GAHC010169602016



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

Case No.: WP(C) 1690/2016

1:SMT. MITALEE CHOUDHURY D/O SRI NRIPENDRA KR. CHOUDHURY R/O VILL- KALLAPARA, P.O. MONIARI TINIALI P.S. PALASHBARI, DIST. KAMURP RURAL, PIN - 781125.

VERSUS

1:THE STATE OF ASSAM AND 4 ORS REP. BY THE COMMISSIONER AND SECRETARY, HEALTH and FAMILY WELFARE, GOVT. OF ASSAM, DISPUR, GUWAHATI-6.

2:THE PRINCIPAL GUWAHATI MEDICAL COLLEGE HOSPITAL BHANGAGARH GUWAHATI-5.

3:THE SUPERINTENDENT GUWAHATI MEDICL COLLEGE HOSPITAL BHANGAGARH GUWAHATI-5.

4:THE SELECTION COMMITTEE
HEADED BY THE SUPERINTENDENT
GMCH
BHANGAGARH
GUWAHATI-5.

5:SMTI. ANINDITA ADHIKARY D/O SRI CHANDAN ADHIKARY R/O WIRELESS BASISTHAPUR LANE NO. 1 HOUSE NO. 53 GUWAHATI-06 ASSAM **Advocate for the Petitioner** : MR.D DAS

Advocate for the Respondent: MR.R SINGHAR-5

BEFORE HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

29.04.2019

Heard Mr. R. Chakraborty, learned counsel for the petitioner. Also heard Mr. B. Gogoi, learned Standing Counsel for the Health Department, respondent Nos. 1 to 4 and Mr. R. Singha, learned counsel appearing for the private respondent No.5.

- 2. The selection of the private respondent No.5 in the Grade-III post of Optometrist in the Guwahati Medical College Hospital vide notice published in the newspaper on 01.03.2016 is the subject matter of challenge in the present writ petition filed under Article 226 of the Constitution of India.
- 3. In the writ petition, it is projected that on 20.10.2015, an advertisement was issued in the newspapers inviting applications for filling up various posts in Guwahati Medical College Hospital (GMCH), which included the post of Optometrist in serial No.13 thereof. The petitioner had applied for the said post and the names of short listed candidates was published in the newspapers on 20.02.2016. The interview for the recruitment of Optometrist was held on 23.02.2016. Thereafter, the final select list was published in the newspapers on 01.03.2016, which is impugned herein.
- 4. The learned counsel for the petitioner has submitted that at the time of selection, the petitioner had 15 years of working experience with her. He has submitted that at the time moving the writ petition, the petitioner was not aware of the anomalies in the selection process, which came to light only from the RTI reply received from the authority, which was hitherto not known to the petitioner. By referring to the order under Memo No. HLB.113/2016/2 dated 24.02.2016 issued by the Joint Secretary to the Government of Assam Health and Family Welfare Department, it is submitted that by the said order, one Biman Dutta, Deputy Secretary to the Government of Assam, Health and Family

Welfare Department was deputed as the Government Official for conducting the interview for selection of candidates for various Grade-III posts in GMCH, Guwahati with effect from 23.02.2016 to 26.02.2016. By referring to the compilation of marks of interview held for the post of Optometrist on 23.02.2016, it is submitted that the person who was appointed as Govt. Official on 24.02.2016, is found to have signed the said comparative statement of marks on 23.02.2016, which was held prior to the date of his appointment. It is submitted that the said documents was received by way of RTI application by the petitioner after institution of this writ petition for which statements in connection with such documents could not have been made in the writ petition. It is further submitted that the present vacancy arose in the financial year 2014-15 and, as such, as per the documents annexed to the affidavit-in-opposition filed by the respondent No.3 on 22.02.2017, the Government approval for filling up the vacant sanctioned post was only valid up to 30.06.2010, which has lapsed in course of the selection process. The further ground for challenging the appointment of the private respondent No. 5 is that the authorities had skipped the written test and, as such, the selection process was completed solely based on the result of the oral interview and accordingly, it is submitted that the authorities had digressed from the selection procedure and resultantly, the respondent No.5 who had lesser work experience was selected on a pick and choose basis. By referring to the case of Sethi Auto Service Station and Ors. Vs. Delhi Development Authority, (2009) 1 SCC 180 and Shanti Sports Club and Ors. Vs. Union of India and Ors, (2009) 15 SCC 705, the learned counsel for the petitioner submits that the file notings in a departmental file do not have the sanction of law to be an effective order and accordingly, it is submitted that as the order of appointment of the Govt. Official as an independent interview board member was made on 24.02.2016, his participation in the interview held on 23.02.2016 had vitiated the entire selection process. Hence, the learned counsel for the petitioner prays for allowing the writ petition in terms of the prayer made therein.

5. The learned Standing Counsel for the Health Department has produced the original file bearing No. HLB.113/2016 from the Health and Family Welfare (B) Department in respect of deputation of a Govt. Officer for conducting the interview for selection of candidates for filling up Grade-III post in GMCH. He has submitted that the proposal for deputing such officer was put up on 19.02.2016 and the Commissioner and Secretary to the Government of Assam, Health and Welfare Department had given his approval on 20.02.2016 and accordingly, there was no impediment for the person appointed, who was the Deputy Secretary in the same department to participate in the selection process for conducting the interview on 23.02.2016. He has further submitted that in so far as the approval by the Finance (SIU) Department is concerned for filling up vacant sanction post, it is submitted that by

order No. FSI. 5/2005/Pt. II/39 dated 02.05.2017, the approval were extended up to 31.03.2018 by the Commissioner and Secretary to the Government of Assam, Finance Department and, as such, it is submitted that there was no infirmity in the selection that was carried out on 23.02.2016, which had culminated in the declaration of the result on 01.03.2016. He has further submitted that the petitioner had participated in the selection process and, as such, it was not open for the petitioner to challenge the selection process thereafter. He has further submitted that on merit, the private respondent No.5 had secured the highest marks and therefore, the private respondent No.5 was selected.

- 6. The learned Standing Counsel for the Health Department has also referred to the notification under Memo No. DME/97/2012/Pt./498-521 dated 31.01.2015 issued by the Director of Medical Education, Assam, permitting the written test to be held where applications are more than 100 followed by oral interview and, as such, it is submitted that the present case in hand, only 16 candidates had participated for the process of selection to the post of Optometrist, GMCH on 23.02.2016 and as such, there was no necessity to have a written test prior to holding of the selection by way of interview.
- 7. The learned counsel for the private respondent No.5 has supported the submissions made by the learned State counsel. He has submitted that in Clause-4 of the employment advertisement published on 20.10.2015, it was clearly indicated that the authority would decide for holding the written test for the post in addition to interview depending upon the number of candidates as per rules. Accordingly, it is submitted that in terms of the hereinbefore referred notification dated 13.01.2015, as the total candidates for the post of Optometrist were less than 100, there was no infirmity at all in the selection process. It is also submitted that having participated in the selection process, as no objection was raised either on the date of interview on 23.02.2016, or prior to the date of declaration of result. Hence, it is submitted that in view of the ratio laid down in the case of *Amlan Jyoti Borooah Vs. State of Assam and Ors., (2009) 3 SCC 227*, it was not open to the petitioner to challenge the selection process.
- 8. Having heard the submissions made by the learned counsel for all sides, materials available on record including the original records produced by the State counsel have been perused. It is seen that the Deputy Secretary to the Government of Assam, Health and Welfare Department, namely, Biman

Dutta was appointed as the Government Official for conducting interview for selection of Grade-III posts in GMCH with effect from 23.02.2016 to 26.02.2016 on 24.02.2016. However, the records produced reveals that the concerned file was moved on 19.02.2016 and the note was put up before the Commissioner and Secretary, Health and Welfare Department on 19.02.2016 and that subsequently the deputation of the concerned official was approved by the Commissioner and Secretary, Health and Welfare Department on 20.02.2016. Thereafter, the file was moved on 24.02.2016 for preparing a draft for approval and the formal order was issued on 24.02.2016 itself. It is not in dispute that the interview for the post of Optometrist was conducted on 23.02.2016 and the Government Official concerned, though formally appointed on 24.02.2016 is seen to have participated in the selection process on 23.02.2016. In the considered opinion of this Court, unless there was some sort of communication from the Health and Family Welfare Department to the Superintendent, GMCH, the said specific Government official would not have been permitted to be a part of the interview board. Accordingly, when the approval of appointment of the Government official on deputation for the interview was recorded on 20.02.2016, a post facto order on 24.02.2016 must be read to have rendered the interview held on 23.02.2016 to be valid. Moreover, this Court is enable to treat the presence of the particular Government Official in the interview held on 23.02.2016 to have vitiated the selection process because the post facto order issued on 24.02.2016 appointing the said Official from 23.02.2016 is not the subject matter of challenge in the present writ petition. Hence, in this case there is no material on record to show that any prejudice was caused to the petitioner by the presence of the said particular Government Official in the selection process on 23.02.2016. This Court does not find the selection process to be vitiated merely because formal appointment letter issued on 24.02.2016 whereas the interview was conducted on 23.02.2016, as the post facto order of appointment would be deemed to have ratified the presence of the said member in the Interview Board for selection held on 23.02.2016.

9. In the case of *Sethi Auto Service Station (supra)*, the appellant therein had invoked the doctrine of legitimate expectation based on the file notings for re-location of two petrol pumps due to construction of flyover and that despite notings, no official communication was addressed to or was received by the appellants for accepting their claim for re-location. Under such circumstances, the Apex Court had held that mere notings in the file would culminate into a legitimate order only after such notings get the approval and the final order is communicated to the person concerned. In the case *Shanti Sports Club (supra)*, there existed file notings for withdrawal of a particular land from acquisition and it is in that context that Apex Court had held that a noting recorded in the file is

merely a noting simpliciter and nothing more it merely means the opinion of the particular individual, which cannot be treated as the decision of the Government. It was also observed that the noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, and authenticated in the manner provided in Article 77 (2) or Article 166 (2) and it was further held that the Court cannot take cognizance of the earlier notings or decision for exercise of the power of judicial review. However, in the present case in hand, the file noting of granting approval of appointment of Biman Dutta as the Government Official for the interview, was subsequently ratified by a formal order dated 24.02.2016, as such, the citations referred by the learned counsel for the petitioner does appear to help the petitioner in any manner.

- 10. In so far as the issue of lapse of the official approval as raised by the learned counsel for the petitioner is concerned, the said issue is not required to be gone into notwithstanding the order dated 02.05.2017 by which approval of the Finance (SIU) Department were extended till 31.03.2018, because if the appointments were made *de hors* the approval, it would be open to the Finance Department to deal with the matter if any appointments were made without their approval. The non-extension of approval on the date of selection is not the subject matter of the present writ petition. In so far as the issue raised by the learned counsel for the petitioner is concerned relating to challenge of the selection process on ground of lack of experience of the private respondent No. 5 is concerned, it is seen from the comparative statements of marks given to the candidates by the Interview Board which is referred hereinbefore that the private respondent No.5 was placed at serial No. 1 on the basis of marks obtained. While the petitioner had secured 29 marks, the private respondent No.5 had secured 33 marks.
- 11. Having seen that the selection committee constituted of (i) the Director and Head of the Department Regional Institute of Ophthalmology, GMCH as Chairman, (ii) the then Deputy Superintendent, GMCH as Member Secretary, (iii) Assistant Professor, GMCH as Member, and (iv) one independent Government official as the member of the selection team, it appears to this Court that all the members of the selection committee had the expertise required for selection of the Optometrist. As the constitution of the Selection Committee is the subject matter of challenge in the present writ petition, accordingly, this Court would not venture for examining the correctness of the evaluation by the experts and substitute its own view over the evaluation done by the experts.

- 12. This leads to the last issued raised as to whether the selection process was vitiated for not holding a written examination. In this regard, it is seen that in the employment advertisement appearing in the newspaper on 20.10.2015, the authorities had duly notified that it had retained the liberty of deciding whether to hold a written test in addition to interview depending upon the number of candidates as per law. The learned State counsel has been able to demonstrate from the order under Memo dated 13.01.2015 that written test was to be conducted where there are applications more than 100 and in the present case when only 16 candidates had applied for appointment to the post of Optometrist, it cannot be said that the authorities had arbitrarily digressed from the selection process by not holding the written test.
- 13. Moreover, having participated in the selection process of interview, the petitioner had not lodged any complaint on 23.02.2016 or before 01.03.2016 when the results of the selection process was declared. Therefore, it was not open to the petitioner to challenge the selection process after declaration of result.
- 14. In view of the ratio laid in the case of *Amlan Jyoti Borooah (supra*) the challenge to the selection process by the petitioner is not found to be tenable.
- 15. Accordingly, in light of the discussions above, this Court finds no reasons to interfere with the selection process or with the appointment of private respondent No.5.
- 16. Accordingly, this writ petition stands dismissed. No order as to costs.
- 17. The records produced by Mr. B. Gogoi, learned Standing Counsel for the Health Department is returned.

JUDGE