



GAHC010249472014

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

Case No. : WP(C)/5204/2014

BIJOY BASUMATARY and ANR.
S/O LT. PARESH CH. BASUMATARY, R/O GOMBHIRKATA, P.O. KAZIGAON,
DIST- KOKRAJHAR, BTAD, ASSAM

2: ANENDRA NATH SANGMA
S/O SAILENDRA MARAK
R/O KAZIGAON
PT-I
P.O. KAZIGAON
DIST- KOKRAJHAR
BTAD
ASSA

VERSUS

THE STATE OF ASSAM AND 10 ORS
REP. BY THE COMMISSIONER AND SECY. TO THE GOVT. OF ASSAM,
GENERAL ADMN. DEPTT., DISPUR, GHY-6

2: BODOLAND TERRITORIAL AUTONOMOUS DISTRICT
REP. BY THE PRINCIPAL SECRETARY
KOKRAJHAR
ASSAM

3: THE DY. COMMISSIONER
KOKRAJHAR
BTAD
ASSAM

4: THE ADDL. DY. COMMISSIONER
PERSONAL
KOKRAJHAR
BTAD
ASSAM



5:THE SUB DIVISIONAL OFFICER CIVIL
PARBATJHORA
KAZIGAON
BTAD
ASSAM

6:DIPAK BALMIKI

C/O O/O THE DY. COMMISSIONER
KOKRAJHAR
ASSAM

7:SANIN BASUMATARY
C/O O/O THE DY. COMMISSIONER
KOKRAJHAR
ASSAM

8:PABITRA SARKAR
C/O O/O THE DY. COMMISSIONER
KOKRAJHAR
ASSAM

9:TILAK MUKHARJEE
C/O O/O THE DY. COMMISSIONER
KOKRAJHAR
ASSAM

10:BIJOY DEBNATH
C/O O/O THE DY. COMMISSIONER
KOKRAJHAR
ASSAM

11:GITUMONI BARMAN
C/O O/O THE DY. COMMISSIONER
KOKRAJHAR
ASSA

Advocate for the Petitioner : MR.A PATHAK

Advocate for the Respondent : GA, ASSAM

Date of hearing & Judgment : 11.08.2021

**BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI**

JUDGMENT & ORDER (ORAL)

Considering the subject matter of dispute and also the fact that this writ petition is pending since the year 2014, the same is taken up for disposal at the admission stage. The subject matter of this writ petition is a selection which was initiated vide an advertisement dated 28.01.2014 for certain post in the office of the Deputy Commissioner, Kokrajhar.

2. Before coming to the issue which has come up for adjudication, it would be convenient to place on record the brief facts of the case.

3. Two petitioners have joined together with a common cause of action. The petitioners contend that there were both rendering their services as Grade-IV employees in the office of the SDO(Civil), Parbatjhora, Kazigaon in the BTAD since the establishment of the said offices. The engagement of the petitioners as Grade-IV staff was in accordance with an order dated 18.09.2004 it is the case of the petitioners that they had continued in the said post without any break and to the full satisfaction of the authorities. In the year 2014, an advertisement was published by the Deputy Commissioner, Kokrajhar for the appointment of Grade-IV posts for which the minimum qualification was Class-VIII passed.

4. Both the petitioners being Matriculate and thus eligible for such appointment had applied for the said appointment and accordingly on 28.02.2014, the interview was held in which the petitioners claimed to have fared well. The petitioners also rely upon the experience gained by them while working as temporary employees pursuant to their appointments in the year 2004. While the petitioners were legitimately expecting that they would be selected for such appointment, on 16.09.2014, a select list was published in which respondent Nos. 6 to 11 were declared to be selected and on the same date i.e., 16.09.2014, the appointment letters were issued to the said respondents. It is the specific case of the petitioners that such appointment was illegal in view of violation of Clause-7 of the advertisement which requires that appointment would be made after police verification. The petitioners have categorically averred that no such police verification was done before the appointments were offered to the private respondents. The petitioners have additionally

contended that their past experience was wholly ignored.

5. I have heard Ms. A. Talukdar, learned counsel for the petitioners. I have also heard Sri D. Borah, learned State Counsel for the respondent Nos. 3, 4 & 5 whereas Ms. R.B. Borah, learned Standing Counsel, BTC is present for the respondent Nos. 2. Sri M. Dutta, learned counsel has appeared for the private respondent Nos.6 and 8 to 11. The materials before this Court have also been carefully examined.

6. Ms. Talukdar, learned counsel for the petitioners submits that the impugned selection culminating in the select list dated 16.09.2014 is absolutely illegal and arbitrary. It is submitted that the past experience of the petitioners have been wholly ignored by which grave prejudice has been caused to the petitioners. It is contended that by working for a long period of time since their appointments vide order dated 18.09.2004, the petitioners have gained sufficient experience. By drawing attention of this Court to the order dated 18.09.2014 issued by the Additional Deputy Commissioner, Kokrajhar, the learned counsel submits that the said order would reveal that the fresh appointees were posted at different places temporarily to acquire knowledge on their official activities. By referring to the advertisement dated 28.01.2014, more specifically Caluse-7 thereof, appointment was to be made only after police verification as per procedure. However, in the instant case the select list was published on 16.09.2014 and on the same day, the appointments were made. It is submitted that the mandatory requirement on having police verification was wholly done away with which is absolutely against the interest of public service.

7. In support of her submission the learned counsel for the petitioners places reliance on the following citations

- i. 1999(2) GLT 121 Assam Animal Husbandry And Veterinary Service Association and Ors
- ii. 2002(3) GLT 313 Abu Taba (Dr.) & Ors. Vs. State of Arunachal Pradesh & Ors.

8. In the case of Assam Animal Husbandry (Supra) a Division Bench of this Court after discussing the various case laws including the case of **Madan Lal Vs. State of Jammu & Kashmir** reported in **(1995) 3 SCC 486** has laid down that there is no absolute bar for challenging a selection process by unsuccessful candidates and everything depends upon the

facts and circumstances of the case. The Division Bench has given the illustration that such challenge would be barred if the ground is any defect in the Selection Committee which was within the knowledge of the candidates. For ready reference, the relevant part is extracted hereinbelow-

“(27) We feel in a case e. g. where the constitution of the Selection Board may be challenged to be defective, which fact was within the knowledge of a candidate before he took the chance and appeared before the selection Board, it would be appropriate case where he may be estopped from challenging constitution and proceedings of the Selection board on that ground. But, where infirmities or irregularities come to the knowledge of a candidate or could come to the knowledge of a candidate only during the course of the selection proceedings itself, it cannot be said that such proceedings cannot be challenged merely because the candidate submitted to the selection. It is not that when the interview was in progress and irregularities was noticed the candidate may quits or withdraws from the interview. Normally, he would be there till interview is completed. Such a situation would not bar him to challenge the selection proceedings.”

9. The case of Abu Taba (Supra) has been cited to canvass a similar proposition wherein this Court has held that though normally unselected candidates cannot be allowed to turn around and challenge the selection process, in case of serious allegations of bias in nepotism, such challenge can be maintained. For ready reference the relevant part is extracted hereinbelow-

“23) On behalf of the respondent Nos. 12, 13, 25 and 26, who are for the post of Junior Dental Surgeon, it has been submitted that since even the Service rules of 2000 provide making of recruitment on the basis of the written examination to be followed by interview or on the basis of interview alone, the commission, in effect, acted, within the ambit of Service Rules of 2000 , by choosing to make selection on the basis of interview alone. In this regard, suffice it mention that I have already held that since the petitioners have

participated in the selection process, they cannot, now, turn around and challenge legality of the selection process, but in view of the fact that the entire selection process, as held above, is marked by strong possibility bias, the selection made on the basis of such a process cannot be allowed to stand good on record.”

10. The aforesaid case laws have been cited in view of the vehement objection raised on behalf of the respondents regarding the locus of the petitioners to maintain the present challenge.

11. The learned counsel for the petitioners further submits that though the beneficiaries of the impugned selection process are arrayed as party respondents, they have chosen not to file any affidavit-in-opposition which may imply that that the allegations are uncontroverted.

12. The learned counsel for the petitioners accordingly submits that the present is a fit case for interference by this Court in exercise of its extra ordinary powers under Article 226 of the Constitution of India.

13. Countering the submissions made on behalf of the petitioners, Sri D. Borah, learned State Counsel has submitted that the petition is without any merits. It is contended that in absence of any allegations of anomalies in the selection in the manner of bias or nepotism, the selection process cannot be questioned by the petitioners who are unsuccessful candidates. It is contended that having participated in the selection without any objection, the petitioners cannot be allowed to turn around and challenge the same only because of their failure to be selected.

14. By drawing the attention of this Court to the advertisement dated 28.01.2014, the learned State Counsel has submitted that nowhere in the said advertisement any preference or weightage for experience has been prescribed and therefore the ground of experience taken up by the petitioners will not deserve any consideration. It is submitted that the only ground of challenge is the appointment letters were issued without prior police verification. The State Counsel has contended that the same requirement is only directory in nature and cannot be a ground to hold the selection as illegal. By referring to the records, it is submitted that after the appointment letters were issued, PVRs were obtained for each of the successful

candidates. In any case, it is submitted that the same ground could not vest any right upon the petitioners to claim appointment.

15. In support of his submission, Sri Borah, the learned State Counsel has referred to the following decisions

i. (2011) 1 SCC 150 Vijendra Kumar Verma Vs. Public Service Commission, Uttarakhand and Ors.

ii. (2015) 11 SCC 493 HC Pradeep Kumar Rai and Ors. Vs. Dinesh Kumar Pandey and Ors.

16. In the case of Vijendra Kumar Verma (Supra) it has been held that having participated in the selection process with full knowledge about the various requirements, an unsuccessful candidates cannot be allowed to turn around and challenge the same as he is estopped from doing so. For ready reference the relevant paragraphs are given below-

“18. It was also submitted by the learned counsel that the appellant having participated in the entire selection process and having specific knowledge that he would be required to have basic knowledge in computer operation and then having taken a chance therein by appearing in the viva voce and facing the questions of the expert on the computer operation, he cannot now turn back and take a stand that the said selection process is vitiated.

26. In this connection, we may refer to the decision of the Supreme Court in G. Sarana (Dr.) v. University of Lucknow wherein also a similar stand was taken by a candidate and in that context the Supreme Court had declared that the candidate who participated in the selection process cannot challenge the validity of the said selection process after appearing in the said selection process and taking opportunity of being selected. Para 15 inter alia reads thus:

“15. ... He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee.”

28. *In Union of India v. S. Vinodh Kumar and Ors. Reported in MANU/SC/7926/2007 : (2007) 8 SCC 100 at para 18 it was held that it is also well settled that those candidates who had taken part in the selection process knowing fully well the procedure laid down therein were not entitled to question the same. Besides, in K.H. Siraj v. High Court of Kerala in SCC paragraphs 72 and 74 it was held that the candidates who participated in the interview with knowledge that for selection they had to secure prescribed minimum marks on being unsuccessful in interview could not turn around and challenge that the said provision of minimum marks was improper, said challenge is liable to be dismissed on the ground of estoppel."*

17. The case of Pradeep Kumar Rai (Supra) has been cited wherein the earlier case of Vijendra Kumar Verma (Supra) has been approved and it has been held that unsuccessful candidates cannot approbate and reprobate at the same time, the relevant extract being quoted hereinbelow-

"16. Moreover, we would concur with the Division Bench on one more point that the appellants had participated in the process of interview and not challenged it till the results were declared. There was a gap of almost four months between the interview and declaration of result. However, the appellants did not challenge it at that time. Thus, it appears that only when the appellants found themselves to be unsuccessful, they challenged the interview. This cannot be allowed. The candidates cannot approbate and reprobate at the same time. Either the candidates should not have participated in the interview and challenged the procedure or they should have challenged immediately after the interviews were conducted."

18. Ms. R.B. Borah, learned Standing Counsel, BTC has endorsed the submission of the learned State Counsel by questioning the locus of the petitioners to maintain the present challenge. The learned counsel relied upon a decision of this Court reported in (2009) 4 GLR



714 (Dr. Tarik Doke and Ors. Vs. State of Arunachal Pradesh And Ors.) The following paragraphs of the said decision were pressed into service-

“19. I have given my anxious consideration to the submissions made by the learned counsel for the parties. There is no dispute that the petitioners never raised any grievance relating to relaxation extended to or in respect of any of the clauses in the advertisement. They participated in the selection process by offering their candidature and took a chance for favourable consideration. However, when they did not find their names in the impugned select list dated 3. 7. 2006, made a challenge to the very selection process and the selection of the private respondents. The prayer made in the writ petition is to quash the entire selection process convened and contained vide the aforesaid advertisement dated 24. 1. 2006 and so also, to set aside and quash the entire select list, more particularly, the selection of the Respondents No. 3 to 16. Further prayer made is not to make any appointment from the impugned select list.

20. From the above prayers made in the writ petition, it will be seen that the petitioners have questioned the very validity of the selection process in which they duly participated without raising any objection. Further, if the select list containing the name of 25 selected candidates, is to be quashed, the same will lead to affecting the rights of the remaining 9 candidates, who are not the party in this writ proceeding. In the case of Probodh Kumar Verma Vs. State of U. P. , reported in AIR 1985 SC 167, the Apex Court has observed that High Court ought not to decide a writ petition under Article 226 of the Constitution without the person who would be vitally affected by its judgment.

21. In Om Prakash Shukla (supra), the Apex Court has observed that the appellants/petitioners in that case having participated in the interview, it was not open to turn round thereafter when they failed in the interview and then to contend that the provision of minimum marks in the interview was not proper. In the instant case also, as noticed above, the petitioners participated in the selection process taking a chance for a favourable consideration without any

reservation and now, they cannot turn round the same so as to question the very validity of the selection process. In the case of Suneeta Aggarwal Vs. State of Haryana and Ors. as reported in (2000) 2 SCC 615, the Apex Court having found that the petitioners therein not only applied for the particular post but also appeared before the selection committee constituted was held that the appellant therein having appeared before the selection committee without any protest and having taken a chance for favourable consideration, she was estopped by her own conduct from challenging the order of the authority."

19. Sri M. Dutta, learned counsel for the private respondents submits that the petitioners were casual workers and the advertisement not prescribing any preference for experience, the entire writ petition has been structured on a wrong premise. The only issue raised is the one of PVRs which were apparently done after the appointment is a mere irregularity which cannot be a sufficient ground to interfere in the selection process. As regards the contention of not filing any affidavit-in-opposition, it is contended that even in such a case the Court has to independently examine the contents of the writ petition and other materials available before the Court.

20. The rival contentions of the contesting parties have been duly taken into consideration and the materials before this Court have been carefully examined.

21. Upon perusal of the writ petition, it is found that the challenge upon the selection process initiated vide the advertisement dated 28.0.12014 is not on the grounds of bias or nepotism or any other irregularity but on the principal ground that one of the prescription regarding PVR has not been adhered to. The aspect of PVR, though is connected with a selection process, the same is mainly concerned with the later part of the selection namely, issuing of appointment letters/ orders. Viewing from this perspective, the aspect of PVR has got nothing to do with the process/ procedure of selection. Therefore, the present challenge boils down to the aspect of appointment only. This Court is of the view that the selection process is not the subject matter of challenge in absence of any grounds, the subsequent action of issuing appointment orders becomes secondary. This Court finds force in the argument made on behalf of the respondents that failure to obtain PVR prior to issuing the appointment letters can, at best, be termed as mere irregularity and cannot go into the root



of the matter as appointments are always subject to satisfactory PVR.

22. Though, a preliminary objection has been raised on behalf of the respondents questioning the locus of the petitioners to maintain the present challenge, this Court is of the view that there cannot be an absolute bar for unsuccessful candidates to challenge a selection process. However, all would depend on the facts and circumstances of the case wherein the *bona fide* of the petitioners are to be examined. If the petitioners, after participating in a selection process come to know about certain gross illegalities/ irregularities which vitiate the same, there cannot be a legal part in challenging the said. However, if the challenge is based upon certain aspects which were within the knowledge of the petitioners before participating in the selection process with open eyes, they would be estopped from challenging the said. This Court would reiterate the example cited by the Division Bench in the case of Assam Animal Husbandry (Supra) wherein challenge would estopped on the ground of defectiveness on the constitution of selection board which fact within the knowledge of the candidate and even than the candidate had taken a chance and appeared before the same.

23. Though, the learned counsel for the petitioners may have a point in submitting since no affidavit-in-opposition has been filed by the private respondents, the averment made in the writ petition may be deemed to be admitted, in the instant case, the official respondents namely the respondent No.3 has filed the affidavit-in-opposition and therefore it cannot be said that contentions of the writ petition has remain un rebutted. This Court is also view that even in a case of failure to controvert by filing affidavit-in-opposition, the contesting parties would still be at liberty to argue on the points of law and the Court would have a duty to independently apply its mind to the facts and circumstances of the case.

24. In view of the aforesaid discussion and the facts and circumstances of the case, this Court is of the opinion that no indefeasible rights of the petitioners have been violated. The writ petition is thus held to be devoid of any merits and accordingly dismissed.

JUDGE

Comparing Assistant