



GAHC010196212021

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

Case No. : WP(C)/6284/2021

LOHORI DAS
W/O SRI SANTOSH BHOWMIK, R/O VILL. RONGPUR PT-IV, P.O. RONGPUR
P.S. SILCHAR, DIST. CACHAR, ASSAM, PIN-788009

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
SECONDARY EDUCATION DEPTT. DISPUR, GUWAHATI-6

2:THE SECRETARY
TO THE GOVT. OF ASSAM
PERSONNEL (B) DEPTT. DISPUR
GUWAHATI-6

3:THE MISSION DIRECTOR CUM PROJECT DIRECTOR
RASHTRIYA MADHYAMIK SIKSHA ABHIJAN ASSAM
KAHILIPARA
GUWAHATI-19

4:THE MEMBER SECRETARY
TET EMPOWERED COMMITTEE FOR SECONDARY EDUCATION ASSAM
KAHILIPARA
GUWAHATI-19

5:THE DIRECTOR OF SECONDARY EDUCATION
ASSAM
KAHILIPARA
GUWAHATI-1

Advocate for the Petitioner : DR. B AHMED

Advocate for the Respondent : SC, SEC. EDU.

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

Date of Hearing : 29.04.2022

Date of Judgment : 29.04.2022

JUDGMENT AND ORDER (ORAL)

Heard Mr. N. Haque, the learned counsel for the petitioner and Mr. R. Mazumdar, the learned Standing Counsel, Secondary Education Department appearing on behalf of the respondent Nos. 1, 3, 4 & 5. Also heard Ms. D. D. Barman, the learned Additional Senior Government Advocate, Assam for the respondent No. 2.

2. The petitioner herein has filed the instant writ petition for setting aside and quashing the final select list, Secondary Education, pursuant to the advertisement No.GD-EST/Advertisement/1/2020/11 for Graduate Teacher (Arts) of Cachar District so far as it relates to Schedule Caste category which has already been published by the respondent authorities as well as for a direction that the respondents, particularly the respondent No. 5 to publish a fresh correct final select list of Graduate Teachers (Arts) in Cachar District under Schedule Caste category and appoint the petitioner by including her name on the basis of her securing higher marks than the selected one.

3. The case of the petitioner is that the petitioner had completed her B.A. degree in Arts in the year 1999, M.A. (Bengali) in the year 2001 and also obtained B.Ed degree in the year 2003 from the Assam University, Silchar. Being from the Schedule Caste category, the petitioner claims to be entitled to relaxation of age provided under the Constitution of India. The TET Empowered Committee for Secondary Education, Assam issued an advertisement No.RMSA/Special/TET/842/2017/80 dated 31.07.2017 for conducting special TET of High School Level Teachers stating the upper age limit

not above 43 years as on 01.01.2017 for Graduate Teachers. It was provided that there would be relaxation of upper age limit for SC, ST(P), ST(H) for another 5 years as per the Government of Assam's Office Memorandum No.ABP.06/2016/04, dated 03.03.2016. The petitioner submitted her application through online TET (Teacher Eligibility Test), 2017 bearing application No.17535190 (Bengali Medium). While the petitioner was waiting for the response to her application submitted in terms with the advertisement dated 31.07.2017, the Member Secretary, TET Empowered Committee for Secondary Education, Assam had issued another advertisement vide No.RMSA/Special/TET /842/ 2017/172 dated 13.11.2019 inviting applications from intending candidates for Graduate Teachers in Secondary Education, Assam for appearing in the Teacher Eligibility Test, medium-wise for Secondary Level in pursuance of earlier advertisement dated 31.07.2017. On the date of the advertisement, i.e. on 13.11.2019, a public notice was also issued by the Member Secretary, TET Empowered Committee, Secondary Education, Assam stating that the Medium TET for Secondary Level will be held on 02.12.2019.

4. The petitioner again applied/uploaded her application through online pursuant to the advertisement dated 13.11.2019 and her Application Number was 17535190 (Bengali Medium). The respondent authorities had conducted TET for Graduate Teachers on 19.01.2020 and the petitioner was allotted an Admit Card bearing Roll No.924010471 as well as Application No.17535190. Having appeared in the said TET, the petitioner successfully qualified in the TET for Graduate Teacher (Arts). The petitioner was issued a Mark Sheet-cum-Certificate on 23.07.2020 whereby it was shown that the petitioner secured 114 marks out of 200 marks.

5. Thereafter the Government of Assam, Personnel (B) Department had issued an Office Memorandum No.ABP.6/2016/51 dated 02.09.2020 by which the upper age limit was raised for entry into the State Government Services from 38 years to 40 years for Grade-III and Grade-IV posts. The Government had also decided to further raise the upper age limit by 5 years for general age limit, i.e. up to 45 years from existing 43

years for entry into the State Government Services in respect of candidates who belong to the Schedule Caste and Schedule Tribe and by 3 years, i.e. up to 43 years in respect to OBC/MOBC candidates.

6. The petitioner having qualified the TET for Graduate Teacher was waiting for being appointed as a Graduate Teacher in any Secondary School. However, on 11.09.2020, an advertisement was issued by the Director of Secondary Education, Assam, inviting online application from intending and eligible candidates for filling up of 5746 number of posts of Graduate Teachers (Science & Arts) in provincialised High/Higher Secondary Schools in Assam wherein the upper age limit was fixed at 40 years for unreserved category, 43 years for OBC/MOBC and 45 years for SC/ST (P)/HT(H) as on 1st of January, 2020. The petitioner submitted her application through online along with the required documents for Cachar District vide Application No.5006061.

7. The petitioner's further case is that after verification the petitioner's name was duly published in the District Level Compiled List for Preparation of the Merit list for the District Cachar. However, in the district-wise final selection list of the Secondary Education published for the Cachar District, the petitioner though secured 211.58 marks but her name was not included in the said list. On the other hand, a candidate by the name of Tuli Rani Das who Secured 210.933 marks in the same Schedule Caste category as of the petitioner was included in the select list. The petitioner, being aggrieved, has preferred the instant writ petition challenging the said final select list and for a direction to the respondents, more particularly the respondent No. 5, to publish a fresh correct final select list thereby including the name of the petitioner and thereupon to appoint the petitioner on the basis of her securing higher marks than the selected one.

8. It is the case of the petitioner that the petitioner had applied for appearing in the TET for Graduate Teachers in the Secondary Education, Assam in terms with the

advertisements dated 31.07.2017 and 13.09.2019 respectively and the petitioner was 41 years and 43 years respectively and she was eligible for any appointment under the Government of Assam as the upper age limit was modified. But the respondent authorities did not conduct TET for Graduate Teachers timely after issuance of the advertisement dated 31.07.2017 and ultimately the respondents conducted TET for Graduate Teachers on 19.01.2020 and after issuing another advertisement on 13.11.2019 in continuation of the earlier advertisement dated 31.07.2017. It is also relevant to mention that the Government of Assam, Personnel (B) Department had issued a corrigendum vide No.ABP.6/2016/52 dated 20.02.2021 whereby it was clarified that in the earlier Office Memorandum No.ABP.6/2016/51 dated 02.09.2020, the second sentence of Paragraph No. 3 "*This relaxation shall be applicable only to those candidates who have attained the necessary educational or other qualification prior to crossing of their existing age limit of 40 years*" shall be deleted from the said Office Memorandum.

9. The instant writ petition was filed on 18.11.2021 and this Court vide an order dated 13.12.2021 while issuing notice as an interim measure directed the respondent authorities not to fill up one post of Graduate Teacher in provincialised High School or Higher Secondary School in the Schedule Caste category, without prejudice to the employment advertisement, if any, which may have come prior to the date of the order dated 13.12.2021.

10. The respondent Secondary Education Department through its Director of Secondary Education filed *affidavit-in-opposition* wherein it was mentioned that the age limit adhered to the candidates was in terms with the Office Memorandum No.ABP.6/2016/61 dated 02.09.2020 which described the age limit for entering into the State Government Services as:-

- (i) 40 years for UR category;
- (ii) 42 years for Ex-Servicemen;

- (iii) 43 years for OBC category;
- (iv) 45 years for SC and ST category;
- (v) 50 years for Persons with Disabilities.

It was further mentioned that at Paragraph No.3 of the said Office Memorandum dated 02.09.2020 that *"There shall be no change in the procedure of recruitment or any relaxation of educational or other qualification or service conditions such as year or age of retirement etc. This relaxation shall be application to those candidates who have attained the necessary educational or other qualifications prior to crossing of the existing upper age limit of 40 years. The application of this O.M. will be limited to vacant posts for which advertisements are made on or after the date of the effect of the O.M."*

11. On the basis of the said Office Memorandum, the respondent Secondary Education Department stated that the conditions stipulated therein was strictly followed. It was mentioned that after going through the records it was seen that the date of birth of the petitioner who belongs to the SC category was 23.04.1975 and the petitioner acquired the TET after 40 years of her age and as such, the petitioner was not selected during the said selection process held in respect to the advertisement dated 11.09.2020. It was further mentioned that only on 20.02.2021, the sentence mentioned at Paragraph No. 3 of the Office Memorandum dated 02.09.2020, i.e., *"This relaxation shall be applicable only to those candidates who have attained necessary educational or other qualifications prior to crossing of their existing upper age limit of 40 years"* was omitted. It was, therefore, the stand of the respondent Secondary Education Department that the exercise of filling up of the vacant posts of the Graduate Teachers (Arts & Science) in response to the advertisement dated 11.09.2020 has been finalised when the Office Memorandum of Personnel (B) Department dated 02.09.2020 was in force and subsequently, appointment letters were issued on 05.02.2021, i.e., before issuance of the corrigendum No.ABP.6/2016/52 dated 20.02.2021 of the Government of Assam, Personnel (B)

Department.

12. I have heard the learned counsel for the petitioner as well as the respondent authorities and given my anxious consideration to the matter. Mr. N. Haque, the learned counsel for the petitioner submits that the rejection of the candidature of the petitioner on the ground of not obtaining TET qualification within the prescribed age limit is absolutely unreasonable, arbitrary and whimsical apart from being discriminatory. The learned counsel for the petitioner further submits that the petitioner has been treated as a different class though there seems to be without any object sought to be achieved by such classification and nexus. The learned counsel for the petitioner further submits that it is not a case where the TET qualification was acquired after the recruitment process had started, and in fact, the petitioner had acquired TET qualification much prior to the date of advertisement. The learned counsel for the petitioner further drawing the instance of one Tuli Rani Das submitted that in view of the actions of the respondent authorities, less meritorious candidates have been given the benefit of appointment by ignoring the claims of the petitioner. The learned counsel for the petitioner, therefore, submits that the rejection of the case of the petitioner on such trivial grounds is required to be interfered with and the respondents should be directed to appoint the petitioner as a Graduate Teacher. The learned counsel for the petitioner further submits that by an order passed on 13.12.2021, this Court, in interim, had directed the respondent authorities not to fill up one post of Graduate Teacher in the provincialised High School or Higher Secondary School in the SC category. The learned counsel for the petitioner further submitted that the corrigendum dated 20.02.2020 where the very basis on which the petitioner's case was rejected was deleted from the Office Memorandum dated 02.09.2020 by the corrigendum No.ABP.6/2016/52 dated 20.02.2021 and as such in view of such issuance of the said corrigendum, the respondent authorities cannot reject the case of the petitioner as the very basis on which the rejection was made had ceased to exist. The learned counsel for the petitioner further submitted that this

Court had already taken into consideration a similar matter and by a judgment and order dated 09.11.2021 passed in WP(C) No. 345/2021 and other writ petitions had held that the TET qualification acquired by the petitioners therein prior to the recruitment process has to be construed to be meeting the eligibility criteria, and therefore, had set aside the rejection of the petitioners therein in the recruitment process. It was further directed by the said judgment and order that the cases of the petitioners therein for appointment as Graduate Teachers as per the advertisement dated 11.09.2020 shall be duly considered and based upon their positions in the merit list be offered expeditiously and in any case within an outer limit of 45 days from the date of the said judgment.

13. Mr. R. Mazumdar, the learned Standing Counsel, Secondary Education Department submits that it is the settled position of law that to get the benefit of appointment, an intending candidate is required to be eligible as on the date of initiation of the recruitment process and the process in the instant case was initiated by the date of advertisement, i.e., on 11.06.2020. The learned Standing Counsel, therefore, submits that even taking the ultimate date of submission of the application form as per the advertisement, the petitioner would not be eligible as admittedly the TET qualification was acquired after the prescribed age. The learned Standing Counsel further submits that the corrigendum dated 20.02.2021 would have prospective effect only and cannot be given a retrospective effect. The learned Standing Counsel further submits that the judgment passed by this Court dated 09.11.2021 in WP(C) No. 345/2021 and others, cannot be applied to the facts of the instant case as the petitioners therein had approached this Court prior to the issuance of the various appointment letters.

14. Let this Court first take into consideration the Office Memorandum dated 02.09.2020 whereby the Principal Secretary to the Government of Assam, Personnel (B) Department has raised the upper age limit for entry into the State Government services for Grade-III and Grade-IV posts. A perusal of the said Office Memorandum

shows that the Government had decided to further raise the upper age limit for entry into the State Government services from 38 years to 40 years for Grade-III and Grade-IV posts. It has also been mentioned that the Government had decided to further raise the upper age limit by 5 years over the general age limit, i.e. up to 45 years from the existing 43 years for entry into the State Government services in respect of candidates who belong to the Schedule Caste and Schedule Tribe and by 3 years, i.e., up to 43 years in respect to OBC/MOBC candidates and 2 years, i.e., up to 42 years in respect to Ex-Serviceman and 10 years, i.e., up to 50 years in respect of persons with disabilities. However, in the said Office Memorandum in Clause No. 3 it has been mentioned that the relaxation shall be applicable only to those candidates who have attained the necessary educational or other qualifications prior to crossing of their existing upper age limit of 40 years. There seems to be no justification of limiting the upper age limit of 40 years in respect to Schedule Caste and Schedule Tribe candidates whose upper age limit have been extended to 45 years or for OBC/MOBC candidates whose upper age limit has been extended to 43 years. Same is also the case as regards Ex-Serviceman whose upper age limit has been raised to 42 years as well as for persons with disabilities whose upper age limit has been fixed at 50 years. It seems that there was an inadvertent mistake committed by the Government in limiting the existing upper age limit of 40 years for obtaining the educational or other qualifications in the Office Memorandum dated 02.09.2020. Therefore, vide the corrigendum dated 20.02.2021 was issued whereby the sentence "*This relaxation shall be applicable only to those candidates who have attained necessary educational or other qualifications prior to crossing of their existing upper age limit of 40 years*" was omitted from the Office Memorandum dated 02.09.2020.

15. Now the question which arises is as to whether the said Corrigendum was clarificatory in nature. No doubt a perusal of the Corrigendum dated 20.02.2021 shows that the words used therein were "*it is clarified that the second sentence of paragraph 3 (three) 'This relaxation shall be applicable only to those candidates who*

have attained necessary educational or other qualifications prior to crossing of their existing upper age limit of 40 years' shall be deleted from the Office Memorandum" but can this Court on the basis thereof hold that the Corrigendum dated 20.02.2021 was clarificatory. The answer to the same can be found in the judgment of the Supreme Court in the case of **Gelus Ram Sahu & Ors vs. Dr. Surendra Kumar Singh & Ors** reported in **(2020) 4 SCC 484** wherein the Supreme Court had in paragraph Nos. 24 to 26 dealt with when a legislation or Notifications can be said to be clarificatory. Paragraph Nos. 24 to 26 are reproduced below:

"24. "Clarificatory" legislations are an exception to the general rule of presuming prospective application of laws, unless given retrospective effect either expressly or by necessary implication. In order to attract this exception, mere mention in the title or in any provision that the legislation is "clarificatory" would not suffice. Instead, it must substantively be proved that the law was in fact "clarificatory", as noted by this Court in Virtual Soft Systems Ltd. v. CIT : (SCC pp. 687-88, paras 50-51)

"50. It may be noted that the amendment made to Section 271 by the Finance Act, 2002 only stated that the amended provision would come into force with effect from 1-4-2003. The statute nowhere stated that the said amendment was either clarificatory or declaratory. On the contrary, the statute stated that the said amendment would come into effect on 1-4-2003 and therefore, would apply only to future periods and not to any period prior to 1-4-2003 or to any assessment year prior to Assessment Year 2004-2005. It is the well-settled legal position that an amendment can be considered to be declaratory and clarificatory only if the statute itself expressly and unequivocally states that it is a declaratory and clarificatory provision. If there is no such clear statement in the statute itself, the amendment will not be considered to be merely declaratory or clarificatory.

51. Even if the statute does contain a statement to the effect that the amendment is declaratory or clarificatory, that is not

the end of the matter. The Court will not regard itself as being bound by the said statement made in the statute but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods.”

(emphasis supplied)

25. The present case is one where except for the title, nothing contained therein indicates that the 2016 AICTE Notification was clarificatory in nature. The said Notification is framed in a question-answer style and merely restates what has already been made explicit in the 2010 AICTE Regulations. There seems to be no intent to alter the position of law but instead only to simplify what the AICTE had resolved through its original regulation. The 2016 AICTE Notification is a response to the doubts put forth to AICTE by the public. This is evident from the stand put forth by AICTE before us in its reply as well as during the course of hearing, namely, that there is no retrospective alteration in the qualification prescribed for the post of Principal.

26. Even if the 2016 AICTE Notification was clarificatory, it must be demonstrated that there was an ambiguity in the criteria for appointment to the posts of Principal, which needed to be remedied. Clarificatory notifications are distinct from amendatory notifications, and the former ought not to be a surreptitious tool of achieving the ends of the latter. If there exists no ambiguity, there arises no question of making use of a clarificatory notification. Hence, in the absence of any omission in the 2010 AICTE Regulations, the 2016 AICTE Notification despite being generally clarificatory must be held to have reiterated the existing position of law.”

16. A perusal of the observation of the Supreme Court would show that in order to be a clarificatory notification, mere mention in the title or in any provision that it is clarificatory would not suffice. Instead it has to be proved that the law or the Notification was clarificatory. If the Notification is issued to remove an ambiguity, then the said Notification would be regarded as clarificatory.

17. This Court further finds it relevant to take into consideration the judgment of the Supreme Court rendered in the case of *WPIL Ltd., Ghaziabad vs. Commissioner of Central Excise, Meerut, U.P.*, reported in (2005) 3 SCC 73 wherein in Paragraph 15 of the said judgment the Supreme Court observed that the clarificatory notification would take into effect retrospectively as the said notification clarifies the position and makes explicit what was implicit. Paragraph No. 15 of the said judgment is quoted herein below:

"15. The learned counsel for the appellant is also right in relying upon a decision of this Court in CCE vs. Wood Craft Products Ltd. In that case, this Court held that a clarificatory notification would take effect retrospectively. Such a notification merely clarifies the position and makes explicit what was implicit. Clarificatory notifications have been issued to end the dispute between the parties."

18. A perusal of the said judgment would show that the Supreme Court had by taking into consideration that the Government in that case was satisfied about its policy which was in vogue not to impose excise duty on part of power driven pumps used in the factory premises for manufacture of power driven pumps and to clarify the position had issued notification and held that said notification to clarificatory and passed the above quoted observations.

19. In the instant case, it would be seen that the Office Memorandum dated 02.09.2020 had categorically raised the upper Age limit for entry into the State Government services for Grade-III and IV posts. In that respect raised the upper limit for general categories from 38 to 40 years; for SC & ST from 43 years to 45 years; for OBC/MOBC from 40 years to 43 years; for Ex-servicemen from 40 years to 42 years and for persons with disabilities from 40 years to 50 years. This was the policy in vogue. However, in the Office Memorandum dated 02.09.2020, the Government limited the applicability of the said policy by restricting the candidates who obtained the qualification within 40 years. There was an apparent mistake committed by the



Government as already held hereinabove for which an ambiguity arose. Under such circumstances, the Government issued the Corrigendum to remove the mistake as well as the ambiguity. It is therefore in the opinion of this Court the Corrigendum is clarificatory in nature thereby clarifying the position and makes explicit what was implicit.

20. In view of the above observations as the petitioner had the qualification of TET prior to the advertisement dated 11.09.2020, the petitioner was eligible to be considered for appointment in terms with the score obtained in the TET Examination.

21. Accordingly, this Court is of the opinion that the petitioner has been able to make out a case for interference in exercise of the power under Article 226 of the Constitution of India. It is accordingly held that the TET qualification acquired by the petitioner, prior to the recruitment process, has to be construed to be meeting the eligibility criteria, and therefore, while the rejection of the petitioner in the recruitment process is set aside, the case of the petitioner for appointment as a Graduate Teacher as per the advertisement dated 11.09.2020 shall be duly considered based upon her position in the merit list be offered expeditiously and in any case within an outer limit of 45 days from the date a certified copy of the instant judgment is submitted to the respondent No. 5, i.e. the Director of Secondary Education, Assam, Kahilipara, Guwahati.

22. With the above observation, the instant writ petition stands disposed of.

JUDGE

Comparing Assistant