

SUPREME COURT OF INDIA

Amlan Jyoti Borooah

Vs.

State of Assam

C.A.NO. 387 OF 2009 arising out of SLP (C) No.10726 of 2006

(S.B. Sinha and V.S. Sirpurkar)

23/01/2009

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. This appeal is directed against a judgment and order dated 5.5.2006 passed by a Division Bench of the Guwahati High Court in Writ Appeal No.54 of 2004 whereby and whereunder the judgment and order dated 12.2.2004 passed by a learned Single Judge of the said Court was modified.

3. The basic fact of the matter is not in dispute. The Director General of Police, Assam published an advertisement inviting applications for 112 vacancies which were likely to arise in the post of Sub-Inspector of Police on or about 6.9.1997, the relevant clauses laying down the procedures therefor, were as under :

"On selection candidates will be put through a prescribed course of training for one year at the Assam Police Training College. Dergaon and during the period of training they will be treated as cadre S.I. of Police. The cadets who fail in the final examination after training at the Police Training College will be liable to be discharged. The candidates securing top positions in the final Examination will be considered for U.B. and therest for A.B. subject to the 20 points Roster. All candidates possessing necessary qualification will appear in a written test which will comprise of one paper of 3 (three) hours duration. Questions will be on subjects like General Knowledge, History, Science, Basic Mathematics, Comprehension etc. Venue of the test will be decided by the Supdt. Of Police of the Districts in which candidates are presently residing as shown in the application form. They will contact Police Reserve of the Districts for the purpose and ascertain dates. Those candidates who qualify in the written test will be required to appear in a physical test and interview to be conducted centrally for which date will be notified later. The candidates will have to appear in the written test, physical test and interview at their own expenses."

4. Pursuant thereto or in furtherance thereof, appellant as also the private respondents applied therefor. They were asked by a call letter dated 18.3.1998 to appear at the written test on 25th/26th April, 1998 and physical ability test on 27th/28th April, 1998. Indisputably, the written test was held on 26.4.1998. It, however, appears that despite laying down the said procedures in the advertisement, a decision was taken by the Selection Committee to call such candidates for interview only who had acquired 40% in the written test. Call letters were issued accordingly, a sample copy whereof is as under:

"You are requested to appear in the interview to be held in the venue noted below along with original certificates. No TA/DA would be paid for appearing in the above interview. In case you are selected in the interview you will be called for physical test for final selection."

5. Appellants as also the private respondents amongst others appeared in the interview before the duly constituted Interview Boards. The Selection Committee short listed 1803 candidates in order of merit. The said select list is said to have been published and hung on the notice board of the office of the Director General of Police on 1.2.2000. Appellant's position in the select list was 750. He obtained 32 points in the interview and 92 in the written test, total being 124 marks. It is stated that the life of the said select list was two years.

6. Allegedly, on 2.3.2000, the Inspector General of Police requested the Home Department of the Government of Assam to obtain sanction of the State Level Empowered Committee for appointment of 174 Sub-Inspector of Police pursuant whereto the Home Department accorded sanction there for.

7. Those candidates who were found eligible to be called for physical ability test were asked to

appear therein which was held on 19.2.2000. On or about 4.7.2000, 169 candidates who had cleared the physical test/medical test were appointed on the post of Sub-Inspector of Police.

The said order, appointing the aforementioned 169 posts was not the subject matter of the challenge before the High Court. However, it appears that during the currency of the life of the select list, the Director General of Police, by a letter dated 21.12.2000, addressed to the Commissioner- Secretary to the Home Department, Dispur, asked for sanction of the State Level Empowered Committee (SLEC) to fill up 77 additional vacancies that had arisen from the aforementioned select list, stating :

"I am writing to inform you that presently, there are 2154 number of vacancies in the rank of constables (Battalion 1136, District AB 504, District UB 514) and 77 Nos. of vacancies in the rank of S.Is in the Assam Police. These are all functional posts. In the context of insurgency situation obtained in the state and that there will be Assembly Election within the next four months, we will need to mobilize all the manpower. In view of this, it is requested that permission of the State Level Empowered Committee may be conveyed to us to fill up these vacancies by direct recruitment from the results of the records of the previous recruitment rallies already available with us. Government orders on the same may kindly be issued immediately."

8. Allegedly, urgency and compelling reasons for which the said vacancies were to be filled up was vast deteriorating law and order situation in the State as also sudden spurt of extremists related incidents of violence. It was furthermore stated that in the Brahmaputra valley, the ULFA and the NDFB had intensified their subversive activities and resorted to widespread killing and extortion spree in the hill district of Karbi Anglong and the NC Hills where the UPDS and DHD had already been active. It was furthermore contended that the NSCN (IM) and the Kuki militants also resorted to sporadic acts of violence in the said two districts. According to the State, during the period 1.7.2000 to 31.12.2000 356 extremists related incidents took place and between the period 1.1.2001 to 30.6.2001, 259 such incidents took place wherein a large number of civilians, force personnel and extremists were killed. It was contended that the number of kidnapping which took place during the aforementioned period was 70.

9. An office note was thereafter put up for consideration of the Director General of Police in respect of 88 vacancies which had arisen by that time in the rank of Sub-Inspector of Police. Approval was sought for from the Director General of Police as to whether the said vacancies be filled up from amongst the candidates whose names appear in the aforementioned select list from Serial No.175 onwards as the list had already been acted upon upto serial No.174. The Director General of Police is said to have accorded the necessary approval. Pursuant thereto, the Home Commissioner was requested to sanction 80 posts in the existing vacancies in the State in place of 77 vacancies. The said select list was again published on 8.1.2001. 84 candidates out of the said select list were asked to appear in the physical ability test on 22.1.2001. Three candidates failed to appear in the physical test and four others failed to clear the physical test and the rest 77 candidates were called to appear

for the medical test on 25.1.2001 out of which 75 candidates were found suitable for appointment. The Deputy Secretary to the Government of Assam, Home Department, thereafter by a letter dated 20.2.2001 conveyed the sanction of the SLEC for direct recruitment in respect of 80 vacancies to the post of Sub-Inspector of Police, stating :

"In inviting a reference to your letter cited above, I am directed to inform you that the Personnel (B) Department has obtained and conveyed the clearance of the SLEC for direct recruitment of 80 (UB) Sub-Inspector of Police by observing necessary formalities as required in this regard. This issue as per endorsement of the Personnel (B) Department communicated vide their consulted U/O No.141/2001, dated 17.2.2001."

10. Appellant herein and some other candidates thereafter filed a writ petition before the High Court impugning the selection of 84 candidates to the post of Sub-Inspector of Police in February 2001.

11. Indisputably, during pendency of the said writ petition, posts were filled up as 75 persons who had been found suitable were offered appointment to the post of Sub-Inspector of Police on 2.3.2001. The respondents who were 74 in number had accepted the said offer of appointment on 3.3.2001; one of them, however, did not join the post. They were sent for and completed their training. Indisputably, they have been working in the said post. By reason of a judgment and order dated 12.2.2004 a learned Single Judge of the said Court, however, set aside the appointment of 54 candidates, opining :

"Surely, if the physical test constituted a competitive component of the selection process, calling the 84/76 a person for the physical test on the basis of the marks secured by them in the written test and oral interview and in ignoring the petitioners was fatal. All the candidates were not judged by a uniform process; those appointed and those left out were assessed by two different yardsticks, discrimination, therefore, is writ large. The possibility of the petitioners, who were not appointed being placed higher than those eventually, appointed had the petitioners also been assigned marks in the physical test cannot be ruled out, particularly, when the records produced reveal that the difference of the total marks secured by the candidates in the written test and oral interview was exceedingly small. Illustratively, note may be taken of the fact that not only a large number of candidates secured the same marks, the first of the 84 candidates called for the physical test had secured 147 marks in the written test and oral interview whereas the last candidate out of the group of 84/76 called for the physical test had secured 146 marks. The petitioner in WP (C) No.628/01, who secured the 750th position, secured 124 marks, i.e., a difference of only 22 marks in comparison to the last of the candidate appointed. The possibility of an entirely different picture emerging, if the petitioners have been called for the physical test, therefore, looms large. For the aforesaid reasons, this Court has no hesitation in reaching the conclusion that the fundamental rights of the petitioners under Articles 14 and 16 of the Constitution have been infringed by the procedure adopted. The yardstick applied did not result in a correct determination of the inter se merit of all the candidates for the purpose of securing appointment."

Contention of the respondents herein that on equitable grounds, their appointment should not be interfered with, was rejected, stating:

"Equity must not be equated with compassion. Equitable principles must emanate from facts which by themselves are unusual and peculiar. A balance has to be struck and the Court must be cautious to ensure that its endeavour to do equity does not amount to judicial benevolence or acquiescence of established violation of fundamental rights and the principles of Rule of law."

It was directed:

"For all the aforesaid reasons, this Court is unable to save any of the appointments of the 84/76 Sub-Inspectors of Police made on 1.3.2001. All such appointments, therefore, shall stand interfered with. In view of the conclusion reached, no relief to the petitioners by directing consideration of their cases afresh will also be possible. However, in the totality of the facts and circumstances of the case, it is considered appropriate to direct that in the fresh selection process that will now have to be initiated by the State, if any of the candidates, who had taken part in the earlier selection process, opts to apply for the posts that may be advertised, suitable relaxation of age, if required will be made by the authorities."

12. Three Writ Appeals were preferred there against. By reason of the impugned judgment dated 5.5.2006, a Division Bench of the High Court, while upholding the appointment of the private respondents, set aside the judgment of the learned Single Judge directing them to fill up remaining 14 vacancies by holding physical and medical test of the candidates from the select list containing the names of 1803 candidates.

13. Appellant herein filed Special Leave Petition on 3.7.2006. However, even prior thereto, i.e. on 24.6.2006 in terms of the judgment of the Division Bench of the High Court, an advertisement was issued in a local daily "The Assam Tribune". Indisputably, appellant with others appeared in the physical test, of course, without prejudice to his rights and contentions herein. He secured only 20 marks (144 marks in aggregate) in the physical test which was lower than the marks secured by the last general category candidate who had secured 153.5 marks.

14. Mr. Raju Ramachandran, learned senior counsel appearing on behalf of the appellant, would submit that the Division Bench of the High Court committed a serious error in passing the impugned judgment in so far as it failed to take into consideration the importance of holding a physical test before preparation of the select list. The learned counsel urged that arbitrariness on the

part of the Selection Committee is apparent from the fact that the order of holding tests kept on changing as the physical ability test was pushed to the background. It was furthermore submitted that the Division Bench of the High Court did not assign sufficient and cogent reasons for interfering with the well considered judgment of the learned Single Judge and proceeded to modify the same without any applicant of mind.

Our attention was moreover drawn to the fact that the purported reasons for modification which were enumerated in paragraph 12 of the impugned judgment really contain the statement of facts and, thus, the same is wholly unsustainable.

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15. Mr. P.K. Goswami, learned senior counsel appearing on behalf of the private respondents and Mr. Phukan, appearing on behalf of the State, on the other hand, would contend that the appellant, in the facts and circumstances of this case, must be held to be estopped and precluded from raising any contention with regard to the validity or otherwise of the procedure for selection adopted by the Selection Committee as he had participated in the Selection process without any demur whatsoever.

16. Mr. Manish Goswami, learned counsel appearing on behalf of respondent No.157, Rajesh Kumar Das, would draw our attention to the fact that the said respondent was an NCC candidate and as such was entitled to a preferential treatment. He, having been ignored, filed a writ petition being WP(C) No.1757 of 2000 and by an order dated 7.4.2000, a learned Judge of the High Court passed an interim order to the following effect :

"Mr. Uzir, learned counsel for the petitioner submitted that an advertisement was published inviting applications for filling up of vacant posts of Sub-Inspector (UB), Assam Police Force and it was clearly stated in the advertisement that preference will be given to those candidates who possess N.C.C. `C' certificate. The petitioner also possesses N.C.C. `C' certificate and yet he did not get preference to the selection. The petitioner had therefore, challenged the selection to the post of Sub-Inspector of Police (UB). As an interim measure, I direct that one post of Sub-Inspector (UB) out of the 31 posts advertised shall be kept vacant till pendency of the writ petition."

The said writ petition was allowed by a judgment and order dated 10.8.2000, directing :

"While issuing a notice of motion, this Court by an order dated 7.4.2000 passed an interim order directing that one post of Sub-Inspector (UB) out of the 31 such posts advertised shall be kept vacant till the disposal of this writ petition. This writ petition is finally disposed of with a direction to the respondent No.2, the Director General of Police, Government of Assam, to consider the case of the petitioner for appointment against the post of Sub-Inspector (UB) directed to be kept vacant by this Court's interim order dated 7.4.2000, as a special case subject to verification as to his

antecedents in view of the fact that the advertisement categorically mentioned that the candidates possessing NCC certificate would be given preference and the petitioner is the only candidate who possesses NCC certificate to be precise, the highest NCC 'C' certificate. The petitioner shall furnish a certified copy of this order along with a copy of this writ petition and the annexures thereto to the respondent No.2, the Director General of Police, Assam, who shall comply with the above direction of this court within 10 (ten) days from the date of receipt of the same."

17. It is stated that pursuant thereto and in furtherance thereof only the said respondent had been appointed and had been working since then. Our attention was furthermore drawn to the fact that against the order of the learned Single Judge, a writ appeal had been filed by him which is pending.

18. Indisputably in the advertisement, the candidates were required not only to qualify in the written test but also the physical ability test. A plain reading of the advertisement clearly goes to show that the interview was to be conducted only after holding of the said two tests.

19. In tune with the said requirements only, the candidates were asked to appear in the written test on 25/26.4.1998 and in the physical test on 27/28.4.1998. There cannot, however, be any doubt whatsoever that a Selection Committee in a given situation, may lay down a procedure for the purpose of short listing the candidates but that does not mean that for the said purpose the order of holding a requisite test would be changed. In terms of a decision which was taken on 7.4.1999, the Selection Committee thought to take interview prior to holding of the physical ability test. Physical ability test keeping in view the nature of the job required to be performed by the candidates was an extremely important one. Passing in the physical ability test is a sine qua non for selection of the candidates in the post of Sub-Inspector of Police. It was indeed a competitive test. The merit list, thus, should have been prepared not only on the basis of the written test and interview but also the physical ability test. The Selection Committee, in our opinion, committed a serious error in changing the order of holding the tests. The learned Single Judge, therefore, was correct in arriving at a conclusion that physical ability test should have been held prior to holding of the interview.

20. The question which, however, arises for consideration is as to whether despite the same, we, in exercise of our jurisdiction under Article 136 of the Constitution of India, should interfere with the impugned judgment. Appellant concededly did not question the appointment 169 candidates. It is idle to contend that he was not aware thereof. If he was to challenge the validity and/or legality of the entire select list in its entirety, he should have also questioned the recruitment of 169 candidates which took place as far back as on 4.7.2000.

Appellant was aware of his position in the select list. He was also aware of the change in the procedure adopted by the Selection Committee. He appeared at the interview without any demur whatsoever although was not called to appear for the physical ability test prior thereto.

Appellant chose to question the appointment of 77 candidates not only on the premise that the procedure adopted by the Selection Committee was illegal but also on the premise that no new vacancy could have been filled up from the select list.

21. Appellant, in our opinion, having accepted the change in the selection procedure sub silentio, by not questioning the appointment of 169 candidates, in our considered opinion, cannot now be permitted to turn round and contend that the procedure adopted was illegal. He is estopped and precluded from doing so.

In *Ashok Kumar Yadav and Others v. State of Haryana and Others* [(1985) 4 SCC 417], a Constitution Bench of this Court has stated that a viva voce examination plays an important role in the matter of selection of candidates in responsible posts. So far as the post of a Sub-Inspector is concerned, he not only must have educational qualification as prescribed in the advertisement but also must have a good presence of mind and other qualities to meet the exigencies of situation. It, however, does not mean that the physical ability test should be relegated to a back seat.

The question came up for consideration again in *State of U.P. v. Rafiquddin and Others* [(1987) Supp. SCC 401], wherein it was held :

"...Commission is required to judge the suitability of a candidate on the basis of sufficiently high marks obtained by a candidate in the viva voce test, it has to fix some percentage of marks which in its opinion may be sufficient to assess the suitability of a candidate. In the absence of a fixed norm, there could be no uniformity in assessing suitability of candidates in the viva voce test. The Commission had therefore power to fix the norm and in the instant case it had fixed 35 per cent minimum marks for viva voce test. The viva voce test is a well recognised method of judging the suitability of a candidate for appointment to public services and this method had almost universally been followed in making selection for appointment to public services. Where selection is made on the basis of written as well as viva voce test, the final result is determined on the basis of the aggregate marks. If any minimum marks either in the written test or in viva voce test are fixed to determine the suitability of a candidate the same has to be respected. Clause (ii) of the proviso to Rule 19 clearly confers power on the Commission to fix minimum marks for viva voce test for judging the suitability of a candidate for the service. We do not find any constitutional legal infirmity in the provision."

In *Union of India and Others v. S. Vinodh Kumar and Others* [(2007) 8 SCC 100], this Court held :

"18. 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."

The matter again came up for consideration before this Bench in *Sadananda Halo and Others v. Momtaz Ali Sheikh and Others* [(2008) 4 SCC 619], wherein this Bench held :

"59. It is also a settled position that the unsuccessful candidates cannot turn back and assail the selection process. There are of course the exceptions carved out by this Court to this general rule." [See also *H.V. Nirmala v. Karnataka State Financial Corporation & Ors.* [2008 (8) SCALE 315]

22. Submission of Mr. Raju Ramachandran that new vacancies created should not have been filled up from the select list may now be considered. Articles 14 and 16 of the Constitution of India provide for equality in the matter of recruitment. A large number of posts of Sub-Inspector of Police fell vacant. Advertisement was issued in the year 1997. Effective steps for filling up the said posts by holding written examinations and interview were taken only in 1998 onwards. Appointments could be made of 169 candidates only on or about 4.7.2000. It is not in dispute that for filling up the post of 112 vacancies about 6,000/- candidates applied. Processing of their applications and holding of written examination, viva voce examination and physical ability test took a long time. At the first stage of the recruitment process, 57 posts more than advertised 112 posts were filled up. Appellant did not question the legality and/or validity thereof. He should have done the same at the earliest possible opportunity. Having regard to the emergent situation, in regard whereto we have taken note of earlier, proposal was made to increase the number of vacancies from time to time.

23. The State in an emergent situation would subject to constitutional limitations is entitled to take a decision which subserve a greater public interest. While saying so, we are not unmindful of the fact that the Constitution also demands that candidates who had acquired eligibility for recruitment to the post in the meantime should also be given opportunities to participate in the selection process. This Court times without number had lamented the lackadaisical attitude on the part of the State to treat the matter of selection for appointment to services in a casual and cavalier manner. If no appointment could be made from 1997 to 2001, it is the State alone who could thank itself therefor, but, unless there exists a constitutional or a statutory interdict so as to compel the Superior Court to set aside the selection which has otherwise been validly made; in exercise of their power of judicial review the same would not ordinarily be interfered therewith.

24. Mr. Raju Ramachandran has strongly relied upon a judgment of this Court in *Union of India and Others v. B. Valluvan and Others* [(2006) 8 SCC 686]. This Court therein opined that the life of a panel ordinarily is one year. Therein this Court noticed this Court's earlier's decision in *Surinder Singh v. State of Punjab* [(1997) 8 SCC 488] to hold:

"17. The life of a panel ordinarily is one year. The same can be extended only by the State and that too if the statutory rule permits it to do so. The High Court ordinarily would not extend the life of a panel. Once a panel stands exhausted upon filling up of all the posts, the question of enforcing a future panel would not arise. It was for the State to accept the said recommendations of the Selection Committee or reject the same. As has been noticed hereinbefore, all notified vacancies as also the vacancy which arose in 2000 had also been filled up. As the future vacancy had already been filled up in the year 2000, the question of referring back to the panel prepared in the year 1999 did not arise. The impugned judgment, therefore, cannot be sustained."

In that case, however, it was held:

"11. The Review Bench of the High Court posed unto itself a wrong question. It did not say how an error apparent on the face of the record had been committed. It did not assign sufficient or cogent reason to hold as to how the original application before the Tribunal would have been maintainable if the petitioners had no existing legal right. The 1st respondent did not have any legal right to be appointed. He filed an application pursuant to the said advertisement. It is not his case that his application had not been considered. He did not raise any plea of unfair treatment. No mala fide was also alleged."

In that case, the posts more than advertised were filled up.

25. Yet again in *State of Bihar and Others v. Amrendra Kumar Mishra* [(2006) 12 SCC 561], this Court took the same view, stating:

"Life of a panel, it is well known, remains valid for a year. Once it lapses, unless an appropriate order is issued by the State, no appointment can be made out of the said panel." It was furthermore held:

"13. The decisions noticed hereinbefore are authorities for the proposition that even the wait list must be acted upon having regard to the terms of the advertisement and in any event cannot remain operative beyond the prescribed period."

26. In this case, however, the life of panel was two years. The process of filling up the posts out of the said select list started within one year from the preparation thereof.

27. In Gujarat State Dy. Executive Engineers' Association v. State of Gujarat and Others [1994 Supp (2) SCC 591], this Court while opining that the future vacancies should ordinarily not be filled up from the waiting list, however, observed:

"Appointment in future vacancies from waiting list prepared by the Commission should be exception rather than the rule. It has many ramifications. ... There was no contingency nor the State Government had taken any decision to fill the vacancies from the waiting list as it was not possible for it to hold the examination nor any emergent situation had arisen except the claim of some of the candidates from the waiting list that they should be given appointment for vacancies which arose between 1980 and 1983 and between 1983 and 1993. ... The direction of the High Court, therefore, to appoint the candidates from the waiting list in the vacancies which, according to its calculation, arose between the years 1980 to 1983 and between 1983 to 1993 cannot be upheld."

Therein, the State Government had taken any decision to fill the vacancies from the waiting list as it was not possible for it to hold the examination nor any emergent situation had arisen except the fact that some candidates claimed that from the waiting list they should be given appointment in the vacancies which arose between 1980 and 1983 and between 1983 and 1993. Exception therein had been made out in respect thereof in an emergent situation.

This case meets the said criteria.

28. Mr. Raju Ramachandran would point out that even some appointees had got zero marks in 100 meter race. Such a question had not been raised before the courts below. Had such a question been raised, the respondents could have dealt with the same. Furthermore, they were not found to be physically handicapped of holding the post of Sub-Inspector of Police. Their overall performance in all the events had been taken into consideration for the purpose of finding them physically fit for appointment. Those candidates who were absent in the interview or in the physical ability test had not been selected. It is not a case where the appellants had given a go-by to the physical ability test.

29. For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly. However, in the facts and circumstances of this case, there shall be no order as to costs.