



GAHC010023112020

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

I.A.(Civil)/243/2020 In
WP(C) No.9305/2019

NRIPENDRA DAS AND 20 ORS
S/O SRI CHANDRA KANTA DAS, R/O NO. 2 GALIA HATI, P.O. BARPETA,
DIST. BARPETA, ASSAM.

2: DHIRAJ DAS
S/O SRI UDAY DAS
R/O PALLA ROAD
WARD NO. 11
P.O. AND DIST. NALBARI
PIN 781335

3: JUGAJYOTI DAS
S/O HIRENDRA CH. DAS
R/O VILL. AND P.O. BHULUKADOBA
PIN 781317
DIST. BARPETA
ASSAM.

4: MONTAKIM ZAMAN SK
S/O NURAZZAMAN SK
R/O VILL. COLLEGE NAGAR
GOALPARA
P.O. AND DIST. GOALPARA
PIN 783101

5: RATUL BHARALI
S/O LATE MAKHRAM BHARALI
R/O VILL. CHARING BARUATI
P.O. BARUATI
DIST. SIVASAGAR
ASSAM
PIN 785661



6: PARTHA SAROTHI BORA
S/O MR. NOBIN BORA
R/O JAKHALAPARA
NEAR RUPNAGAR
P.O. CINNAMARA
DIST. JORHAT
ASSAM
PIN 785008

7: SURAJIT BARMAN
S/O SRI SIDDHESWAR BARMAN
R/O VILL. LACHIMA
P.O. SARTHEBARI
DIST. BARPETA
ASSAM. PIN 781307

8: SABITA DAS
D/O KHARGESWAR DAS
R/O VILL. BARPHEKANHAT
P.O. GORESWAR
DIST. BAKSA
ASSAM
PIN 781366

9: DIPAMANI MEDHI
D/O TIKENDRAJIT MEDHI
R/O VILL. AND P.O. BAMAKHATA
DIST. BARPETA
ASSAM
PIN 781325

10: AMIT KUMAR MONDAL
S/O LATE PARIMAL MONDAL
R/O WARD NO. 15
CHANDARIA PATHAR
P.O. BALADMARI
DIST. GOALPARA
ASSAM
PIN 783121

11: RAJIB GOSWAMI
S/O LATE RAJENDRA NATH GOSWAMI
VILL. AND P.O. RAULI
DIST. BARPETA
ASSAM
PIN 781311

12: BHABANI PRASAD GOGOI



S/O LATE HOREN GOGOI
R/O 4 NO. MAKUMPATHAR
WARD NO. 1
MARGHERITA
DIST. TINSUKIA
PIN 786181

13: SANJIB RAJKONWAR
S/O RUDRA RAJKONWAR
R/O VILL. AND P.O. RONGABAM
P.S. KAKOTIBARI
CHARAIDEO
PIN 785691

14: SANJIB KUMAR MONDAL
S/O LATE GAURANGA CH. MONDAL
R/O REDCROSS ROAD
P.O. AND DIST. SIVASAGAR
ASSAM
PIN 785640

15: SANJIB KUMAR DAS
S/O DINESH KUMAR DAS
R/O GALIAHATI G.C. LANE
BARPETA
HOUSE NO. 290-A
WARD NO. 9
P.O.
P.S. AND DIST. BARPETA
ASSAM
PIN 781301

16: DHIRAJ MALAKAR
S/O CHITRA RAM MALAKAR
R/O VILL. BALIKARIA
P.O. KAZIPARA
P.S. AND DIST. NALBARI
PIN 781341

17: NIRUPOM SAIKIA
S/O LATE CHAKRESWAR SAIKIA
R/O VILL. BORDIHINGIA GAON
P.O. AND P.S. KAMARGAON
DIST. GOLAGHAT
ASSAM.

18: BHASKARJYOTI GOGOI
S/O LOKARANJAN GOGOI



R/O VILL. JAIPUR TEA ESTATE
P.O. AND P.S. JAIPUR
DIST. DIBRUGARH
PIN 785614

19: NITUL DEKA
S/O LATE N.C. DEKA
KHETRI COLLEGE ROAD
P.O. KHETRI
DIST. KAMRUP (M)
PIN 782403

20: OMAR FARUK
S/O TABIBAR RAHMAN
R/O WARD NO. 2
MANGALDAI TOWN
DIST. DARRANG
PIN 784125

21: KALPANA DAS
W/O KANKAN BHATTACHARYYA
R/O L.K. ROAD
NEAR P.K.B. NRUSING HOME
NORTH HAIBORGAON
DIST. NAGAON
PIN 78200

VERSUS

BINAY KR KALITA AND 15 ORS
S/O RAJENDRA KALITA, R/O VILL. SADAIKUCHI, P.S. KAYAN (RANGIA),
DIST. KAMRUP, ASSAM, PIN 781350

2:TUTUMANI DAS
SON OF LATE BIREN DAS

RESIDENT OF SANTIPUR HILL SIDE (MATHURA NAGAR)
POLICE STATION- BHARALUMUKH
GUWAHATI- 781009
DISTRICT- KAMRUP (METRO)
ASSAM.

3:BHANITA DAS
DAUGHTER OF LATE HARIDAYAL DAS

RESIDENT OF WARD NO.5
NEAR NAMGHAR ROAD
POLICE STATION- BARPETA ROAD



DISTRICT- BARPETA
ASSAM
PIN- 781315.

4:RAMEN CHANDRA DEKA
SON OF NAUDATTA DEKA

RESIDENT OF VILLAGE- GARIAKOTH
POLICE STATION- RANGIA
DISTRICT- KAMRUP
ASSAM
PIN- 781365.

5:DEEPA BURA GOHAIN
DAUGHTER OF SIBA BURAGOHAIN

RESIDENT OF VILLAGE- PUKHURIA
POST OFFICE- MARIANI
DISTRICT- JORHAT
ASSAM.

6:SABITA KALITA
DAUGHTER OF LATE NANDESWAR KALITA

RESIDENT OF VILLAGE- TERECHIA
POST OFFICE- TERECHIA
POLICE STATION- NALBARI
DISTRICT- NALBARI
ASSAM.

7:TANUSREE DAS
CARE OF LAXMI RANI DAS

RESIDENT OF SORBHOG
WARD NO.3
DISTRICT- BARPETA
ASSAM
PIN- 781317.

8:MEGHALI GOGOI BURAGOHAIN
CARE OF DEBASHISH BURAGOHAIN

RESIDENT OF WARD NO.9
CHANDMARI
GREEN ROAD
DISTRICT- GOLAGHAT
ASSAM
PIN- 785621.



9:UDAYADITYA PHUKON
RESIDENT OF JIBON TAMULY PATH
WARD NO.12
GOLAGHAT
ASSAM
PIN- 785621.

10:MOUSUMI KOERI
DAUGHTER OF LATE RANABIR KOERI

RESIDENT OF WARD NO. 9
RAILWAY STATION ROAD
DHUBRI
POST OFFICE- BIDYAPARA
DISTRICT- DHUBRI
ASSAM
PIN- 783324.

11:WAHAB ALI AHMED
SON OF ALHAJ ABDUL JUBBAR

RESIDENT OF VILLAGE- KUMULLI PARA
POST OFFICE- JOSHIHATI PARA
POLICE STATION- HOWLY
DISTRICT- BARPETA
ASSAM
PIN- 781316.

12:THE STATE OF ASSAM
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM
FINANCE DEPARTMENT
DISPUR
GUWAHATI-6

13:THE COMMISSIONER AND SECRETARY
TO THE GOVERNMENT OF ASSAM
FINANCE (ESTT. B) DEPARTMENT
DISPUR
GUWAHATI-06.

14:THE ASSAM PUBLIC SERVICE COMMISSION
REPRESENTED BY THE CHAIRMAN
JAWAHARNAGAR
KHANAPARA
GUWAHATI-781022
DISTRICT- KAMRUP (METRO)



ASSAM.

15:THE CHAIRMAN (I/C)
PRINCIPAL CONTROLLER OF EXAMINATIONS
ASSAM PUBLIC SERVICE COMMISSION
JAWAHARNAGAR
KHANAPARA
GUWAHATI-781022
DISTRICT- KAMRUP (METRO)
ASSAM.

16:THE DIRECTOR OF AUDIT (LOCAL FUND)
ASSAM
DISPUR
GUWAHATI-0

Advocate for the Petitioner : MR. U K NAIR

Advocate for the Respondent : MR. M AHMED

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

Date : 01-02-2021

JUDGEMENT & ORDER

1. Heard Shri U. K. Nair, learned counsel for the applicants (respondent nos. 36, 37, 38, 40, 41, 42, 43, 44, 46, 48, 51, 52, 53, 54, 55, 56, 57, 58 and 60) who by this present application has prayed for modification/vacation/alteration of the *ex-parte* interim order dated 19.12.2019.
2. Also Heard Shri K.N. Choudhury, learned Senior Counsel for the opposite parties / writ petitioners. Shri B. Gogoi, learned Standing Counsel, Finance Department has also been heard along with Shri P.P. Dutta, learned counsel for the APSC.
3. Before dealing with the interim order dated 19.12.2019, it would be convenient to narrate the facts of the case in brief.



4. An advertisement was published on 03.05.2018 by the Assam Public Service Commission (APSC) for filling up 32 nos. of posts of Audit Officers by promotion in the Assam Local Fund Audit Service. Pursuant to the said exercise, a Select list dated 07.11.2019 was published in which 57 nos. of candidates were held to be qualified. In the meantime, a communication dated 18.02.2019 was issued by the Director of Audit to the Finance Department informing of arising of more vacancies in the meantime and accordingly requested to take steps with the APSC for filling up the 51 nos. of vacancies.

5. At that stage the writ petition was filed challenging the aforesaid select list which, according to the writ petitioners, is illegal as the same contains names more than the numbers of vacancies advertised.

6. This Court vide order dated 19.12.2019 while issuing notice had directed that the respondents were allowed to fill up 32 nos. of post of Audit Officers on the basis of the merits as per the advertisement date 03.05.2018 and that such appointments shall be subject to the outcome of the writ petition.

7. Shri Nair, the learned Senior Counsel for the applicants has drawn the attention of this Court to the affidavit-in-opposition of the Finance Department in paragraph 10 whereof it has been stated that the exercise in question was a promotional exercise where only in-house candidates are considered subject to fulfillment of the eligibility criteria. By further drawing the attention of this Court to the pleadings of the Department in paragraph 12, it is submitted that to that as per Rule, advertisement is not a pre-condition at all and the same is issued only for the purpose of giving information regarding the selection process. The applicants are candidates who are selected beyond Serial No.32 in the Select List.

8. The Senior counsel for the applicants has also drawn the attention of this Court to the Rules governing the field namely the Assam Local Fund Audit Services (Amendment) Rules, 1997. Under Schedule III of the said Rules, the procedure has been prescribed for holding the

exams on different subjects and allotment of marks including minimum marks and aggregate marks. Rule 17 lays down that 75% of the vacancies in a year of recruitment in the cadre of Audit Officers would be by promotion and under Rule 17 (3), it has been laid down that the promotional examination would be conducted in accordance with the Rules and syllabus as in Schedule III and shall be at such intervals as the appointing authority may, in consultation with the Commission from time to time determine. Shri Nair accordingly submits that the process to fill up the vacancies by 52 candidates is strictly in conformity with the Rules and therefore, the interim order dated 19.12.2019 is liable to be vacated so that the applicants can be promoted.

9. Per contra, Shri K.N. Choudhury, learned Senior counsel for the opposite parties/writ petitioners submits that the interim order dated 19.12.2019 is absolutely justified and does not require any interference. In the advertisement dated 03.05.2018, the number of vacancies have been specifically mentioned to be 32 nos. According to Shri Choudhury, the number of vacancies which are to be filled up cannot exceed the number published in the advertisement. He further submits that in case of any further vacancy arises, a fresh process of promotion has to be instituted. In support of his submission, Shri Choudhury has relied upon the case of Prem Singh & Ors Vs Haryana State Electricity Board reported in (1996) 4 SCC 319. In the same case, it has been laid down that vacancies to be filled up in a year have to be restricted to those advertised. Only anticipated vacancies can be taken into consideration for filling up and not any other vacancies that may arise.

10. Shri B. Gogoi, learned Standing Counsel Finance Department however supports that case of the applicants/opposite parties. The learned Standing Counsel submits that though 32 nos. of post were advertised initially, in the meantime, the number of vacancies had increased and in this connection, a letter dated 18.02.2019 was issued by the Director of Audit, whereby, it was informed that the vacancy position had risen to 51. Shri Gogoi submits that all the said vacancies were of the same year namely 2018 itself.



11. Shri Nair, the learned Senior Counsel in his rejoinder submits that in view of the clear language of Rule 17 of the Rules, issuance of an advertisement is wholly immaterial as vacancies would have been filled up from time to time if it arises in the same year.

12. The rival submissions of the learned counsel for the parties have been duly considered. We however remind ourselves that the present consideration is only on a *prima facie* basis as to whether the interim order should be vacated or continued and therefore this Court would be guided by the three golden principles namely *prima facie* case, the balance of convenience and suffering of irreparable loss of injury. The fourth judicially evolved principle of overwhelming public interest would also be taken into consideration.

13 The basic ground of challenge in the writ petition is that in a recruitment process, the number of vacancies filled up cannot exceed the numbers which were advertised. There is no dispute to the aforesaid proposition of law inasmuch as the objective is to give all eligible candidates a fair opportunity for any vacancy in public employment for which they are eligible. The said position is also explained by the Hon'ble Supreme Court in the case of *Prem Singh* (supra) wherein anticipated vacancies of the same year can also be taken into consideration. However what is required to be seen is the applicability of the aforesaid provision in the facts of the instant case.

14. The present case is governed by a set of Rules which have been mentioned above. The relevant rule is Rule 17 (3) which is extracted herein below:

"17 (3) The Assam Local Fund Service (Promotion) Examination shall be conducted by the Commission in accordance with the rules and syllabus as in Schedule-III and shall be held at such intervals as the Appointing Authority may in consultation with the Commission from time to time determine. A list of candidates who have qualified in the said examination shall be prepared by the Commission in order of merit and forwarded it to the Appointing Authority Promotion shall be made from the list subject to the availability of vacancies."



15. The present recruitment exercise is for filling up of the post of Audit Officer by way of promotion and not by the direct recruitment. What emerges is that the exercise is only amongst eligible in-house candidates who are required to undergo a process based upon which a Select List is prepared. When the mandate of law is to fill up such vacancies by promotion as such intervals from time to time makes it clear that a selection process can be undertaken to prepare a list of candidates who will be promoted to fill a vacancies which have arisen in a particular year. At this stage, the submission of the learned Standing Counsel Finance Department that all the vacancies have arisen in the year 2018 attains significance.

16. **As regards the case of *Prem Singh (supra)* is concerned, the case before the Hon'ble Supreme Court was pertaining to direct recruitment whereas the present case pertains to promotion of in-house candidates.** Since the number of eligible candidates were already identified and placed as per the merits in the select list dated 07.11.2019 which contains 57 candidates, there cannot be any embargo in filling up the 51 nos. of vacancies out of the select list. This Court also finds force in the submissions of the learned counsel for the applicants as well as the Department that there was actually no requirement to publish an advertisement inasmuch as the exercise were confined to promotion of in-house candidates who were eligible for such consideration.

17. Apart from the aforesaid discussion on *prima facie* case, since the applicants were already empanelled in the select list dated 07.11.2019, balance of convenience is in their favour. Further, the vacancies being filled up by promotion, there is no question of suffering of irreparable loss and injury by the writ petitioners if the interim order is vacated. Lastly, public employment being held up, that too in the post of Audit Officers, overwhelming public interest is in favour of vacating the interim order.

18. In view of the aforesaid facts and circumstances this Court is of the opinion that the applicants have been able to make out of case for vacating the *ex-parte* interim order dated 19.12.2019. Accordingly, the interim order dated 19.12.2019 stands vacated and the embargo to fill up the rest of the vacancies is lifted. However the part of the interim order that all



promotions would be subject to the outcome of the writ petition shall remain.

19. I.A accordingly disposed of.

Comparing Assistant

JUDGE