

GAHC010003882023



2024:GAU-AS:10770

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

Case No. : WP(C)/153/2023

DHRUBA KUMAR NATH AND ANR.
S/O- DINABANDHU NATH,
R/O- WARD NO. 14, COLLEGE ROAD,
NEAR B.N. COLLEGE,
P.S.- DHUBRI,
DISTRICT- DHUBRI,
ASSAM- 783301.

2: TAPAN CHANDRA NATH
S/O- AMULYA CHANDRA NATH
R/O- VILL. AND P.O.- KHALILPUR
DISTRICT- DHUBRI
ASSAM- 783325

VERSUS

THE STATE OF ASSAM AND 2 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM,
HIGHER EDUCATION DEPARTMENT,
DISPUR, GUWAHATI- 781006,
ASSAM.

2:AS PER HON'BLE COURT ORDER DATED 05.06.2023
RESPONDENT NO.2 IS DELETED.
ASSAM.

3:THE PRINCIPAL
B.N. COLLEGE
DHUBRI
WARD NO. 15

P.O.- BIDYAPUR
DISTRICT- DHUBRI

ASSAM- 783324.

4:THE GOVERNING BODY OF B.N. COLLEGE
DHUBRI
REPRESENTED BY ITS SECRETARY CUM PRINCIPAL
B.N. COLLEGE
DHUBRI
ASSAM

Advocate for the Petitioner : MR. U K NAIR, MR B PRASAD (P-1),MR D KALITA,MR. M P SHARMA

Advocate for the Respondent : SC, HIGHER EDU, FOR CAVEATOR,MR D MAHANTA

Linked Case : **WP(C)/3029/2023**

DHRUBA KUMAR NATH
S/O DINABANDHU NATH
R/O WARD NO. 14
COLLEGE ROAD
NEAR B.N. COLLEGE
P.S.-DHUBRI
DIST-DHUBRI
ASSAM-783301

VERSUS

THE STATE OF ASSAM AND 8 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM
HIGHER EDUCATION DEPARTMENT
DISPUR
GUWAHATI-781006
ASSAM

2:THE DIRECTOR
HIGHER EDUCATION
ASSAM
KAHILIPARA
GUWAHATI-19
ASSAM

3:THE PRINCIPAL

B.N. COLLEGE
DHUBRI
WARD NO. 15
P.O.-BIDYAPUR
DIST- DHUBRI
ASSAM-783324

4:THE GOVERNING BODY OF B.N. COLLEGE
DHUBRI
REPRESENTED BY ITS SECRETARY CUM PRINCIPAL
B.N. COLLEGE
DHUBRI
ASSAM

5:MANASH DAS
C/O THE PRINCIPAL
B.N. COLLEGE
DHUBRI
WARD NO. 15
P.O.-BIDYAPUR DISTRICT DHUBRI
ASSAM-783324

6:PAYEL PAUL
C/O THE PRINCIPAL
B.N. COLLEGE
DHUBRI
WARD NO. 15
P.O.-BIDYAPUR DISTRICT DHUBRI
ASSAM-783324

7:NITISH KUMAR GHOSH
C/O THE PRINCIPAL
B.N. COLLEGE
DHUBRI
WARD NO. 15
P.O.-BIDYAPUR DISTRICT DHUBRI
ASSAM-783324

8:DEVAJYOTI PRODHANI
C/O THE PRINCIPAL
B.N. COLLEGE
DHUBRI
WARD NO. 15
P.O.-BIDYAPUR DISTRICT DHUBRI
ASSAM-783324

9:JESHMIN BEGUM
C/O THE PRINCIPAL

B.N. COLLEGE
DHUBRI
WARD NO. 15
P.O.-BIDYAPUR DISTRICT DHUBRI
ASSAM-783324

Advocate for : MR. U K NAIR
Advocate for : SC
HIGHER EDU appearing for THE STATE OF ASSAM AND 8 ORS.

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocate for the petitioner : Shri B. Prasad, Advocate.

Advocate for the respondents : Shri S. Bhuyan, learned SC, Education (Higher) Deptt,
Shri D. Mahanta (R-3 & 4), Shri M. Ahmed (R-5 to 9).

Date of hearing : **04.11.2024**

Date of Judgment : **06.11.2024**

JUDGMENT & ORDER

Both these petitions being connected were heard analogously and are being disposed of by this common judgment and order. The subject matter pertains to challenge to a selection process for Grade-IV post in the B. N. College, Dhubri (hereinafter College).

2. Before going to the issue which has arisen for a determination it would be convenient if the facts of the cases are narrated in brief. It may however be mentioned that initially the two petitioners had filed the present two writ petitions. Shri B. Prasad, the learned Counsel for the petitioners, at the outset has however clarified that though the petitions were filed by 2 nos. of petitioners, the petitioner no. 2 had withdrawn from the writ petitions and there are specific orders in this regard dated 05.06.2023 in WP(C)/153/2023 and

26.05.2023 in WP(C)/3029/2023.

3. As per the facts projected, an advertisement was issued on 22.11.2022 for recruitment of various posts including 7 (seven) numbers of posts of Grade-IV in the aforesaid College. The petitioner no. 1 belongs to the OBC category and claims to have possessed all the eligibility criteria for such selection and has been working as a Grade-IV in the aforesaid College since 01.12.2006. Pertaining to the aforesaid selection, guidelines were issued by the College which were in compliance with the Government Notification dated 28.07.2022, as per which, there was a direction to follow the earlier Notification dated 30.01.2009 prescribing the minimum qualification for Grade-IV as Class-VIII passed. It is the case of the petitioner no. 1 that though he was praying for regularization of his service and was also assured that due weightage would be given, the grievance is with regard to the inaction of the authorities in giving due weightage to him in the selection process. It is submitted that the selection consisted of a written examination followed by *viva voce* which was concluded on 30.12.2022.

4. On such conclusion, the petitioners came to know that no weightage was given and accordingly the first writ petition was filed on 05.01.2023 which was registered as WP(C)/153/2023. In the aforesaid writ petition, an order was passed on 09.01.2023 directing not to finalize the selection till the next date fixed i.e. 18.01.2023. It has been submitted that however, the case was not listed and in May, 2023, the petitioners could come to know that the selection was already completed and appointments were made. Accordingly, the second writ petition was filed being WP(C)/3029/2023 challenging such appointments and the appointed candidates were arrayed as the private respondent nos. 5 to

9.

5. I have heard Shri B. Prasad, learned counsel for the petitioners. I have also heard Shri S. Bhuyan, learned Standing Counsel, Higher Education Department, Shri D. Mahanta, learned counsel for the respondent nos. 3 & 4 and Shri M. Ahmed, learned counsel for the private respondent nos. 5 to 9.

6. Shri Prasad, the learned counsel for the petitioners has submitted that though there was a clear assurance from the College to give weightage to the petitioners in the selection, such weightage was not given. He has submitted that the College, on the other hand, in its affidavit-in-opposition has taken a stand that no assurance was given to the petitioners on the aspect of weightage for past services. At the same time, the Director of Higher Education in his affidavit has submitted that there is no scope for regularization of the services of an *ad hoc* employee.

7. The learned counsel for the petitioners has submitted that in view of the long period of services rendered by the petitioner no. 1, the authorities could have taken a decision to regularize his service. He alternatively submits that even in case the petitioners were made to face a selection which they had actually done, due weightage ought to have been given for the experience gained by them by working in the same category for a long period of time. In this regard, he has drawn the attention of this Court to the pleadings made in paragraph 6 of the writ petition wherein the aspect of assurance regarding weightage has been clearly mentioned. He has submitted that the College authorities in the affidavit-in-opposition filed on 04.06.2024 did not specifically deny the said pleadings and therefore this Court may pass appropriate direction in that regard. He has clarified that even as of today, the services of the

petitioner no. 1 are being utilized by the College as a Grade-IV employee.

8. The learned counsel for the petitioner in support of his submission, has relied upon the case of ***Sachivalaya Dainik Vetal Bhogi Karamchari Union, Jaipur Vs State of Rajasthan & Ors.*** reported in **(2017) 11 SCC 421**. In the said case, it is submitted that the principles laid down in the case of ***Secretary, State of Karnataka and Ors. Vs. Uma Devi (3) & Ors*** reported in **(2006) 4 SCC 1** was held to be not applicable. He has submitted that even in the case of ***Uma Devi (3)*** (supra), the aspect of weightage has also been taken into consideration for employees who have been working for long. In this regard, he has placed reliance upon paragraph 55 of the said case, the relevant portion being extracted below:

“55. ... But when regular recruitment is undertaken, the respondents in CAs Nos. 3595-612 and those in the Commercial Taxes Department similarly situated, will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for their having been engaged for work in the Department for a significant period of time. That would be the extent of the exercise of power by this Court under Article 142 of the Constitution to do justice to them.”

9. *Per contra*, Shri D. Mahanta, the learned counsel for the respondent nos. 3 & 4-the College Authorities, has submitted that the aspect of regularization of service has to be examined from the point of view of the principles laid down in the case of ***Uma Devi (3)*** (supra). It is submitted that the selection was conducted strictly in accordance with law in which the petitioners had participated and having failed in the same had instituted the present challenge. He, however, clarifies that even as on today, the petitioner no. 1 is serving as a contractual employee. He has also informed that the petitioner no. 2 was one of the beneficiaries in the selection process and has been appointed.

10. Shri S. Bhuyan, the learned Standing Counsel in the Education Department, has submitted that the rules governing the field, more particularly the ***Assam College Employees Provincialization Rules, 2010***, do not provide for giving any preference in selection process on the aspect of weightage to serving employees. He has also submitted that though initially the writ petitions were instituted by 2 nos. of petitioners, the petitioner no. 2 was found to be selected and therefore, he had withdrawn his challenge. He submits that the aforesaid fact would make it clear that the selection was held in a fair and transparent manner wherein the petitioner no. 2 himself had got the benefit.

11. Shri M. Ahmed, representing the respondent nos. 5 to 9 has submitted that the writ petition lacks merits and is liable to be dismissed. It is submitted that the advertisement was published on 22.11.2022 in which there was no provision for giving weightage to in-house candidates and such advertisement was not put to challenge regarding absence of such provision. On the other hand, the petitioners had participated in the recruitment process without any protest and are therefore estopped from challenging the same. He further submits that from the materials on record, it would be discernible that the initial appointment of the petitioner no. 1 on 01.12.2006 was made by the Principal of the College whereas the appointing authority is the Director of Higher Education and such appointment was made without any jurisdiction and therefore, the petitioner no. 1 is not entitled to any benefits from the same. He has also submitted that in the affidavit-in-opposition filed by the Director of Higher Education, it has been clarified that the petitioner no. 1 was initially appointed in a non-existent post.

12. In support of his submission, the learned counsel for the respondent nos. 5 to 7 has relied upon the following decisions:-

- i. *The State of Uttar Pradesh Vs Karunesh Kumar & Ors. reported in 2023 0 AIR (SC) 52.***
- ii. *Karnati Ravi & Anr Vs Commissioner, Survey Settlements and Land Records and Ors. reported in (2018) 12 SCC 635.***
- iii. *Taniya Malik Vs Registrar General of the High Court of Delhi reported in (2018) 14 SCC 129.***
- iv. *Hage Lampu Vs Gauhati High Court & Ors. reported in 2023 (4) GLT 164.***
- v. *Mrinal Baishya (Dr.) Vs State of Assam & Ors reported in 2019 (4) GLT 865.***

13. In the case of ***Karunesh*** (supra) the principles of restrictions and limitations of a candidate participating in a selection process to choose to challenge the same has been laid down. It has been laid down that such candidate is estopped and has acquiesced himself from questioning the same. The aspect of approbation and reprobation has also been discussed by the Hon'ble Supreme Court in respect of such candidates.

14. In the case of ***Karnati Ravi*** (supra) it has been laid down that a candidate who had participated in the selection without any objection cannot challenge the procedure. In the case of ***Taniya Malik*** (supra) the Hon'ble Supreme Court by relying upon an earlier case of ***K. H. Siraj Vs High Court of Kerala & Ors.*** reported in **(2006) 6 SCC 395** has reiterated the restrictions

and limitations regarding challenge by an unsuccessful candidate.

15. In the case of ***Hage Lampu*** (supra) a Division Bench of this Court has laid down as follows:-

“33. We are of the view that petitioner though being cognizant of the conditions incorporated in the advertisement dt. 17.07.2015 fixing minimum marks for viva-voce, participated therein and failed. Thus, keeping in view the ratio of the Hon’ble Supreme Court judgment in the case of Taniya Malik (paragraph No.21 highlighted above), there is no doubt in the mind of the Court that the petitioner is estopped from challenging the condition of minimum marks in the interview...”

16. In the case of ***Mrinal Baishya*** (supra) the said principles has been reiterated by this Court by laying down that after participating in a selection process a candidate cannot challenge the criteria with regard to the educational qualification.

17. The rival submissions have been duly considered and the materials placed before this Court have been carefully perused.

18. To appreciate the issue involved, it would be beneficial if the relief sought for, more specifically in the subsequent WP(C)/3029/2023 is examined which accordingly is extracted herein below.

“ In the premises aforesaid, it is most respectfully prayed that Your Lordship would be pleased to admit this petition and issue Rule calling upon the respondents to show cause as to why the selection and appointment in Grade - IV posts of the College pursuant to advertisement dated 22.11.2022 shall not be set aside and quashed and why a direction shall not be issued to the Respondent Authorities to hold the selection process afresh framing proper guidelines and further as to why the list of candidates at Annexure 12 above in respect of B.N. College, Dhubri shall not be set aside and quashed and upon such cause or causes being shown and upon hearing the parties be pleased to

make the Rule absolute giving full and complete relief to the petitioners and/or pass such further order or orders as your Honour may deem fit and proper in the facts and circumstances of the case."

19. The challenge is against the selection made for the Grade-IV posts pursuant to the advertisement dated 22.11.2022. The further prayer is to hold the selection afresh by framing proper guidelines.

20. The foundation of the aforesaid challenge is on the ground that the petitioners, by virtue of working for a long period of time on temporary basis is entitled to weightage for such experience. To appreciate the aforesaid contention, it would be necessary to look into the materials before this Court.

21. The petitioner no. 1 appears to have been appointed in a temporary basis vide a letter dated 30.11.2006. The said letter was issued by the Principal-in-Charge of the College. It is not in dispute that the power of appointment to the College in question does not lie with the Principal but with the Director of Higher Education. Though it may be a fact that on the strength of the aforesaid appointment dated 30.11.2006, the petitioner no. 1 is continuing, such continuation will not give him any right either for regularization or for grant of weightage. The advertisement dated 22.11.2022 does not provide that any weightage will be given for the in- house candidates. Admittedly, both the petitioners, instead of challenging the advertisement had participated in the same and had also gone to the extent of facing the *viva voce* test.

22. As revealed from the materials on record, after such participation the petitioner no. 2 was in fact selected whereafter he had withdrawn his challenge. The aforesaid fact would be a clear indication that the selection was held in a

fair and transparent manner and without causing any prejudice to the in-house candidates in spite of the fact that a litigation was pending on the initiation of the petitioners. So far as the aspect of assurance allegedly made by the College to give weightage is concerned, apart from the fact that no such provision exists in the advertisement in question, the submissions made on behalf of the petitioners that such pleadings regarding assurance has not been denied is not correct.

23. For ready reference, the relevant pleadings are extracted herein below:-

Paragraph 6 of the writ petition:

“6. That the petitioners respectfully state that although petitioners had appeared in the written test and the interview conducted by the Respondent No. 3 as stated above as they had no other option, they could learn that the Respondent No. 3 and 4 has not at all considered the matter of providing any weightage to the petitioners who are serving in the college for last several years. The petitioners state that on several occasions the petitioners had approached the College Authorities to appoint them regularly and the Authorities had also assured them that regular selection would be initiated wherein due weightage will be given to them for their temporary service. But in the instant selection process, the Respondent Authorities without framing any guidelines and without taking any decision for providing due weightage had proceeded for the selection making them to compete with fresh candidates like freshers and thereby deprived the Das petitioners from a fair consideration.”

Paragraph 8 of the Affidavit-in-opposition of the College:

“8. That with regard to the statements made in paragraph no.6 of the writ petition this deponent denies the same to be wholly correct. The deponent begs

to state that while conducting the selection process the college Authorities had adopted the Govt. Guidelines as letter per no. DHE/CE/49/2021/135 dtd 25th April, 2022 and letter no. DHE/CE/Misc/341/2016/12 dtd 29.04.2017 and letter no. DHE/PA/Misc/1/2016/Pt/117dtd 28th July,2022 and letter No GAG(B) 199/2008/5 dated 30th Jan, 2009 and as per G.B. Resolution No.2 dated 01.12.2022 and in the advertisement dated 22.11.2022 as well as guidelines it was nowhere mentioned that the petitioners experience will be considered at the time of interview. The deponent further begs to state that no undertaking was given to the petitioners that due weightage will be given to the petitioners at the time of regular selection."

24. In the aforesaid pleadings of the College, there is a clear statement that no undertaking was given for any weightage. This Court is unable to accept the submission made on behalf of the petitioner that there is a distinction between the aspect of undertaking and assurance. This Court is of the view that mere use of the expression "undertaking" instead of "assurance" will not make any substantial difference to the categorical stand of the College.

25. Reliance has been made upon certain observations made in the case of ***Uma Devi (3)*** (supra) more specifically in paragraph 55 regarding weightage. Apart from the fact that such observations have been made by the Hon'ble the Supreme Court in exercise of powers under Article 142 of the Constitution of India, the same have to be read in context of principles laid down in paragraph 53, the relevant part of which is extracted herein below:

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan and referred to in paragraph 15 above, of

duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a onetime measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

26. Though it would be within the domain of the authorities to take a decision for any regularization of an existing employee if he or she is working for a long period of time, the same cannot be a matter of a Mandamus in view of the principles laid down as quoted above.

27. The aspect of participation by the petitioners in the selection and thereafter choosing to file the writ petition is also relevant. In the cited case of **Karunesh Kumar** (supra), **Karnati Ravi** (supra) and the other cases, it has been clearly laid down that the unsuccessful candidate would have a very limited scope to challenge the selection.

28. In the instant case, the relief prayed for is for interfering with the appointments of the selected candidates. This Court is however of the opinion that there cannot be any difference between challenging a selection or praying for setting aside the appointments pursuant to such selection. The corresponding prayer for holding a fresh selection does not warrant any merit inasmuch as the selection appears to have been done in a fair and transparent manner in which the petitioner no 2 himself is a beneficiary. Further, there is no substantive grounds made out to challenge such appointments.

29. The Rules of 2010 more particularly Rule 5, makes it clear that the recruitment has to be done by an open advertisement which appears to have been followed in the instant case.

30. In view of the aforesaid facts and circumstances, this Court is of the view that no case for interference is made out and accordingly the writ petitions are dismissed.

31. No order as to cost.

JUDGE

Comparing Assistant