

# SUPREME COURT OF INDIA

Sri Jyotish Kaiborta

Vs.

The State of Assam

C.A. No.1252 of 2009

(Tarun Chatterjee and Aftab Alam JJ.)

25.02.2009

## JUDGMENT

### **Aftab Alam, J.**

1. I.A. No.1 of 2007 is allowed and Sanjib Das who was arrayed in SLP (C) No.12129/2006 as one of the respondents is permitted to be transposed as a petitioner. Consequently, the number of petitioners in that case becomes eight. Apart from the eight petitioners in SLP(C) No.12129/2006 there are two each in SLP(C) No. 12766 of 2006 and SLP (C) No.17979 of 2006 and two more in I.A. No.5/2009 filed in SLP (C) No. 17979/2006.

2. Leave granted in all the SLPs.

3. The three appeals are directed against the judgment and order dated May 17, 2006 passed by a full bench of the Guwahati High Court disposing of a large group of writ petitions. The appellants, however, are aggrieved by the decision only in so far as it found and held that the selections made for filling up the vacancies in the posts of Lower Division Assistant (LDA) were bad and the select list, dated June 24, 2003 was illegal and consequently set it aside.

4. The controversy relates to appointments to the vacant posts of Lower Division Assistants in the Transport Department, Government of Assam for which the concerned authorities, following a selection process, prepared the select list dated June 24, 2003. The eight appellants in Civil Appeal arising from SLP(C) No.12129/ 2006 were among the 12 selected candidates in the select list that was set aside by the High Court. They are thus directly hit by the High Court judgment. The other six appellants in the other two Civil Appeals and I.A. No.5 of 2009 admittedly did not figure in the select list dated June 24, 2003. According to them, they were in some earlier list dated November 20, 2001 on the basis of which the select list of June 24, 2003 was finally drawn up. Their case is thus materially different from the case of the eight appellants in Civil Appeal arising from SLP(C) No.12129 /2006.

5. For filling up the vacancies in the posts of LDA in the Transport Department, Govt. of Assam, the selection process commenced in October, 1998. As is not uncommon these days,

even before it was complete the selection process had to go through obstacles and face challenges in the Court. But having regard to the limited scope of these appeals it is not necessary to go into those details. Suffice it to note that on the basis of a written test held on November 14, 1999 and viva voce held on December 18, 2000 a select list was eventually prepared and in pursuance of the direction of the Guwahati High Court dated October 10, 2001 in W.P.(C) No. 4431 of 2001 it came to be finally published on June 24, 2003. It is not in dispute that the eight appellants in Civil Appeal arising from SLP(C) No.12129/ 2006 were among the 12 selected candidates in that list.

6. After the select list was published on June 24, 2003 appellants 1 & 2 (along with some others) filed W.P. (C) No.6139 of 2003 before the Guwahati High Court seeking direction for appointment on the basis of the select list. In that case the High Court passed an interim order on August 8, 2003 directing that any existing vacancies should be filled up from the select list and prohibiting any ad hoc appointments from outside that list. A similar order was passed by the High Court on March 5, 2004 in W.P. (C) No. 8815 of 2004 filed by one Inamul Hoque (who was at serial No.7 in that select list). Earlier to that a writ petition being W.P. (C) No.66222 of 2003 was filed, the petitioner's in which challenged the select list dated June 24, 2003 published by the Joint Commissioner Transport, Government of Assam and sought direction for their appointment on the basis of some purported select list dated February 21, 2006. This writ petition too was one of the batch of cases disposed of by the full bench judgment against which the present appeals are preferred. The High Court found and held that there was no such select list as claimed by the petitioners of that case and that part of the judgment is not under appeal before us. In yet another proceeding, in Contempt Case No. 314 of 2003 the Guwahati High Court gave directions to the concerned authorities in the government to complete the process of appointment within six weeks in accordance with law.

7. The aforementioned were some of the matters relating to the select list dated June 24, 2003 and the claim of the selected candidates for appointment based on that list.

8. As against that there was a counter claim for regularization as LDAs by some casual employees working in the department. A writ petition being W.P. (C) No. 1154 of 2004 came to be filed before the High Court on March 5, 2004 by some casual employees seeking stay on the appointments from the select list and on the same day (March 5, 2004) the High Court directed the concerned authorities not to issue any appointment orders for the post of LDAs till the next date (March 11, 2004) fixed in the case.

9. Eventually all the writ petitions raising claims for appointment on different grounds as LDA in the transport department came to be grouped together and in view of the conflicting orders passed in different writ petitions the entire group came to be heard by a full bench of the Court.

10. The full bench by a long and well considered judgment totally rejected the claim of regularization raised by the casual employees but at the same time it found and held that the selection process was not fair and proper and consequently set aside the select list of June 24,

2003. In paragraph 23 of the judgment the Court summarized its decisions as follows: "Our answers to the questions referred and also to the questions incidentally arising are self-contained in the various paragraphs of the present order. However, to dispel all doubts and avoid any possible confusion we deem it appropriate to reiterate our conclusions to follows: (1) The Office Memorandum dated 20.4.1995 does not reflect a Valid policy decision of the State for regularization of Muster Roll/Work Charge employees. No Muster Roll/Work Charge employee is entitled in law to seek and claim regularization in terms of the aforesaid Office Memorandum dated 20.4.1995, (2) However, as a large number of regularisations of different categories of employees have already been effected in terms of the Office Memorandum dated 20.4.1995, considering the human factor involved, the Court does not consider it necessary to pass orders setting aside any of the said regularizations. However, there will be no further regularization in terms of the aforesaid Office Memorandum, dated 20.4.1995, and/or such other judicial order(s) for regularization, passed, in this regard, but has not yet been implemented. (3) The Office Memorandum dated 20.4.1995 does not cover any category of employees other than Muster Roll and Work Charge employees. No policy decision has been taken by the State with regard to regularization of different categories of casual/contingent/adhoc employees working in the different departments of the State Government. Such employees are, therefore, not entitled to claim any regularization either under the Office Memorandum dated 20.4.1995 or any other Office Memorandum in force. (4) Casual employees of the Transport department in Grade III posts are not entitled to regularization in terms of the Office Memorandum dated 20.4.1995 or any other Office Memorandum in force. (5) The selections held for filling up the vacant posts of L. D. Assistants in the Transport department including the select list dated 24.6.2003 is found to be illegal and therefore set aside. (6) The Court expresses no opinion with regard to the validity of the Cabinet decision dated 22.7.20005 or its implementation and execution. The matter will be considered, if required, at the appropriate time and stage. All the writ petitioners shall stand disposed of as being answered in terms our conclusions recorded above."

11. As noted above the appellants are aggrieved by the finding at serial No.5 in regard to the select list and the direction to set it aside.

12. Mr. P.K. Goswami learned Senior Counsel appearing for the appellants in Civil Appeal arising from SLP(C) No.12129/2006 submitted that the manner in which the High Court proceeded to examine the validity of the selection process and the reason assigned by it for holding the select list to be bad and invalid were quite unsustainable in law. Learned Counsel submitted that though the pleadings in the writ petition challenging the select list were found by the High Court as scanty yet it proceeded to consider the select list by examining the official records summoned by it. Mr. Goswami submitted that the only reason assigned for holding the select list to be bad was contained in paragraph 27 of the judgment which is as follows:

"The unselected candidates have also raised a question with regard to the validity of the selection process. Through the writ petitions filed in this regard do not contain any elaborate pleadings, as the records in original had been called for and placed before the Court and the same has been duly perused, we are of the view that it will only be

correct for the Court to record its views in the matter on the basis of the original records made available for scrutiny of the Court instated of non-suiting the petitioners on the ground of the scanty pleadings contained in the writ petitions."

13. Having examined the records the High Court recorded its reason for striking down the select list as follows: "In this regard we have considered the marks awarded to the candidates who had undergone the selection and on such consideration we find that each of the selected candidates has been given very high marks in the interview segment and it is only on account of such high marks in the interview that the said candidates have been selected. While it is correct that the selected candidates have also secured equally high marks in the written test we have also noticed that other candidates who had secured equally high and even higher marks in the written test in that the selected candidates have fared very poorly in the interview. The scrutiny of the marks awarded to the successful and unsuccessful candidates reveal a distinct pattern i.e. those who have been selected have secured very high marks in the interview whereas those unselected have secured very low marks in the interview held. Such a uniform pattern, in our considered view, is unnatural and in spite of our best efforts we have not been able to persuade ourselves to accept the final result of the selection. We, therefore, set aside the select list dated 24.6.2003 and direct the posts in question to be readvertised. ....".

14. We are unable to appreciate or even follow the reason assigned by the High Court for condemning the select list. In case, in viva voce very high marks were given to candidates who secured low or very low marks in the written test that might be a ground for suspicion. But if the candidates securing high marks in the written test were able to secure equally high marks in viva voce we are unable to find any anomaly. After all there has to be some difference between the selected and the unselected candidates. Unfortunately the High Court has not made clear the 'distinct pattern' it was able to discern from a scrutiny of the marks awarded to the candidates. The selection records are not before us and we do not have the benefit of its perusal but we are clearly of the view that the approach of the High Court was quite contrary to law laid down by this Court. In *Sadananda Halo and Others vs. Momtaz Ali Sheikh and Other*<sup>1</sup>, this Court, in Paragraph 49 of the judgment, observed as follows:

"49. Learned Single Judge in his judgment has observed that as per the report of the amicus curiae the selected candidates got higher marks in viva voce ranging between 30 and 41 marks. In our opinion this has hardly any effect and merely because the selected candidates got the higher marks ranging between 30 to 41 marks that by itself could be no reason to reject the selection. We have extensively referred to the comments made by the learned Single Judge in the earlier part of the judgment where the learned Judge has in fact recorded his satisfaction for the printed charts and more particularly about their authenticity. The learned Judge has also expressed his satisfaction with the procedure adopted. There is hardly any reason given by the learned Single Judge excepting that the benchmark of 250 candidates had already been crossed."

15. Paragraphs 58 and 65 of the judgment are also relevant for the present and are reproduced below:

"58. It is settled law that in such writ petitions a roving inquiry on the factual aspect is not permissible. The High Court not only engaged itself into a non-permitted fact-finding exercise but also went on to rely on the findings of the amicus curiae, or as the case may be, the scrutiny team, which in our opinion was inappropriate. While testing the fairness of the selection process wherein thousands of candidates were involved, the High Court should have been slow in relying upon such microscopic findings. It was not for the High Court to place itself into a position of a fact-finding commission, that too, more particularly at the instance of those petitioners who were unsuccessful candidates. The High Court should, therefore, have restricted itself for the Selection Committee and also in the process assumed the role of the respondents. Unfortunately, the High Court took it upon itself the task of substituting itself for the Selection Committee and also in the process assumed the role of an appellate tribunal which was, in our opinion, not proper. Thus, the High Court converted this writ petition into a public interest litigation without any justification."

"65. We also do not approve of the approach adopted by the learned Single Judge of the High Court as going all the way into the facts and the microscopic details not via the pleadings of the parties but on the basis of an unnecessary investigation. We also disapprove of the logic of relying on the findings arrived at only on the basis of sample survey. Such selection of large number of candidates could not have been set aside on the basis of same survey. NO evidence was available before us as to the proportion of this so called "sample survey"'"

16. To the same effect are two earlier decisions of the Court in *Madan Lal and Others. vs. State of J & K and Others*<sup>2</sup>, Paragraphs 10 and 17 and in *Ashok Kumar Yadav vs. State of Haryana*<sup>3</sup> Para.21.

17. In view of the discussion made above we are unable to sustain the decision of the High Court in so far as it held the select list dated June 24, 2003 as invalid.

18. We are informed that following the direction of the High Court a fresh selection process has been initiated to fill up the vacancies of LDAs in the Transport Department. But that may not affect the relief claimed by the appellants in Civil Appeal arising from SLP(C) No.12129/2006. On January 10, 2008 this Court directed that 12 posts of LDA should be kept vacant until further orders. Civil Appeal arising from SLP(C) No.12129/2006 is accordingly allowed and the concerned authorities are directed to fill up the 12 vacancies of LDAs in the Transport Department from the select list dated June 24, 2003 strictly in order of merit ( six from the selected candidates and six from the waiting list ). In case any of the candidates from the select list dated June 24, 2006 does not turn up in response to the offer the vacancy would be filled up from the fresh selection taken up as per the High Court direction.

19. The claim of the other six appellants is not based on the select list dated June 24, 2003. Counsel appearing on their behalf referred to a list of November 20, 2001 containing the names of 42 candidates. The names of the six appellants are at serial Nos. 20, 24, 26, 31, 34, and 39. The last two candidates are said to belong to OBC category. According to the six appellants, the select list dated June 24, 2003 was drawn up on the basis of the earlier list of 2001 in which their names also figured. It was submitted on their behalf that there are sufficient vacancies against which they too could be accommodated. We are unable to see how the six appellants can be granted any relief. In the first place the counsel appearing for the State of Assam denied the existence of any select list dated November 20, 2001. Secondly on their own showing the appellants are much below even in that list and no direction for their appointment can be given in disregard of the candidates above them even in that list. The claim of these six appellants thus has no merit or substance. The two appeals arising from SLP(C) No.12766 of 2006 and SLP (C) No.17979 of 2006 and I.A. No. 5/2009 (filed in SLP (C) No.17979/2006) are accordingly dismissed.

<sup>1</sup>2008 (4) SCC 619

<sup>2</sup>1995 (3) SCC 486

<sup>3</sup>1985 (4) SCC 417