



GAHC010009702011

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/6195/2011

BISWAJIT SURAJ MALAKAR
S/O SRI PRABHAT MALAKAR, RESIDENT OF HOUSE NO.23, SANKARDEV
PATH, HENGARABARI, NEAR FOREST GATE, GUWHATI, DIST- KAMRUP,
ASSAM

VERSUS

STATE OF ASSAM and ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, HEALTH and FAMILY WELFARE DEPARTMENT, DISPUR,, GHY-
6

2:THE ASSAM PUBLIC SERVICE COMMISSION

REPRESENTED BY ITS SECRETARY
JAWAHAR NAGAR
KHANAPARA
GHY-22

3:THE SELECTION COMMITTEE

CONSTITUTED BY THE ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
KHANAPARA
GHY-22 FOR SELECTION TO THE POST OF DEMONSTRATOR IN ORAL AND
DENTAL PATHOLOGY
REGIONAL DENTAL COLLEGE
GUWAHATI

4:THE REGIONAL DENTAL COLLEGE
REPRESENTED BY THE PRINCIPAL
INDRAPUR
BHANGAGARH



GUWHATI-32

5:DR. DEBESWAR DAS

RESIDENT OF SARUPATHAR PRIMARY HEALTH CENTRE
GOLAGHAT
ASSAM

Advocate for the Petitioner : MR.U K NAIR

Advocate for the Respondent : MR.S K TALUKDAR

**BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM**

JUDGMENT & ORDER (Oral)

Date of hearing : **12.06.2023.**

Date of judgment : **12.06.2023.**

Heard Mr. U. K. Nair, learned senior counsel assisted by Ms. L. Das, learned counsel appearing for the writ petitioner. Also heard Mr. B. Gogoi, learned Standing Counsel, Health & Family Welfare Department, Assam appearing for the respondent Nos.1 and 4. Ms. P. Sharma, learned Standing Counsel, APSC has appeared for the respondent Nos.2 and 3 and Mr. S. K. Talukdar, learned counsel has appeared for the respondent No.5.

2. This writ petition has a chequered history and therefore, the facts leading to the filing of this writ petition is briefly stated hereunder. The writ petitioner and the respondent No.5 are both dentists by profession. On 14.10.2005, the Assam Public



Service Commission (APSC) i.e. the respondent No.2 herein had published an advertisement notice inviting applications inter-alia for filling up one post of Demonstrator of Oral and Dental Pathology in the Regional Dental College (RDC), Guwahati. The said post was reserved for SC category candidates. As per the advertisement notice, those candidates who were in Government service or in Government owned undertakings or other similar organizations/Corporations/Boards/Bodies or in private employments were required to apply through proper channel. It appears that at the relevant point of time, the respondent No.5 was serving as a Dental Surgeon under the Joint Director of Health Services at Golaghat and the writ petitioner was serving as a Demonstrator in the RDC, his appointment having been made under Regulation 3(f) of the Assam Public Service Commission (Limitation of Functions) Regulation, 1951. The petitioner had submitted his application through proper channel. However, in so far as the respondent No.5 is concerned, he had submitted his application directly but by enclosing a No Objection Certificate (NOC) from the Joint Director of Health Services, Golaghat. On conclusion of the selection process the APSC had published the select list dated 03.03.2006. In the said select list, the name of the respondent no.5 appeared at Serial No.1 whereas, the petitioner's name appeared at Serial No.2. It further appears that the select list dated 03.03.2006 was earlier called into question by filing a writ petition inter-alia alleging that the petitioner being a better candidate in terms of merit, he ought to have been selected at the top of the list. The challenge made to the select list was rejected by this Court. The case number of the proceeding as well as the particulars about the order passed therein are, however, not available on record. Be that as it may, it is the



admitted position of fact that the challenge made to the validity of the select list was rejected by this Court, which fact also finds due mention in the common judgment and order dated 25.01.2011 passed by the learned Single Judge in WP(C) No.2106/2006 and WP(C) No.5014/2006 preferred by the writ petitioner.

3. WP(C) No.2106/2006 was filed by the writ petitioner inter-alia contending that the respondent No.5 not having submitted his application through proper channel i.e. the Commissioner & Secretary to the Government of Assam, Health & Family Welfare Department, his application ought to have been rejected by the APSC. Therefore, the selection of respondent No.5 in the post of Demonstrator of Oral and Dental Pathology in the RDC was illegal. During the pendency of WP(C) No.2106/2006, order of appointment was issued in favour of the respondent No.5 on 19.09.2006 which had led to filing of WP(C) No.5014/2006. As mentioned above, both the aforesaid writ petitions were disposed of by the learned Single Judge by the common judgment and order dated 25.01.2011, making an observation that the respondent No.5 had not applied through proper channel, thus remanding the matter to the Government for a fresh decision in the light of the observations made in the said order.

4. It would be pertinent to mention herein that as per the materials available on record, after institution of WP(C) No.2106/2006, the Government had apparently issued order dated 30.11.2006 reverting the respondent No.5 back to his original post under the Joint Director of Health Services, Golaghat. As such, assailing the order dated 30.11.2006, the respondent No.5 had approached this Court by filing WP(C) No.6457/2006. By the interim order dated 22.12.2006 passed in WP(C) No.6457/2006,

the operation of the order dated 30.11.2006 was stayed by this Court as a result of which the respondent No.5 continued to work as Demonstrator in the RDC. WP(C) No.6457/2006 was ultimately disposed of by the learned Single Judge by judgment and order dated 17.09.2007 setting aside the order dated 30.11.2006 inter-alia providing that the fate of the writ petitioner (respondent No.5 herein) will abide by the outcome of WP(C) Nos.2106/2006 and 5014/2006 which were pending disposal before this Court. Eventually, both those writ petitions having been disposed of by the judgment and order dated 25.01.2011, the Government took a fresh look at the matter and thereafter, issued the impugned order dated 23.09.2011. The relevant part of the order dated 23.09.2011 is reproduced herein below for ready reference :-

“(III) Subsequently, on complaint Dr. Debeswar Das was reverted back to his original post of Dental Surgeon by an order on 30.11.2006 on the ground that he did not apply through proper channel. The said order was challenged by Dr. Das through WP(C) No.6457/2006 and Hon'ble Gauhati High Court vide an interim order dtd. 22-12-2006 in the said WP(C) stayed operation of the said order of reversion and in the final judgment and order dtd. 17-9-2007 Hon'ble Court had quashed the said order of reversion dtd. 30-11-2006. Accordingly, Dr. Das has been continuously working as Demonstrator at RDC, Guwahati since his joining after appointment in September 2006.

(IV) Therefore, the matter is to be decided now, keeping in view the observation of the Hon'ble Court and other relevant factors, being compliance of the common judgment and order dtd. 25.01.2011 of the Hon'ble Gauhati High Court in WP(C) No.2106/2006 & WP(C) No.5014/2006.

(V) It is relevant that Dr. Debeswar Das did not apply through proper channel as per usual practice except the NOC issued by the Jt. DHS, Golaghat, who was the controlling officer of Dr. Das then.

The basic objective of submission of application through proper channel is to avoid administrative inconvenience by enabling the Govt. either to allow or to debar its employee in appropriate case according to the situation. Since Dr. Das has applied with an NOC of his immediate superior authority and got selected for appointment in the same Health & FW Deptt. It is hardly open to say that non-submission of application through proper channel as usual has frustrated the underlying object thereof.

(VI) In the present case, APSC in its advertisement stipulated for submission of application through proper channel. However, the APSC itself had accepted the candidature of Dr. Das after taking into account the NOC issued by the Jt. DHS, Golaghat and recommended him at the top of the select list and based on which the Govt. in Health & FW(B) Deptt. Had appointed Dr. Das.

(VII) It is relevant to mention that while passing the judgment and order dtd. 25-1-2011 Hon'ble High Court has also upheld the select list of APSC basing on which appointment of Dr. Debeswar Das was made.

(VIII) That apart, since the incumbent has been serving in the post for about 5(five) years and keeping in view the order dtd. 25-1-2011 of the Hon'ble Gauhati High Court upholding the select list, his termination from the existing post or/and his reversion to the original post would not be justifiable at this stage.

This order has been issued in compliance of the common judgment and order dtd. 25.01.2011 passed by the Hon'ble Gauhati High Court in WP(C) No.2106/2006 and WP(C) No.5014/2006.”

The order dated 23.09.2011 is under challenge in this writ petition.

5. By drawing the attention of this Court to the observations made by the learned Single Judge in the judgment and order dated 25.01.2011 Mr. Nair submits that the

learned Single Judge had made categorical observations by holding that the respondent No.5 did not apply through proper channel as per the requirement of the advertisement notice. Therefore, by the order dated 25.01.2011 the Commissioner and Secretary of the Department was asked to take a fresh decision in the matter which was consistent with the observations made in the order. Notwithstanding the same, by arriving at a conclusion that the APSC was justified in accepting the application submitted by the respondent No.5, the Government has taken a view which is clearly inconsistent with the observations made in the judgment and order dated 25.01.2011. On such ground, submits Mr. Nair, the impugned order dated 23.09.2011 deserves to be set aside and the matter be directed to be considered afresh.

6. Mr. Gogoi, learned Standing Counsel, Health & Family Welfare Department, Assam, on the other hand, submits that the departmental authority had expressed his opinion on the merit of the case without in any manner going against the observations made by the learned Single Judge. Since liberty was granted to the Government to take a fresh decision in the matter, the opinion expressed in the impugned order dated 23.09.2011 by taking note of the facts and circumstances of the case, cannot be said to be in conflict with the judgment and order dated 25.01.2011 passed by this Court.

7. By referring to the counter-affidavit filed by the respondent No.5, Mr. Talukdar submits that as per the standing administrative instructions, as projected in paragraph 9 of the counter-affidavit, it is always open to the departmental authorities to

consider and take a decision as to whether, the procedure of submission of application is correct or not in a particular case. In this case, since the administrative department did not find any fault with the procedure adopted in submission of application by the respondent No.5, there is no infirmity in the impugned order dated 23.09.2011.

8. I have considered the submissions made at the Bar and have carefully gone through the materials available on record.

9. As has been noted above, this Court had already declined the challenge made to the select list dated 03.03.2006 in so far as the merit of the candidates is concerned and the learned senior counsel for the petitioner has also submitted in his usual fairness that the said aspect of the matter is no longer res integra. Since the only argument of Mr. Nair is that the impugned order dated 23.09.2011 is inconsistent with the views expressed by the learned Single Judge in the order dated 25.01.2011, this Court has meticulously examined the order and finds that it is correct that the learned Single Judge has categorically observed that the respondent No.5 did not apply through proper channel. However, whether such deficiency would automatically lead to cancellation of candidature of the respondent No.5 is a matter which has not been dealt with by the learned Single Judge in the judgment and order dated 25.01.2011. Instead, the said aspect of the matter has been left to be decided by the departmental authority.

10. In the impugned order dated 23.09.2011 the Commissioner & Secretary of the Department has also recorded a finding that the respondent No.5 did not apply

through proper channel strictly in accordance with the requirement of the advertisement notice dated 14.10.2005. However, the Commissioner was of the view that such deficiency would not be sufficient to reject the candidature of the respondent No.5, more so since the APSC had accepted the same after taking due note of the NOC issued by the Joint Director of Health Services, Golaghat. The aforesaid view taken by the departmental authorities appears to be a plausible view and in the opinion of this Court, the same does not in any manner contradict the observations and findings recorded by the learned Single Judge in the judgment and order dated 25.01.2011. Since the learned Single Judge had granted liberty to the departmental Commissioner to take a fresh decision in the matter, it cannot be said that the view expressed by the Commissioner in the impugned order dated 23.09.2011 was beyond his competence, when viewed in the light of the judgment and order dated 25.01.2011.

11. It is also to be noted herein that the advertisement notice in this case was of the year 2005 and the select list was published on 03.03.2006 pursuant where to, the respondent No.5 was appointed as Demonstrator on 19.09.2006. In view of the interim order passed by this Court in WP(C) No.6457/2006, the respondent No.5 has continued to serve in the said post till today. It is also significant to mention herein that the validity of the select list had already been affirmed by this Court. Situated thus, this Court is of the opinion that at this point of time no writ of mandamus can be issued directing the authorities to appoint the writ petitioner on the basis of the select list dated 03.03.2006. Under the circumstances, interference with the impugned order dated 23.09.2011 only for reconsideration of the matter by the departmental



Commissioner would not only be a futile exercise but, in the opinion of this Court, would be highly inequitable.

12. For the reasons stated herein above, this Court is of the opinion that there is no merit in this writ petition. The same is accordingly dismissed.

Parties to bear their own cost.

JUDGE

T U Choudhury/Sr.PS

Comparing Assistant