

(2007) 04 GAU CK 0039
In the Gauhati High Court

Pranab Kumar Baidya and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 13-04-2007

Acts Referred:

Citation : (2007) 3 GLT 88

Hon'ble Judges : Brojendra Prasad Katakey, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.P. Katakey, J.—A process of selection for appointment to the post of Lower Division Assistant (LDA) in the establishment of the Deputy Commissioner, Nagaon under the provision of the Assam Ministerial District Establishment Service Rules, 1967 (hereinafter referred to as "the 1967 Rules") was initiated in the first part of the year 1999 by notifying vacancies to the Employment Exchange, wherein the petitioners, the private respondents and others participated. On the basis of the written test as well as viva voce test conducted by the Selection Committee constituted under the provisions of the 1967 Rules, a select list selecting 28 persons including the petitioners, in order of merit, was prepared and published on 09.06.99 by the Deputy Commissioner, who is the Chairman of the Selection Committee with the stipulation that the list would be valid for one year and would expire on 30.06.2000. In the said select list the names of the petitioners appeared at Serial Nos. 21, 23, 25 and 27. But the names of the private Respondents did not find place in the said select list.

2. The petitioners claiming that though they were selected for appointment as Lower Division Assistant, the Respondent authorities in spite of having vacancies, appointed only 18 persons from out of the list and also appointed the private respondents, who were never selected, filed Writ Petition (C) No. 3043/2000 during the validity of the select list praying for setting aside the orders of appointment of the persons including private Respondents, who were not selected for appointment. The petitioners also prayed for a direction to the

official respondents to appoint the petitioners in terms of their position in the select list.

3. The said writ petition was disposed of by a Single Bench of this Court initially vide order dated 17.07.2003 by setting aside the appointments of the private respondent Nos. 3, 4, 5 and 6 in Grade-III posts in the Deputy Commissioner's amalgamated establishment, Nagaon and directing the Respondent Nos. 1 and 2, namely, the State of Assam and the Deputy Commissioner, Nagaon to consider the case of the petitioners for appointment against consequential vacancies caused.

4. Respondent No. 4, thereafter, filed a review petition being Review Petition No. 25/2004 seeking review of the said judgment and order dated 17.07.03 on the ground that the said judgment was passed without serving notice on the said respondent. The said review petition was allowed vide order dated 28.06.2005 by recalling the judgment and order dated 17.07.03 and directing to list the writ petition for hearing. Before filing of the review petition, the Deputy Commissioner, Nagaon pursuant to the judgment and order dated 17.07.2003 passed an order on 05.03.2004 terminating the service of the Respondent No. 4, review petitioner Smti Padma Rani Devi by observing that she was appointed temporarily against a vacancy due to missing of the regular incumbent and appointed the petitioner No. 1 Pranab Kumar Baidya in her place as Junior Assistant. It has further been mentioned in the said order that the Respondent No. 3 and 6 were appointed as LDA against temporary posts for working in connection with 2001 Census and the retention of those two temporary posts was valid upto 31.05.2001 and consequently they were released on that date. So far the Respondent No. 5 is concerned, it has been observed in the said order that she was never appointed against any post. The Deputy Commissioner, in the said order, also observed that altogether 23 posts have been filled up by candidates selected by the said select list, out of which 18 belonged to general category (Serial No. 1 to 18), and the remaining reserved category. The petitioner No. 1 being a candidate belonging to Other Backward Class (OBC), was appointed against the post held by the Respondent No. 4 Smti Padma Rani Devi, as per the roster maintained. It may be mentioned here that before disposal of the writ petition by the learned Single Bench on 17.07.03, neither the private Respondents nor the State Respondents had filed affidavit-in-opposition. The State respondents have also not filed any affidavit-in-opposition after the earlier judgment and order dated 17.07.03 has been reviewed. However, the Respondent No. 4 i.e. the review petitioner, has filed her affidavit-in-opposition.

5. During pendency of the aforesaid writ petition, the petitioners filed another writ petition being W.P.(C) No. 4145/2006 praying for directing the Respondent authorities to fill up the posts fell vacant between 09.06.99 (i.e., the date when the select list was published) and 30.10.2001, pursuant to the judgment and order dated 23.09.2002 passed by another Single Bench of this Court in W.P.(C) No. 2663/2000, on the same set of facts as in W.P.(C) No. 3043/2000. But, in the

said writ petition Smti Padma Rani Devi, 4th Respondent in W.P.(C) No. 3043/2000, has only been added as private Respondent No. 3, apart from the State of Assam and the Deputy Commissioner, Nagaon as Respondent Nos. 1 and 2. In this writ petition also, though Padma Rani Devi, Respondent No. 3 filed the affidavit-in-opposition, no affidavit has been filed by the State Respondents namely, Respondent Nos. 1 and 2. Since the subject matter of both the W.P.(C) No. 3043/2000 and W.P.(C) No. 4145/2006 is same, as the petitioners claim appointment on the basis of the same select list dated 09.06.1999, an order dated 24.08.2006 was passed in W.P.(C) No. 3043/2000 to hear both the writ petitions together and accordingly both the writ petitions have been taken up together for hearing.

6. I have heard Mr. A.K. Purkayastha, learned Counsel for the petitioners and Ms. B. Bhuyan, learned Counsel appearing on behalf of Smti Padma Rani Devi (Respondent No. 4 in W.P.(C) No. 3043/2000 and Respondent No. 3 W.P.(C) No. 4145/2006). None appears on behalf of other respondents.

7. Mr. Purkayastha, learned Counsel for the petitioner referring to Sub-rule (5) of Rule 6 of the 1967 Rules, has submitted that since a select list for appointment against the post of LDA, which is a Grade-III post, in the office of the Deputy Commissioner, Nagaon has been prepared under the provisions of the said Rules, the authority is required to fill up the vacancies occurred in course of the year and during the period when the select was in existence and cannot refuse to fill up those posts and appoint persons outside the select list. Relying on the judgment and order dated 23.09.2002 passed in W.P.(C) No. 2663/2000, subject matter in which was also relating to the same select list dated 09.06.1999, it has further been contended by Mr. Purkayastha that since the learned Single Judge by the said judgment has directed the authorities to fill up the vacancies in Grade-III occurred during 08.06.1999 to 30.10.2001 from the select list dated 09.06.1999 and not by any other fresh select list, the petitioners are entitled to be considered for appointment on the basis of their position in the select list dated 09.06.1999, as a large number of vacancies occurred during that period.

8. Ms. Bhuyan, learned Counsel appearing for the private Respondent Smti Padma Rani Devi, on the other hand, has submitted that the writ petition filed by the petitioners is liable to be dismissed on the ground of suppression of material facts, as according to the learned Counsel, the petitioners have suppressed the fact that Smti Padma Rani Devi was appointed way back in 1996 temporarily against the post held by a regular incumbent, namely, Dimbeswar Saikia, who was missing. It has further been contended by Ms. Bhuyan that the vacancy in the said post arose only on 31.08.2000 when the regular incumbent attained the age of superannuation and, therefore, there cannot be any selection against the said post held by him in the year 1999 and hence no person selected vide select list dated 09.06.99 can claim appointment against the said vacancy, as the vacancy against the said post arose after the validity of the select list expired on 30.06.99. Ms. Bhuyan has further contended that her case for regularization in

service has been forwarded to the State Government, which is still under active consideration of the authority.

9. There is no dispute about initiation of process of selection for appointment to the posts of LDA in the establishment of the Deputy Commissioner, Nagaon in the year 1999 and selection of candidates, in order of merit, for appointment under the provisions of the 1967 Rules. According to the petitioners, Sub-rule (5) of Rule 6 of the said Rules requires filling up of vacancies occurred during continuance of the select list and there being a direction from a Single Bench of this Court vide order dated 23.09.2002 passed in W.P.(C) No. 2663/2000 directing the authorities to fill up vacancies, if any, occurred during the period from 08.06.99 to 30.10.01, from out of the select list dated 09.09.99, the petitioners are entitled to be considered for appointment in Grade-III posts in the establishment of the Deputy Commissioner, Nagaon, as a number of vacancies occurred either due to retirement or promotion from LDA to UDA, in the establishment including the post against which the private Respondent Smti Padma Rani Devi was temporarily appointed, as admittedly the regular incumbent namely Dimbeswar Saikia attained the age of superannuation on 31.08.2000. The contention of the learned Counsel for the private Respondent on the other hand, is that the writ petition suffers from suppression of material facts as the petitioners have not stated that the private respondent was appointed way back in 1996, though temporarily, as the regular incumbent Dimbeswar Saikia was missing from the office and he having attained the age of superannuation on 31.08.2000, there cannot be any selection against the said post in the year 1999 and as such, the petitioners are not entitled to be considered for appointment against the said post.

10. Admittedly, the appointment of the private Respondent, Smti Padma Rani Devi, was on stop gap arrangement and not on the basis of any selection for appointment, she cannot claim the post against which she was appointed on ad hoc basis. She also has no right to claim regularization in service by virtue of such appointment, as in that case, it will amount to encouraging back door entry into service. The contention of Ms. Bhuyan, the learned Counsel for the said Respondent, that the writ petition deserves dismissal on the ground of suppression of material facts also cannot be accepted, as the writ petitioners have not suppressed any material fact and the fact about her appointment on ad hoc basis, is not a material fact to decide the issue involved in the writ petition and hence non-mentioning of the same does not amount to suppression of material fact. That apart, the order of subsequent termination of her service has not been challenged.

11. Rule 6(5) of the 1967 Rules provides for direct recruitment to the post of LDA as well as on the basis of competitive examination and for preparation of select list every year. It also provides for selection for appointment to the post of Lower Division Assistant from amongst Grade-IV staff of the district establishment on the basis of seniority-cum-merit, who have the requisite qualification as

stipulated therein. The quota for appointment from both the sources have been fixed at 90:10 respectively, with the stipulation that in the event of non-availability of sufficient number of qualified or suitable persons for appointment amongst the Grade-IV staff, the vacancies meant for them shall be filled up by direct recruitment. For better appreciation Sub-rule (5) of Rule 6 of 1967 Rules is quoted below:

Rule 6. (5) Lower Division Assistant--(a) By direct recruitment on the basis of a competitive examination to be conducted by the Deputy Commissioner at the beginning of each year unless otherwise directed by Government on this behalf.

Provided that in the office of the Deputy Commissioner, United Khasi-Jaintia Hills the recruitment shall be made through the Employment Exchange in such manner as may be directed by Government from time to time.

Note- At the beginning of each calendar year the Deputy Commissioners shall call for application to fill up temporary vacancies of any kind which are likely to occur in course of the year in their respective establishments. On receipt of application by a specified date, a test shall be held and a list of all candidates suitable for appointment to the posts of Lower Division Assistants shall be prepared in order of merit by the Deputy Commissioners. The list shall remain valid for one year unless its exhausted earlier and one such list shall be prepared every year. The Deputy Commissioners shall make all appointments during the year from such a select list. The syllabus for such tests shall be as specified in the Schedule I.

(b) By selection on the basis of seniority-cum-merit from amongst Grade-IV staffs of the district establishment concerned who have passed the Higher Secondary or equivalent examination and have rendered at least 7 years of continuous service in the district establishment on the first day of the year in which selection is made.

Note- (1) the proportion of vacancies to be filled in any year according to Clauses (a) and (b) of Sub-rule (6) of Rule 6 shall be 90:10 respectively. In the event of sufficient number of qualified or suitable persons not being available in category (b), the balance shall be made from category (a), i.e. through direct recruitment. Here vacancies shall include both permanent and temporary vacancies.

(2) Appointment by selection under Clause (b) of Sub-rule (6) of this Rule shall be made by the Deputy Commissioner from amongst the eligible Grade-IV staffs.

12. Reading of Rule 6(5) of 1967 Rules reveals that the Deputy Commissioner is to initiate process of selection for appointment to the post of Lower Division Assistant by direct recruitment and by selection from amongst qualified Grade-IV staff in ratio 90:10 respectively, in respect of temporary vacancies, which are likely to occur in course of the year, in his establishment. The said Rule provides for conducting a test and preparation of select list in order of merit stipulating that it shall be valid for one year, unless it is exhausted earlier and such list are

to be prepared every year.

13. Admittedly, the list" on the basis of which, the petitioners claim appointment was published on 09.06.1999 stipulating therein that the same will be valid upto 30.06.1999. By operation of Rule 6(5) of the 1967 Rules, its validity comes to an end on expiry of one year, if the said list is not exhausted earlier. The private Respondent Smti Padma Rani Devi was appointed on temporary basis vide order dated 23.05.1996 passed by the Deputy Commissioner, Nagaon, as Lower Division Assistant against the post held by Dimbeswar Saikia, the regular incumbent, as he was missing and thus absent from duty. The said order of appointment clearly stipulates that her appointment is terminable at any time or as soon as said Dimbeswar Saikia resume duties. It is not in dispute that said Dimbeswar Saikia continued to be missing and he attained the age of superannuation on 31.08.2000. Therefore, the vacancy against the post held by Dimbeswar Saikia occurred only on that date i.e., 31.08.2000 and hence there cannot be any selection against the said post in the year 1999, pursuant to which the select list dated 09.06.99 was published. Even otherwise also, the selection process having been initiated in the year 1999 and the select list prepared on 09.06.99 having been valid upto 30.06.2000, there cannot be any appointment against the post held by Dimbeswar Saikia, against whom the private Respondent Smti Padma Rani Devi was temporarily appointed, from the said list.

14. As discussed above, Rule 6(5) of the 1967 Rules clearly mandates that the select list shall be valid for one year and there has to be selection every year. The Rule further provides for filling up of vacancies occurred during continuance of such select list. Therefore, in my view, the life of the select list comes to an end on expiry of one year from the date of publication, which in the present case was published on 09.06.99.

15. This leads to the question--whether there was any other vacancy occurred during the validity of the select list i.e. from the date of publication of select list till 30.06.2000. The petitioners in para-41 of the W.R(C) No. 3043 of 2000 have stated that 3 (three) persons have been appointed as LDA though they have not been selected, apart from appointing 18 selected candidates. In paragraph-42 and 43 it has been stated that 23 selected candidates were appointed apart from 6(six) persons outside the list, out of which 3 (three) were serving and 3 (three) were new appointee. The petitioners though named those 6(six) persons in the writ petition, have not added them as party respondent and not challenged their appointments, except Smti Niva Rani Das (Respondent No. 3) and Smti Anuprabha Saikia (Respondent No. 5), apart from 2 (two) others, namely Smti Padma Rani Devi (Respondent No. 4) and Shri Pabitra Hazarika (Respondent No. 6). The petitioners in para-48 of the writ petition have stated that 2(two) other vacancies occurred due to promotion and death of regular incumbent. Though those statements have not been controverted by the State Respondents by filing any affidavit-in-opposition, such statements cannot be accepted due to vagueness in pleadings as well as on the ground of factual incorrectness as the

Deputy Commissioner in his order dated 05.03.04 (Annexure-3 in W.P.(C) No. 4145/06) has specifically stated that Smti Niva Rani Das (Respondent No. 3) and Shri Pabitra Hazarika (Respondent No. 6) were temporarily engaged in connection with 2001 Census and will discontinued with effect from 31.05.01 and Smti Anuprabha Saikia (Respondent No. 5) was never appointed. Therefore, no reliance can be placed on such statement, for holding that there were vacancies, apart from the vacancies filled up, during the validity of the select list. It also appears from the said order that during the period of validity of the select list 23 (twenty three) vacancies arose against which selected candidates, in order of merit and taking into account reservation policy, were appointed and the 24th vacancy arose due to termination of service of Smti Padma Rani Devi (Respondent No. 4) in terms of the order dated 17.07.2003 passed disposing of the said writ petition earlier (which order has, as discussed above, been subsequently reviewed and recalled vide order dated 28.06.2005 passed in Review Application No. 25 of 2004), against which vacancy, as discussed above, the petitioners cannot be considered for appointment. It is, therefore, evident that all the 23 (twenty three) vacancies arose during the validity of the select list, have been filled up by the selected candidates, whose appointments have not been questioned by the writ petitioners.

16. The petitioners during pendency of the Writ Petition (C) No. 3043 of 2000 filed the second writ petition in W.P.(C) No. 4145 of 2006, claiming appointment on the basis of the same select list dated 09.06.99, which is also the subject matter in the first writ petition. In the second writ petition, the petitioners also claim relief on the basis of the judgment dated 23.09.2002 passed by a Single Bench of this Court in W.P.(C) No. 2663 of 2002, wherein a Single Bench of this Court, as discussed above, while coming to the finding that the writ petition has no merit and thereby refused to direct the respondents therein for consideration of the case of the writ petitioner, in that writ petition, who was placed at Serial No. 20 in the list dated 09.06.99, has directed the authorities to fill up the vacancies occurred during 08.06.99 to 30.10.2001, on the ground that, though in the select list there is clear stipulation that it will remain valid upto 30.09.2000, as the authority appointed selected candidates upto 30.10.2001 by acting upon the said select list, the vacancy occurred from 08.06.99 to 30.10.2001, if required to be filled up, shall have to be filled from the said select list dated 09.06.99.

17. In the said case, the question relating to the validity of the select list in view of the provision contained in Rule 6(5) of 1967 Rules regarding the validity period was not raised and discussed. But, in the present case in hand, the said question came up for consideration by this Court. As discussed above, the period of validity of the list dated 09.06.99 expired on completion of one year by virtue of Rule 6(5) of the 1967 Rules. Therefore, I am unable to give relief to the petitioners on the basis of the judgment and order dated 23.09.2002 passed in the aforesaid writ petition. Moreover, appointment of a selected candidate after expiry of the validity of the select list, will not amount to automatic extension of

validity of such select list, more so when the 1967 Rules does not contemplate power of extension. At the most such appointment may be illegal having been made after expiry of the validity of such list. No person can base his claim for issuance of a writ of mandamus on the illegality committed by the authority. Court cannot pass any order which will have the effect of perpetuating illegality. A writ of Mandamus is issued in favour of a person, who establishes a legal right in himself. It is issued to a person who has a legal duty to perform, but has failed and/or neglected to do so. The life of the select list having expired by operation of statutory rules, namely 1967 Rules, and there being no other vacancy arose, apart from 23 vacancies as discussed above, which have been filled up by selected candidates, petitioners cannot claim a legal right for appointment on the basis of the said select list.

18. In view of the above discussions, I do not find any merit in the writ petition, hence, these are dismissed.

No cost.