selection was held on 16.11.2016 and he had submitted a representation on 26.12.2016 on the ground of bias. He submits that the respondent no. 6 was not even eligible for being considered for the post of Principal as the B.Ed. degree which is mandatory clearly appears to be one which has been procured illegally. He also submits that the selection was vitiated by the presence of the respondent no. 5 in the Selection Committee which led to grant of marks in a bias and unfair manner. On the point of bias, reference has been made to the case of Badrinath Vs. Govt. of T.N. and Ors. reported in (2000) 8 SCC 395.

9. Shri Das, the learned counsel for the petitioner submits that in the aforesaid selection held on 16.11.2016, while the petitioner was allotted 11 marks, the respondent no. 6 was allotted 12 marks. The breakup of the marks reads as follows:

Leadership

Administrative

ACR/Integrity

Petitioner

5

3

3

Resp. no. 6

5

3

4

He submits that the marks are to be allotted as per notification dated 23.06.2016 and according to the petitioner, under the Head of "Leadership", the petitioner should have been allotted 3.61 marks and the respondent no. 6 should have been allotted 3.23 marks. Further, under the Head of "Integrity/ACR", it is submitted that the grant of marks is erroneous mainly for the following reasons, namely, there was no adverse remarks; marks were to be given by the Inspector of Schools whereas the same was given by the President of the SMDC. In this connection, Shri Das has referred to an order dated 28.03.2018 of this Court in WP(C)/3050/2017 in the case of Benudhar Dutta Vs. State of Assam in which it has been laid down that ACR gradings are to be assessed by the prescribed officer.

10. With regard to the issue of obtaining B.Ed. degree by the respondent no. 6 from the Deomornoi B.Ed. College, Darrang, Shri Das, the learned counsel has

referred to the order dated 16.02.2023 passed by this Court in WP(C)/5258/2022 in the case of Smt. Bornali Saikia Kakoti @ Bornali Saikia Vs. the State of Assam and Ors. and has also referred to Rule 13 of the Assam Civil Services (Conduct) Rules, 1965 which lays down the requirement of permission. The learned counsel has also submitted that the Director of Secondary Education has passed two orders holding such B.Ed. degree to be irregular. The learned counsel has also referred to a response received on an RTI Application from which it appears that the respondent no. 6 did not seek any permission for pursuing the B.Ed. Course.

11. Shri Das has also referred to the Assam Secondary Education (Provincialisation) Service Rules, 2003, more specifically, Rule 13 thereof. By referring to the case of Trilokya Nath Das Vs. State of Assam and Ors. [WP(C)/2373/2019] and the order dated 25.11.2020 passed thereon by this Court, it is submitted that the School Selection Committee cannot make any assessment of the merit.

12. Since, there is a reference to some allegation that the petitioner had delayed in handing over documents, the learned counsel for the petitioner has submitted that the petitioner was on Medical Leave and in this regard, has also placed on record the relevant documents.

13. Per contra, Shri Khataniar, learned Standing Counsel, Education Department has opposed the writ petition by submitting that no grounds have been able to be made out for interference. He submits that the challenge regarding award of marks is without any basis. As regards the role of the respondent no. 5 in the Selection Committee, he submits that the said respondent no. 5 was the Principal In-Charge and therefore, was the ex-officio Member Secretary. He submits that the petitioner was aware of this and did not raise any objections during the interview or even immediately thereafter. So far as the ground on raising a question on the B.Ed. degree of the respondent no. 6, it is submitted that the letter dated 23.06.2023 would make things clear. He submits that the Deomornoi B.Ed. College at Mangaldoi had Evening Shift and the respondent no. 6 had also paid non-collegiate fee which is with regard to shortage of attendance. He further submits that there were orders granting leave to the respondent no. 6 to attend the examination.

14. Shri Borthakur, learned counsel for the respondent no. 6 has submitted that there is absolutely no foundation in the present writ petition and at every stage the petitioner is trying to introduce new facts and documents. By referring to Rule 8(iv) of the Rules of 2003, it is submitted that the Member Secretary of the Selection Committee has to be the Principal / Headmaster ex-officio and therefore, the constitution of the Selection Committee in the instant case cannot be found fault with. In any case, he submits that the petitioner had participated in a selection without any objection and his first representation is admittedly dated 26.12.2016 which is more than a month after the selection which was held on 16.11.2016. By referring to the case of Madan Lal and Ors. Vs. State of J & K

and Ors., reported in (1995) 3 SCC 486, it is submitted that the petitioner, who is an unsuccessful candidate cannot maintain the present challenge.

15. Shri Borthakur further submits that with regard to the allegation that marks were allotted by the President, the same is not supported by any pleadings. He submits that marks to be allotted under Rule 13(ii). He further submits that with regard to the marks on Integrity & ACR, as per notification dated 23.06.2016, the total marks is 5 and the maximum marks on ACR is 3 and therefore, the marks on Integrity is 2. He submits that the petitioner has proceeded on an incorrect presumption while structuring his challenge on this ground.

16. With regard to the B.Ed. degree, Shri Borthakur, the learned counsel submits that his client had procured the degree by attending Evening Classes where permission is not required. He also endorses and reiterates the submission made by the learned Standing Counsel for the Department on this point. He further submits that most importantly, the B.Ed. degree of the respondent no. 6 is not the subject matter of challenge in this petition. He further informed this Court that the said B.Ed. degree has been separately challenged by the petitioner by means of a writ petition being WP(C)/1733/2023 which is at the stage of service of notice. It is submitted that unless such B.Ed. degree is specifically challenged and held to be invalid in a judicial proceeding, the same cannot be questioned. It is lastly submitted that the post of Subject Teacher (Economics) which the respondent no. 6 was earlier holding prior to his promotion has already been filled up and therefore, even in case of any interference, the petitioner will be left with no post. Further, it is informed that the respondent no. 5 has also retired in the meantime.

17. Shri Das, learned counsel for the petitioner, in his rejoinder, has placed reliance on the case of Raj Kumar and Ors. Vs. Shakti Raj and Ors. reported in (1997) 9 SCC 527 to distinguish the case of Madan Lal (supra).

18. The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been carefully examined.

19. The first ground of challenge is the ground of bias and the same is structured on the involvement of the respondent no. 5 in the selection process of the post of regular Principal of the School in which the respondent no. 6 was selected. The foundation of such allegation is the history of litigations between the petitioner and the respondent no. 5 with regard to the post of In-Charge Principal of the School and in this regard, reference has been made to the writ petitions, namely, WP(C)/4797/2011 and WP(C)/5169/2011. Though, the aforesaid ground may appear to have some basis, the same has to be tested with the contemporaneous facts and circumstances. Firstly, it is seen that the said respondent no. 5, who was holding the post of In-Charge Principal was to act as an ex-officio Member Secretary of the Selection Committee as per the statute holding the field. Secondly, it is seen that even if there was a bona fide apprehension of any bias,

objections should have been raised immediately which has not been seen in the present case. The records reveal that the date of selection was 16.11.2016 whereas the first representation by the petitioner was submitted only on 26.12.2016 i.e. more than after a month. Therefore, the aforesaid ground which is otherwise based on the perception of the petitioner and not on any objective standards cannot be accepted. Though the petitioner had relied upon the case of Badrinath (supra), in the instant case, the objection of the petitioner itself being raised after more than a month, the said objection cannot be held to be sustainable.

20. With regard to the ground of error in allotting marks, it appears that the petitioner had proceeded on certain presumption regarding the marks on the Head "Integrity". However, the notification dated 23.06.2016 makes it clear that the total marks allotted of 5 includes the marks of ACR which is a maximum of 3. Therefore, the marks under "Integrity" is 2.

21. With regard to the allegation that marks were allotted in the selection by the President of the SMDC, this Court finds force in the argument made on behalf of the respondent no. 6 that the said allegation is not supported by any pleadings and therefore, cannot be taken up in the argument.

22. The learned counsel for the petitioner has also raised the issue that the respondent no. 6 could not have obtained the B.Ed. degree from a College at Mangaldoi while attending her duties at Jorhat. In this connection, Rule 13 of the Assam Civil Services (Conduct) Rules, 1965 was taken recourse to by the petitioner as per which permission to pursue a course is required and the case of Barnali Saikia Kakoti (supra) was referred. The information obtained regarding lack of permission by RTI application was also placed on record. However, the learned counsel for the respondent no. 6 has submitted that the College at Mangaldoi was offering Evening Classes for which no permission was required from the authorities. He also points out that the B.Ed. degree of the respondent no. 6 as such is not the subject matter of challenge in the present case. He has also informed that in this regard, the petitioner has filed another WP(C)/1733/2023 on the issue. This Court is of the view that unless the B.Ed. degree of the respondent no. 6 is held to be invalid by a competent Court in an appropriate petition, interference on that ground cannot be made.

23. In the case of MK Kunhikanan (supra) relied upon by learned counsel for the respondent, the Hon'ble Supreme Court has made the following observation:

"8. In Halsbury's Laws of England, 4th Edn., (Re-issue) Vol. 1(1) in para 26, p. 31, it is stated, thus:

"If an act or decision, or an order or other instrument is invalid, it should, in principle, be null and void for all purposes; and it has been said that there are no degrees of nullity. Even though such an act is wrong and lacking in jurisdiction, however, it subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction. Until its validity is challenged, its legality is

preserved.”

In the *Judicial Review of Administrative Action*, De Smith, Woolf and Jowell, 1995 Edn., at pp. 259-60 the law is stated thus:

“The erosion of the distinction between jurisdictional errors and non-jurisdictional errors has, as we have seen, correspondingly eroded the distinction between void and voidable decisions. The courts have become increasingly impatient with the distinction, to the extent that the situation today can be summarised as follows:

(1) All official decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent jurisdiction.”

Similarly, Wade and Forsyth in *Administrative Law*, Seventh Edn., 1994, have stated the law thus at pp. 341-342:

“... every unlawful administrative act, however invalid, is merely voidable. But this is no more than the truism that in most situations the only way to resist unlawful action is by recourse to the law. In a well-known passage Lord Radcliffe said:

‘An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.’

This must be equally true even where the brand of invalidity is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council without distinction between patent and latent defects.”

The above statement of the law supports our view that the order of the Board dated 28-6-1977, declining to implead Respondents 3 and 4 (which stood confirmed in revision) concludes the matter against Respondents 3 and 4.”

24. The petitioner had also alleged violation of Rule 13(2) of the Rules of 2003 and also referred the case of Trilokya Nath Das (supra). However, the records do not support the case of the petitioner as it is only the compilation of the marks which is objective in nature which was the function of the School Selection Committee and the ultimate selection is done by the State Selection Board. This Court has rather noticed that Section 13 of the Rules of 2003 has vested certain powers to the School Selection Committee in the manner of making selection for the post of Principal.

25. The respondents have also raised the objection of the estoppel by citing the case of Madan Lal (supra). The said objection was replied to by the petitioner by citing the case of Raj Kumar (supra) wherein the earlier rigid view has been distinguished. However, since this Court has been informed that the B.Ed. degree

of the respondent no. 6 is the subject matter of challenge in a pending writ petition, this Court will not express any opinion on the objection regarding the right of the petitioner to institute the present challenge.

26. In view of the aforesaid facts and circumstances and the discussions made above, this Court is of the opinion that no case for interference is made out and accordingly the writ petition is dismissed. It is however clarified that no opinion has been expressed on the validity of the B.Ed. degree of the respondent no. 6 in this case as the same was not a subject matter of challenge.

27. No order as to cost.