
(2010) 01 GAU CK 0034

In the Gauhati High Court

Case No : Writ Petition (C) No's. 357 and 358 of 2009

Nitai Deb

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 29-01-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2010) 3 GLR 655 : (2010) 2 GLT 578

Hon'ble Judges : T. Nandakumar Singh, J

Bench : Single Bench

Advocate : D.K. Biswas and S. Lodh, for the Appellant; T.D. Majumder, P. Dutta, A. Sengupta and S. Deb (Gupta), for the Respondent

Judgement

T. Nandakumar Singh, J.—These two writ petitions, which involve the similar question of facts and law, seeking the similar prayers, were taken up jointly for disposal by a common judgment and order.

2. Heard Mr. D.K. Biswas, learned Counsel appearing for the petitioners of both the writ petitions. Also heard Mr. T.D. Majumder, learned Addl. Government Advocate appearing for the respondent Nos. 1 and 2, Mr. P. Dutta, learned Counsel for the respondent No. 3, Ms. S. Deb (Gupta), learned Counsel for the respondent No. 4-Shri Anish Das and Mr. A. Sen Gupta, learned Counsel for the respondent No. 5-Shri Niranjana Debnath.

FACTUAL BACKGROUND

3. The Tripura Public Service Commission ("TPSC") issued an advertisement being No. 09/2008 dated 30.8.2008, inviting applications in prescribed form for a competitive examination followed by interview for appointment to the four posts of Forest Ranger (two for Scheduled Castes and two for Un-reserved). The eligibility criteria for appointment to the said post of Forest Ranger are also mentioned in the said advertisement, relevant portions of which are quoted hereunder:

TRIPURA PUBLIC SERVICE COMMISSION

Advt. No. 09/2008

Application in prescribed Form are invited for a Competitive Examination followed by interview for appointment to the post of Forest Ranger who will be required to under-go Rangers Course Training for 18(eighteen) months outside the States.

2. Vacancies (all permanent) =04(SC= 02 and UR=02).

3. Eligibility conditions: (a) Citizen of India (b) Bachelor degree (or equivalent) in Science or Engineering of any recognized University with at least 1(one) of the following subjects:

(i) Agriculture, (ii) Botany, (iii) Chemistry, (iv) Computer applications/ Computer Science, (v) Environmental Science, (vi) Forestry, (vii) Geology, (viii) Horticulture, (ix) Mathematics, (x) Statistics, (xi) Physics, (xii) Veterinary Science, (xiii) Zoology or Engineering in any of the discipline, viz. Civil, Mechanical, Electrical, Electronics, Chemical, Agriculture, Compute.

(c) Desirable: Knowledge of Bengali.

(d) Minimum Physical Standard:

Category

Distance to be covered for physical test in four hour son foot

Height (CM)

Chest

Normal

Expansion

(i) For General &

Male

25 Km

163

84

05

SC candidates

Female

16 Km

150

79

05

(ii) ST candidates

Male

25 Km

152

84

05

Female

16 Km

145

79

05

4. Age limit: Not less than 18 years and not more than 37 years as on 30.9.2008. Upper age limit is relaxable by 5(five) years in case of ST/SC/ PH candidates and Government Servants.

7. The final selection will be made in order of merit on the basis of the marks obtained by a candidate in written examination, in aggregate, adding the marks obtained in the interview.

8. Date, time and venue of Written Examination and Interview of the eligible/ qualified candidates will be notified in due course.

9. In no case, a candidate will be considered for interview unless he/she appears in all the papers of the written examination. If a candidate remains absent in the interview, his/her candidature will not be considered for final selection.

The minimum physical standard for General and SC candidates for "Chest" are 84 cm (normal) and 05 cm (expansion) for the male candidates.

4. The petitioner of WP(C) No. 357 of 2009 Shri Nitai Deb is a General candidate and his educational qualification is M.Sc. in Mathematics; the petitioner of W.P. (C) No. 358 of 2009 Shri Bimal Das is a member of the Scheduled Caste community and his educational qualification is B.E. Pursuant to the said advertisement dated 30.8.2008, both the petitioners applied for the said post of

Forest Ranger and, accordingly, appeared in the selection test, i.e., written examination and interview conducted by the TPSC. The TPSC vide Notification No. 10(18)-RECTT/ TPSC/2008; dated 30.5.2009, recommended the petitioners and two others in order of merit for appointment to the post of Forest Ranger under the Forest Department, Government of Tripura. In that recommendation, the petitioner of W.P.(C) No. 357 of 2009 Shri Nitai Deb stood first in the category of UR and the petitioner of W.P.(C) No. 358 of 2009 Shri Bimal Das stood second in the category of Scheduled Castes. For easy reference, the said Notification dated 30.5.2009 is quoted hereunder:

No.F.10(18)-RECTT/TPSC/2008 TRIPURA PUBLIC SERVICE COMMISSION
AGARTALA Dated, the Agartala 30th May, 2009 //NOTIFICATION//

References -Advertisement No. 09/2008 dated 1st September, 2008

The names of the under mentioned candidates have been recommended for appointment to the post of Forest Ranger under Forest Department Government of Tripura, in the given order of merit:

Sl. No.

Name of the candidate

Category

Roll No.

Marks obtained

Remarks/age

1

Sri Nitai Deb (petitioner of WP(C) No. 357 of 2009)

UR

66

367

2

Sri Manimoy Sarma

UR

4

365

3

Sri Tapan Das

SC

67

346

4

Sri Bimal Das (petitioner of W.P.(C). 358 of 2009)

SC

53

319

Sd/- (A.K. Podder) Secretary, Tripura Public Service Commission

5. The Under Secretary, TPSC under his letter dated 4.6.2009 informed the petitioners that they had been recommended for appointment to the post of Forest Ranger, Group-C Non-gazetted and the offer of appointment would be issued by the appointing authority subject to the competent authority satisfying itself about their suitability in all respect including their physical fitness for proper discharge of the duties of the Forest Ranger. The Deputy Conservator of Forests (Headquarters), Government of Tripura, Office of the Principal Chief Conservator of Forests, Tripura, requested the petitioners to report for walking test (25 Km.) to be covered within a time of four hours including measurement of physical standards in respect of height and chest as required for the post of Forest Ranger. Both the petitioners were found successful in the walking test. As the appointment orders were not issued, by the appointing authority, the petitioners made an enquiry as to why the appointment orders were not issued to them. On such enquiry, it was discovered that the selection of the petitioners was cancelled only on the ground that the petitioners were not physically fit as their chests at the time of measurement were less than the prescribed standard for Chest of the candidates and in their place, respondent Nos. 4 and 5 who were said to be in the panel, had been appointed as Forest Ranger.

6. In the writ petitions, the petitioners had categorically pleaded that their chests were not correctly measured at the time of their physical test and the measurement was so made just to eliminate the petitioners for accommodating less deserving candidates in the said post of Forest Ranger. It is the case of the respondent Nos. 1 and 2 that the physical test was held on 23.6.2009 and the petitioners of the present writ petitions were found short of physical standard in respect of chest girth. The relevant portion of the result of physical standards measurement and walking test for consideration of recruitment to the post of Forest Ranger under the Forest Department, Government of Tripura dated 23.6.2009 read as follows:

Conduct of Physical Standards measurement and Walking Test for consideration of recruitment to the Post of Forest Ranger under the Forest Department,

Government of Trioura, Dated, 23.6.2009

Sl. No.

Name and Address

Category

Height (cm)

Chest Girth (cm)

Walking Result

Normal

Expansion

Departure time

Arrival time

Duration (hrs. mins.)

Distance cover

1.

Sri Nitai Deb,S/o Sri Jibendra Kr. Deb. Vill: Ramnagar-2, Agartala, Tripura
(West)Pin-799002(petitioner of WP(C) No. 357 of 2009)

UR

163

80

85

6.10 AM

10.03 AM

3.53

25 KM

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4.

Sri Bimal Das,S/o Gopal Ch. Das Vill: East Champamura,PO: Old Agartala,
Tripura(W)Pin : 799008(petitioner of WP(C) No. 358 of 2009)

SC

165

78

84

6.10 AM

10.03 AM

3.53

25KM

7. As the writ petitioners were found short of physical standard in respect of their chest, their selection had been, cancelled and respondent Nos. 4 and 5 had substituted the writ petitioners as selected candidates for appointment to the said post of Forest Ranger. The writ petitioners filed miscellaneous applications in the present writ petitions, praying for a direction to measure their chest by an expert to submit a report before this Court for disposing the present writ petitions. This Court, after hearing both the parties, passed an order dated

23.11.2009, relevant portion of the said order is quoted hereunder:

Mr. T.D. Majumder, learned Addl. Government Advocate appearing for the State-respondents is directed to take necessary instructions as to who will be the expert from the Government side for taking measurement of the "chest" of the petitioner on the next date.

As agreed to and prayed for by the learned Counsels appearing for the parties, list this case on Wednesday (25.11.2009).

On 25.11.2009, Mr. T.D. Majumder, learned Addl. Government Advocate appearing for the State-respondents submitted that one Shri S.K. Pal, IFS, DFO, Working Plan Division No. 1, Agartala had been nominated by the Government as expert for the purpose of taking measurement of chest of the petitioners. Accordingly, this Court passed an order dated 25.11.2009, directing Shri S.K. Pal, IFS, DFO, assisted by Mr. Dipak Kumar Sharma, Inspector, Weights and Measurement Department to take measurement of chest of the petitioners in presence of the learned Registrar/Deputy Registrar (Judl.) of this Bench as well as Mr. S. Lodh, learned Counsel for the petitioners, Mr. T.D. Majumder, learned Addl. Government Advocate for the State-respondents on 27.11.2009 at 1.15 p.m. in the chamber of the Registrar of this Bench. The relevant portion of the order of this Court dated 25.11.2009 is quoted hereunder.

By an order of this Court dated 23.11.2009, Mr. T.D. Majumder, learned Addl. Government Advocate appearing for the State-respondents was directed to take necessary instructions as to who would be the expert from the Government side for taking measurement of "chest" of the petitioner. Accordingly, Mr. T.D. Majumder, learned Addl. Government Advocate submits at the Bar that one Shri S.K. Pal, IFS, DFO, Working Plan Division No. I, Agartala, has been nominated by the Government as Expert for the purpose of taking measurement of "chest" of the present petitioner.

In view of the above facts, Shri S.K. Pal, IFS, DFO, Working Plan Division No. I, Agartala, assisted by Mr. Dipak Kumar Sharma, Inspector, Weights and Measurements Department is directed to take the measurement of "chest" of the present petitioner Shri Bimal Das in presence of the learned Registrar or Deputy Registrar (Judl.) of this Bench as well as Mr. S. Lodh, learned Counsel for the petitioner and Mr. T.D. Majumder, learned Addl. Government Advocate for the State-respondents, on 27.11.2009 at 1.15 p.m. in the Chamber of the Registrar of this Bench. The Registry is directed to make necessary arrangements accordingly.

8. The expert nominated by the State-Government Shri S.K. Pal, IFS, DFO, assisted by Mr. Dipak Kumar Sharma, Inspector, Weights and Measurement Department, took the measurement of chest of both the writ petitioners on 27.11.2009 in compliance with the order of this Court dated 25.1.2009 in the

Chamber of the Registrar of this Bench in presence of the Deputy Registrar (Judl.) of this Bench, Mr. D.K. Biswas, learned Counsel for the writ petitioners, Mr. T.D. Majumder, learned Addl. Government Advocate for the State-respondents and submitted the Report on that day itself, i.e., 27.11.2009 that the chest measurement of the petitioner of W.P.(C) No. 357 of 2009 Shri Nitai Deb are Normal-86 cm, Expansion-90 cm and that of the petitioner of W.P.(C) No. 358 of 2009 Shri Bimal Das are Normal-86 cm, Expansion-92 cm. For easy reference, the two Reports submitted by the expert who took the measurement of both the writ petitioners are quoted hereunder:

CM. Awl. No. 376 of 2009

WP(C) No. 357 of 2009

Measurement of chest of the petitioner Shri Nitai Deb, S/o Shri Jibendra Kr. Deb, in C.M. Appl. No. 376 of 2009 arising out of W.P.(C) No. 357 of 2009.

Measurement of Chest:

Normal-86 cm. Expansion-90 cm.

Measurement of Chest taken by me being assisted by Sri Gauranga Roy, Forester, in presence of Sri B.P. Karmaker, Dy. Registrar, Judicial, Sri D.K. Biswas, learned Counsel for the petitioner, Sri T.D. Majumder, Addl. Government Advocate, Sri Dipak Ch. Sharma, Inspector, Weights and Measures Department.

Sd/- 27.11.2009 (S.K. Paul, IFS) DFO, Training Division

C.M. Appl. No. 375 of 2009

WP(C) No. 358 of 2009

Measurement of chest of the petitioner Shri Bimal Das, S/o Shri Gopal Ch. Das, in C.M. Appl. No. 375 of 2009 arising out of W.P.(C) No. 358 of 2009.

Measurement of Chest:

Normal-86 cm. Expansion-92 cm.

Measurement of Chest taken by me being assisted by Sri Gauranga Roy, Forester, in presence of Sri B.P. Karmaker, Dy. Registrar, Judicial, Sri D.K. Biswas, learned Counsel for the petitioner, Sri T.D. Majumder, Addl. Government Advocate, Sri Dipak Ch. Sharma, Inspector, Weights and Measures Department.

Sd/- 27.11.2009 (S.K. Paul, IFS) DFO, Training Division

9. As per the report submitted by the expert who took the measurement of chest of both the writ petitioners, pursuant to the direction of this Court, it appears that, the petitioner of W.P.(C) No. 358 of 2009 Shri Bimal Das has clearly fulfilled the physical prescribed standard for chest for the candidates inasmuch as his measurement of chest are Normal-86 cm (prescribed minimum standard is 84 cm.) and Expansion-92 cm (prescribed minimum standard for expansion is 05

cm.). The State-respondents filed their affidavit-in-opposition in the present writ petitions stating that it cannot be ruled out that by four months one can develop his chest girth by exercise and, therefore, no re-measurement is permissible in law. The heavy burden lies on the State-respondents to discharge their burden of proof that within four months the petitioner of W.P.(C) No. 358 of 2009 Shri Bimal Das can increase his chest to the extent of 08 cm. (normal) inasmuch as, as per the expert report stated above, his normal chest measurement is 86 cm and as per the measurement at the time of physical test is only 78 cm and also 08 cm. (expansion), i.e., 92 cm. as per the present expert report and 84 cm. at the time of physical test. The Apex Court in a catena of cases, held that the person on whom the burden of proof lies shall discharge his burden to the extent of creating a high degree of probability so as to shift the onus to the other side [Ref.- R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another,

10. The case of the private respondent Nos. 4 and 5 are also on the same line with that of the State-respondents that the petitioner of W.P.(C) No. 358 of 2009 Shri Bimal Das could develop his chest girth by exercise. The respondents had utterly failed to discharge the burden of proving their case by producing at least some material evidence or/ reasons which would create a high degree of probability of the case put up by them, Therefore, this Court is not accepting the case of the respondents.

11. For a public law remedy enforceable under Article 226 of the Constitution of India, the action of the authority needs to fall in the realm of public law. Certainly, in the present writ petitions, it is beyond reasonable doubt that the present case fall in the realm of public law inasmuch as the action of the State or/ appointing authority for appointment of the candidates in the service of the State imbued with public law element. The public law remedy given by Article 226 of the Constitution of India is to issue not only the prerogative writs provided therein but also any order or direction to enforce any of the fundamental rights and "for any other purpose". The Founding Fathers placed no limitation or fetters on the power of the High Court under Article 226 of the Constitution except self-imposed limitations. The arm of the court is long enough to reach injustice wherever it is found. The court as sentinel on the qui vive is to mete out justice in given facts. [Ref. Air India Statutory Corporation, etc. Vs. United Labour Union and others [overruled], Para No. 59 of the SCC in Air India Statutory Corporation"s case (supra) reads as follows:

59. The Founding Fathers placed no limitation or fetters on the power of the High Court under Article 226 of the Constitution except self-imposed limitations. The arm of the court is long enough to reach injustice wherever it is found. The court as sentinel on the qui vive is to mete out justice in given facts. On finding that either the workmen were engaged in violation of the provisions of the Act or were continued as contract labour, despite prohibition of the contract labour u/s 10(1), the High Court has, by judicial review as the basic structure, a

constitutional duty to enforce the law by appropriate directions. The right to judicial review is now a basic structure of the Constitution by a catena of decisions of this Court starting from Smt. Indira Nehru Gandhi Vs. Shri Raj Narain and Another, to S.R. Bommai and others Vs. Union of India and others etc. etc., . It would, therefore, be necessary that instead of leaving the workmen in the lurch, the court properly moulds the relief and grants the same in accordance with law.

12. For the reasons, discussed above, this Court, in the peculiar facts and circumstances of these two writ petitions, is of the view that the petitioner of W.P. (C) No. 358 of 2009 Shri Bimal Das who is a member of the Scheduled Caste community is to be appointed as Forest Ranger in one of the two posts reserved for Scheduled Castes and for appointing him, the last person in the Scheduled Castes category according to merit list, if already appointed, his appointment should be cancelled; the last person whose appointment is required to be cancelled, may be either the respondent No. 4 or respondent No. 5 according to their merit position. The whole exercise for appointment of the writ petitioner of W.P.(C) No. 358 of 2009 Shri Bimal Das should be completed within a period of 2(two) months from the date of receipt of the copy of this judgment and order. Accordingly, the writ petition W.P.(C) No. , 358 of 2009 is allowed.

13. Further, for the foregoing reasons, the petitioner of W.P.(C) No. 357 of 2009 Shri Nitai Deb who failed to fulfill the prescribed minimum physical standard for the post of Forest Ranger has no case for consideration. Accordingly, the writ petition W.P.(C) No. 357 of 2009 is dismissed.