
(2019) 02 GAU CK 0086
In the Gauhati High Court
Case No : Writ Petition (C) No. 2725 Of 2010

Palash Phukan And 166 Ors

APPELLANT

Vs

State Of Assam And Ors

RESPONDENT

Date of Decision : 22-02-2019

Acts Referred:

Assam Women (Reservation Of Vacancies in Services And Post) Act, 2005 — Section 4, 5

Citation : (2019) 02 GAU CK 0086

Hon'ble Judges : Nelson Sailo, J

Bench : Single Bench

Advocate : A M Mazumdar, D Mazumdar

Final Decision : Disposed Off

Judgement

1. Heard Mr. A.R. Bhuyan, learned counsel for the petitioners and Mr. D. Mazumdar, learned Addl. Advocate General, Assam assisted by Ms. J. Kakati, learned counsel for all the State respondents.

2. The petitioners, who are 167 in numbers having claimed to have a common cause of action against the respondents have joined hands in filing the writ petition. The facts of the case in brief is that the Inspector General of Police (Administration) caused the publication of an advertisement on 20.02.2009, notifying the recruitment of Armed Branch Constable in Assam Police (for ONGC security) Battalion/24th Assam Police (IR) Battalion and 1002 numbers of vacant post of Armed Branch Constables. As per the advertisement, a recruitment rally was to be conducted in different police district/battalions tentatively in the month of June, 2009 for selecting candidates for appointment as Armed Branch Constable. The last date for submitting the application was 28.03.2009. The advertisement amongst others also provided that 10% of the vacancies will be reserved for women candidates. The scheme of selection was that the applications of the applicants, which were found to be correct in all respect, will have to undergo physical measurement and fitness test and 50 marks will be the

maximum marks, while 25 marks will be the qualifying marks. Those found qualified in the physical efficiency test will be shortlisted for appearing in the personal interview, which will have a total mark of 50% and 25 marks as the qualifying marks as well. After the 2 tests, a merit list was to be prepared on the basis of the aggregate marks secured in the physical test and in the interview keeping in mind the reservation rules. The number of candidates in the merit list was to be equal to the number of vacancies available and no waiting list was to be prepared.

3. The petitioners applied from the district Sivasagar and participated in the physical test. After qualifying in the same, they appeared in the viva voce test before the District Selection Committee, Sivasagar. According to them, they performed well in both the test and therefore, they were expecting to be recommended for the post. Although the petitioners performed well both in the physical test as well as in the personal interview, their Roll Numbers did not figure in the employment notice, issued subsequently for the district of Sivasagar. The petitioners contended that in the employment notice that was published for the district of Sivasagar, the Roll Numbers of as many as 150 candidates including women were published. However, the petitioners having all scored more than 50 marks, which was the minimum mark stipulated in the advertisement, their names did not find any place. Being highly aggrieved, they are before this Court.

4. Mr. A.R. Bhuyan, learned counsel for the petitioners submits that the selection to the post of Armed Branch Constable was carried out by the respondents most arbitrarily and whimsically. He submits that in fact 2 candidates, whose Roll Numbers are 3713 and 2715 did not even appear for the personal interview amongst others but they were included amongst those who were selected as notified in the employment notice. He further submits that the reservation of 10% for women candidates as was provided in the advertisement is in clear violation of the Assam Women (Reservation of Vacancies in Services and Post) Act,, 2005 (Women Reservation Act). He submits that Section 4 of the Women Reservation Act provides that 30% of the vacancies in respect of all appointments to the services and posts in the establishment which are to be filled up by direct recruitment shall be reserved for women candidates. As per Section 5 of the Women Reservation Act, the State Government has the power to exempt such reservation if it is of the opinion that it is not necessary to reserve certain specialized service and post for women in view of the specialized qualification or experience required in respect of such service and post. The exemption has to be published by way of a notification in the Official Gazette. In the present case, no such notification has been published by the State Government exempting 30% reservation for women candidates and therefore, the entire selection process being illegal and void, the interference of this Court is call for. He also submits that although the Women Reservation Act has been amended in the year 2010, wherein, a similar power to exempt, increase or decrease the percentage of reservation has been provided, the same will have no

application to the present case inasmuch as, the amendment came into force only on 07.09.2010, while the advertisement for the post of Armed Branch Constable was issued in the month of February, 2009.

5. Mr. A.R. Bhuyan, learned counsel by referring to the affidavit-in-opposition filed by the respondent No. 5 on 22.07.2010 submits that the stand taken in the affidavit is that the minimum cutoff marks for general category candidates was 68.5 marks, for Schedule Caste candidates, it was 63 marks, for Schedule Tribe (Plains) it was 65 marks, for OBC candidates, it was 66 marks and for women candidates, it was 74.5 marks. However, as per the advertisement, no cutoff marks have been stipulated by the authorities. All that was provided is 50 marks as the qualifying marks for being considered for the post in question. By introducing the cutoff marks, the respondents have only indulged in changing the rule of the game, which otherwise is not permissible. In this connection, Mr. A.R. Bhuyan, learned counsel relies upon the decision of this Court in the case of Mathew Rahman Bhuyan & Anr. Vs. State of Assam & Anr., reported in 2002 (1) GLT 316 and also the case of Hemani Malhotra v. High Court of Delhi, reported in (2008) 7 SCC 11.

6. At this stage, it may be mentioned that this Court upon noticing that a perusal of the records will be required in view of the nature of the allegation made by the petitioners. As such, vide order dated 30.08.2017, the respondents were directed to produce the records. Pursuant to the order, the respondents were asked to compile a gist of the records since the same was voluminous. Consequently, the respondents filed their additional affidavit on 01.09.2018 annexing a compilation of the marks given to the selected candidates in so far as the district of Sivasagar is concerned.

7. Mr. A.R. Bhuyan, learned counsel by referring to the additional affidavits submits that the same only reveals that the selection process was carried out in violation of all the norms and rules governing the field. He submits that according to the respondents, the bench mark or the cutoff mark in respect of the general category was 68.5 marks. However, the petitioner Nos. 4, 5, 76, 80, 81, 93, 99, 139 and 142, who belong to either the general, OBC or Schedule casts category have all scored above 68.5 marks. However, they were not recommended and selected for the post. He further submits according to the respondents, the cutoff mark or bench mark in respect of Schedule Tribe (Plains) category was 65 marks but the petitioner Nos. 97 and 101 despite having scored 67 and 65.5 marks respectively as a Schedule Tribe (Plains) category, they were not selected. Similarly, in respect of OBC/MOBC category, the bench mark according to the respondents was 66 marks but the petitioner Nos. 3, 79, 100 and 138 despite having scored 66 or more marks were also not recommended and appointed. Thus, the claim of the respondents that the entire selection process was conducted in a free and fair manner is only an eyewash. He submits that from the discrepancies that have been pointed out by the petitioners in their affidavit filed on 01.10.2018, it can clearly be seen that the respondents have

only resorted to pick and choose policy so as to favor the blue eyed boys and girls. Mr. A.R. Bhuyan, learned counsel submits that the writ petition was filed on 07.05.2010 and during which time no appointments were made. However, during the pendency of the writ petition, the respondents have appointed the selected candidates. He submits that although there is no order for stay of the appointment, appointments so made will only be subject to the outcome of the writ petition. He thus submits that under the facts and circumstances, Court may suitably interfere in the matter to mitigate the grievance of the petitioners.

8. Mr. D. Mazumdar, learned Addl. Advocate General appearing for the respondents submits that the petitioners have not made the persons who have been selected as a party respondents to the writ petition and therefore even if the writ petition is to be succeed, the appointed persons cannot be condemned unheard. He further submits that the advertisement for the post of Armed Branch Constable was published in the month of February, 2009 and the petitioners prior to participate in the selection process did not challenge the reservation made for women candidates to the extent of 10% only. Not only they fail to challenge the same, they knowingly participate in the selection and therefore they do not have any right to challenge the advertisement at this stage alleging violation of the Women Reservation Act. By referring to the additional affidavit filed by the respondent No. 3 on 05.04.2017, Mr. A. Mazumdar, learned Addl. Advocate General submits that the advertisement for the post of Armed Branch Constable with 10% of the vacancies reserved for women candidates was duly approved by the State Government and which was in fact in consideration of the nature of duties assigned to the post. Therefore, the respondents have not committed any illegality.

9. Mr. D. Mazumdar, learned Addl. Advocate General further submits that the cutoff marks as indicated in the affidavit of the respondent No. 5 dated 22.07.2010 in fact are not cutoff marks but bench mark. He submits that the respondent authorities in order to shortlist the candidates to recruit the best candidates on rational and reasonable basis can fix a bench mark. Therefore, the respondents cannot be faulted with in fixing the bench mark for the short listing. In this connection, he relies upon the decision of the Apex Court in the case of Yogesh Yadav v. Union of India, reported (2013) 14 SCC 623.

10. I have heard the submissions advanced by the learned counsels for the rival parties and I have perused the materials available on record. As may be noticed, the claim of the petitioners that there was irregularity in making the selection for the post of Armed Branch Constable is in respect of the district of Sivasagar. By relying upon the advertisement that was floated in the month of February, 2009, the petitioners have alleged that the respondents in making the selection to the post concerned have changed the rule of the game. Secondly, the respondents have also violated the Women Reservation Act by only allotting 10% of the vacancies for women candidates. The Women Reservation Act no doubt provides for a 30% reservation for women candidates in any direct recruitment process.

Although there is a provision for relaxation of the reservation but, it is seen that the respondents have not invoked the relaxation clause. However, the fact remains that the petitioners instead of making a challenge to the advertisement in this respect, proceeded to participate in the selection process. Therefore, it will not be open for them to raise this issue after participating in the selection process. I therefore find force in the argument advanced by the learned Addl. Advocate General in this regard.

11. Adverting to the other issue as to whether the respondents have changed the rules of the game by adopting methods which were not reflected in the advertisement. The stand of the respondents as can be seen from Paragraph No. 8 of the affidavit-in-opposition dated 22.07.2010 is clear. The minimum cut-off marks have been provided for each category of candidates i.e. the reserved and the unreserved. Although, the same is not reflected in the advertisement but the fact remains that in order to select the required number of candidates for the posts advertised, the participating candidates will have to be arranged in order of their merit and therefore, a cut-off mark will have to be arrived at. As may be seen, the advertisement provided that a merit list will be prepared on the basis of aggregate marks secured in both the physical test and viva voce test by the candidate and in accordance with the reservation rules. It also further provided that the merit list shall be equal to the number of vacancies available and that no waiting list shall be prepared. As such, I am of the considered opinion that the respondents by devising the cut-off marks cannot be said to have changed the rules of the game as alleged by the petitioners. However, from the additional affidavit filed by the respondents as pointed out by Mr. AR Bhuyan, it is seen that despite providing for a cut-off mark, the same has not been strictly adhered to in as much as some of the candidates who scored above the cut-off marks have not been selected.

12. The case of Yogesh Yadav (Supra) referred by the learned Addl. Advocate General and the case of Hemani Malhotra (Supra) relied upon by Mr. AR Bhuyan in my considered view will not apply to the present case as the facts in the present case are not similar.

13. The next question which now requires to be considered is what relief that can be granted to the petitioners? As already noticed, the petitioners have not impleaded those persons who according to them have been illegally and arbitrarily selected. Admittedly, the selected candidates were appointed after the filing of the writ petition but the petitioners have not impleaded the appointed candidates and have also not obtained any interim order from this Court. In such circumstances, it will not be fair to dislodge those who have been appointed without giving them an opportunity of being heard. Therefore, despite finding that some illegality has been committed by the respondents undertaking the selection process for the post of Armed Branch Constable, this Court refrains from interfering with the appointment already made. However, at the same time, having come to the conclusion that the process of selection was arbitrary and

beyond the terms and conditions that was indicated in the advertisement, I am of the considered view that the petitioners have also made out a case for the following direction:

1) The respondents are directed to consider the case of the petitioners for their appointment to the post of Armed Branch Constable or in any other equivalent post in the vacancies available i.e. current and next available vacancies. If the vacancies are limited, the petitioners will be considered in a phase manner till all of them are considered.

2) If it is found that the petitioners in the meantime have become overaged, the respondent authorities shall give them age relaxation as may be required.

3) It is made clear that the respondents without considering the case of the petitioners shall not fill up any post of Armed Branch Constable.

14. With the above observations and directions, writ petition stands disposed of.