

GAHC010147572019



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

Case No. : WP(C) 4600/2019

1: PRANJAL KUMAR SARMA AND 3 ORS.
S/O. SUREN CH. SARMA, R/O. RANGAMATI, PALASHBARI, DIST. KAMRUP
(M), ASSAM.

2: SIDDHARTHA KASHYAP
S/O. LT. DILIP KUMAR MAZUMDAR
R/O. SARASWATI SHIKSHA NIKETAN
MIRZA
GUWAHATI
DIST. KAMRUP
ASSAM.

3: BHASKAR BARUAH
S/O. NIBARAN NARAYAN BARUAH
R/O. MEGHAMALLAR HOUSING COMPLEX
BLOCK-A-6
FLAT NO. 203
SEWALI PATH
HATIGAON
GUWAHATI
DIST. KAMRUP (M)
ASSAM.

4: KANGKAN SARMA
S/O. AMARENDRA SARMA
R/O. BHAWANIPUR (NAHATI)
P.O. BHAWANIPUR
DIST. BARPETA
ASSAM

VERSUS

1:THE STATE OF ASSAM AND 6 ORS.
REP. BY THE CHIEF SECY. TO THE GOVT. OF ASSAM, DISPUR, GUWAHATI-
781006.

2:THE SECRETARY TO THE GOVT. OF ASSAM
DEPTT. OF PERSONNEL (B)
ASSAM SECRETARIAT
DISPUR
GUWAHATI-781006.

3:THE ASSAM PUBLIC SERVICE COMMISSION
REP. BY ITS CHAIRMAN
JAWAHAR NAGAR
KHANAPARA
GUWAHATI-22.

4:THE CHAIRMAN
ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
KHANAPARA
GUWAHATI-22.

5:THE SECRETARY
ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
KHANAPARA
GUWAHATI-22.

6:THE DY. SECRETARY
ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
KHANAPARA
GUWAHATI-22.

7:THE PRINCIPAL CONTROLLER OF EXAMINATIONS
ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
KHANAPARA
GUWAHATI-22

Advocate for the Petitioner : MR. S BORTHAKUR

Advocate for the Respondent : SC, APSC

BEFORE
HONOURABLE THE CHIEF JUSTICE (ACTING)
HONOURABLE MR. JUSTICE MANISH CHOUDHURY

JUDGMENT AND ORDER
(ORAL)

08.08.2019

[A. K. Goswami, C.J. (Acting)]

Heard Mr. S. Borthakur, learned counsel for the petitioners. Also heard Mr. C. Baruah, learned standing counsel, Assam Public Service Commission (APSC), appearing for respondents No. 3 to 7, and Mr. H.K. Hazarika, learned State counsel, appearing for respondents No. 1 and 2.

2. Challenge in this writ petition by 4 petitioners is to Clause 12.2 of the Assam Public Service Commission (Conduct of Business) Procedure, 2019 (hereinafter referred to as "2019 Procedure").

3. The petitioners had responded to an advertisement No. 13/2019 published by the Secretary, APSC, on 21.12.2018, for filling up of 65 posts of Assistant Engineer (Civil) under Water Resources Department.

4. On 22.07.2019, when the case was listed, taking note of the submission of Mr. Borthakur that since APSC is conducting a large number of examinations, it would be appropriate to make an attempt to dispose of the writ petition on the returnable date on 08.08.2019, it was observed that an attempt would be made to dispose of the writ petition on 08.08.2019. Accordingly, as agreed to by the learned counsel for the parties, the writ petition is taken up for final disposal.

5. Purportedly, in exercise of powers conferred by the proviso to the Article 320 of the Constitution of India and in supersession of all previous rules, if any, the APSC adopted a Rule called "Assam Public Service Commission (Procedure and Conduct of Business) Rules, 2010 (hereinafter referred to as "2010 Rules"), which came into force with effect from 02.08.2010. The said Rule was the subject-matter of challenge in a writ petition, numbered as WP(C) No. 1998/2017, on various grounds including on the ground that Article 320 of the Constitution of India does not confer any power to the State Public Service Commission to adopt any Rule by itself. During the pendency of the said writ petition, the APSC had repealed the 2010 Rules and

adopted the 2019 Procedure with effect from 01.04.2019.

6. In WP(C) 1998/2017, the respondents No. 3, 4 and 5, i.e., the APSC and its functionaries, had filed an affidavit bringing on record the aforesaid development and stated that Assam Public Service Commission (Procedure and Conduct of Business) Rules, 2010 though styled as a Rule, was basically a procedure for smooth functioning of internal management and operation of affairs of the Commission. The writ petition was disposed of by an order dated 16.07.2019 as follows:-

“Heard Mr. S. Borthakur, learned counsel for the petitioner. Also heard Mr. T.C. Chutia, learned State counsel, appearing for respondent Nos. 1 & 2 and Mr. C. Baruah, learned standing counsel, APSC, appearing for respondent Nos. 3 to 5.

By this writ petition, the petitioner challenges the Assam Public Service Commission (Procedure and Conduct of Business) Rules, 2010.

The respondent Nos. 3, 4 and 5 had filed an affidavit on 03.04.2019 stating that after repealing the Assam Public Service Commission (Procedure and Conduct of Business) Rules, 2010, a new set of procedures, named and styled as "Assam Public Service Commission (Conduct of Business) Procedure, 2019, are formulated and the same came into effect from 01.04.2019. It is also stated that the Assam Public Service Commission (Procedure and Conduct of Business) Rules, 2010, though styled as a Rule, was basically a procedure for smooth functioning of internal management and operation of affairs of the Commission.

Mr. Borthakur submits that in view of the above development, the present writ petition has been rendered infructuous. He submits that though the Assam Public Service Commission (Conduct of Business) Procedure, 2019 has taken care of many of the shortcomings present in Assam Public Service Commission (Procedure and Conduct of Business) Rules, 2010, liberty may be granted to challenge the aforesaid Assam Public Service Commission (Conduct of Business) Procedure, 2019, if need be.

In view of the above submission of Mr. Borthakur, this writ petition is closed as infructuous reserving liberty to the petitioner to assail the Assam Public Service Commission (Conduct of Business) Procedure, 2019, if need be.”

7. In the instant writ petition, the petitioners have called into question Clause 12.2 of the 2019 Procedure. Having regard to the subject-matter, it will be appropriate to extract Clause 12 of the 2019 Procedure in its entirety and the same is extracted below:

“12. REPEAL & SAVINGS

12.1 *The Assam Public Service Commission (Procedure & Conduct of Business) Rules, 2010 are hereby repealed by the Assam Public Service Commission (Conduct of Business) Procedure, 2019.*

12.2 *Notwithstanding such repeal, anything done or any action taken under the Rules referred in Sub-Procedure (i), and all acts, orders, decisions, recommendations, including the conduct of an interview, selection or competitive examination, or declaration of any result thereof by or on behalf of the Commission in accordance with the Rules referred to in Sub-Procedure (i) or the Rules framed there under, shall be deemed to be, and always to have been, valid and any proceedings in relation to interviews, selections or competitive examination pending on the date of commencement of these Procedures may be continued and completed in accordance with the provisions of the Rules in force prior to such commencement.*

12.3 *The Commission may review the provisions of the "Procedure" from time to time with the strength and agreement of the full commission and make necessary correction/corrections and modifications as deem fit and proper in these Procedures."*

8. Mr. Borthakur submits that the petitioners are not aggrieved by the whole of Clause 12.2, but with the portion which is as follows:

"..... and any proceedings in relation to interviews, selections or competitive examination pending on the date of commencement of these Procedures may be continued and completed in accordance with the provisions of the Rules in force prior to such commencement."

He has submitted that the APSC did not allow the earlier writ petition to be decided on merits and, during the pendency of the writ petition, had brought in the 2019 Procedure. He has also submitted that the APSC had conceded as is manifest in the Preamble of the 2019 Procedure itself, as also in the affidavit filed in the earlier round of litigation, that the 2010 Rules is not a Rule but only a Procedure and, therefore, no vested right accrues to any candidate on the basis of so-called 2010 Rules. When the very purpose and object, according to the APSC, for bringing in the 2019 Procedure, is to bring in more transparency and for better use of information and communication technology in the selection process, Clause 12.2, enabling the APSC to continue and complete any pending proceeding in relation to interviews, selections or competitive

examinations is incongruous, arbitrary and the same cannot stand scrutiny of law. He has submitted that merely because the advertisement had been issued prior to coming into force of the 2019 Procedure, the same cannot be a ground for continuous application of the 2010 Rules in the pending interviews, selections or competitive examinations. He has submitted that some validity may be attached, subject to judicial scrutiny, to the concluded events and acts that had taken place in individual cases, but any intermediate process towards culmination of the selection process, which has not been started, ought to be conducted under the 2019 Procedure as the 2019 Procedure has brought in transparency and is a vastly improved version of the procedure to the 2010 Rules.

9. Mr. Baruah has submitted that the 2019 Procedure had ushered in much transparency in the interview process and, in that regard, the procedures envisaged under the 2019 Procedure have taken care of many of the shortcomings of the 2010 Rules. Relying on the affidavit filed, it is submitted by him that since 2019 Procedure does not have retrospective effect, any proceeding that had started prior to 01.04.2019, has to be conducted under the 2010 Rules. It is submitted by him that there is no admission on the part of the APSC that it did not have power to frame Rules under Article 320 of the Constitution of India and the 2010 Rules was not repealed because the same was illegal and was without jurisdiction, but was superseded only to bring in more transparency in selection process. He submits that any advertisement issued by the APSC prior to 01.04.2019 should be taken to its logical conclusion in terms of the 2010 Rules and, therefore, Clause 12.2. was incorporated.

10. Mr. H. K. Hazarika, learned State counsel submits that it is an internal matter of APSC and makes no other submission.

11. We have considered the submissions of the learned counsel for the parties and have perused the materials on record.

12. In first sub-paragraph of paragraph 13 of the affidavit of respondents No. 3 to 7 filed in the instant writ petition, it is stated as follows:

“That, it is to be categorically stated that at the time of advertisement for 65 (sixty-five) nos. post of Assistant Engineer (Civil) under Water Resource Department vide Advertisement No. 13/2018 dated 21/12/2018, the Assam Public Service Commission (Conduct of Business) Procedure, 2019 was not enforced and same Procedure, 2019 came

into force w.e.f. 1st day of April, 2019 giving prospective effect. Rather, at the time of advertisement for the aforesaid post vide Advertisement No. 13/2018, Assam Public Service Commission (Procedure and Conduct of Business) Rules, 2010 was in force hence procedure of selection for aforesaid 65 posts is to be completed following the Rules, 2010. It is also made clear that after coming into force of the Assam Public Service Commission (Conduct of Business) Procedure, 2019 from 01/04/2019 whatever advertisement will be given for various selection, Procedure 2019 will be strictly followed by the Commission.”

13. In the backdrop of the above assertion, Mr. Baruah has submitted that the date of issuance of the advertisement would determine whether the 2019 Procedure or the 2010 Rules are to be followed in the context of a particular selection process.

14. It is not necessary for us in this proceeding to compare the provisions of the 2019 Procedure and 2010 Rules in view of the submissions made that the provisions of 2019 Procedure will promote fairness in the selection process as it is more transparent. The question is whether only because of the fact that an advertisement was issued prior to 01.04.2019, or one part of the selection process, such, as written examination was held prior to 01.04.2019, the procedures contemplated under the 2010 Rule have to be followed in respect of selection process falling under the scope of the particular advertisement ?

15. The Preamble of the 2019 Procedure reads as follows:

“PREAMBLE

In the light of challenge made in the Hon'ble Gauhati High Court pertaining to the APSC) Procedure and Conduct of Business) Rules, 2010 (though it is mentioned as rules, but it is a Procedure for internal operation and management of business of the Commission and for conducting examinations/interviews for selection of candidates to various posts and services), the Commission felt the need to act and accordingly the Commission had taken the view of the Govt. of Assam, Department of the Personnel (B). The Govt. of Assam in the Personnel (B) Deptt, had communicated the views and suggested to formulate a set of procedures by the Commission for its internal operation and management. Under the circumstances, the Commission has decided to repeal the Assam Public Service Commission (Procedure and Conduct of Business) Rules, 2010 with immediate effect. Now, for bringing in more transparency and for better use of information and communication technology in selection of persons for various posts and services with

fairness and excellence in work procedure and for internal operation and management of affairs of the Commission, it has become expedient to frame the following new Procedures which is termed as 'the Assam Public Service Commission (Conduct of Business) Procedure, 2019' and the Commission adopts the Procedure to be effective from the date of notification."

16. A perusal of the Preamble goes to show that it is a set of procedures for the internal operation and management of APSC and that it had become expedient to frame the same for bringing in more transparency and for better use of information and communication technology for selection of persons for various posts and services with fairness and excellence in work procedure and for internal operation and management of affairs of the Commission. Framing of the 2019 Procedure was prompted by the challenge made to the 2010 Rules and the APSC felt the need to act and this has resulted in publication of the 2019 Procedure.

17. It is to be noted that in the Preamble itself it has been stated that that 2010 Rules, though mentioned as Rules, is only a procedure for internal operation and management of business of the APSC and for conducting examinations and interviews. Thus, there is not a shadow of doubt that the 2010 Rules is not a set of rules as is understood in legal parlance.

18. No applicant has a vested right that because he had responded to an advertisement issued prior to 01.04.2019, the procedures envisaged under the 2010 Rules or procedure have to be followed. No substantive right of any of the applicants will be affected in the event of the procedure prescribed in 2019 Procedure is followed. What have been changed are only the procedures and existing substantive right of any of the applicants has not been affected. No new disabilities or obligations would be created in respect of the candidates who had responded to the advertisement issued prior to 01.04.2019. The 2019 Procedure also does not create any new rights and liabilities.

19. Repeal is a concept associated with statute. A power to make a law carries with a power to repeal a law. Subject to any constitutional retraction, the general rule is that power of a Legislative body to repeal a law is co-extensive with a power to enact such a law. There is also no real distinction between repeal and amendment. Such being the legal position, we are of the opinion that, in essence, the 2019 Procedure has been issued in supersession of the 2010 Rules and the word 'repeal' is a misnomer. Notwithstanding the nomenclature of 'repeal' used in Clause 12.2, so far as it saves the acts, orders, decisions, recommendations including conduct of

interviews, selections, competitive examinations or declaration of results thereof by or on behalf of the Commission in accordance with the 2010 Rules, can be deemed to be valid subject to, of course, any challenge made to any action taken. It is also worthwhile to note that protecting and saving the concluded acts is not assailed by Mr. Borthakur. We see no justification or legal necessity to apply the provisions of the 2010 Rules so far as the proceedings in relation to the interviews, selections or competitive examinations for which no exercise has begun. Issuance of an advertisement prior to 01.04.2019, in our considered opinion, has no relevance for the purpose of applicability of the 2019 Procedure or 2010 Rules. If the interview has taken place under the 2010 Rules, surely, the 2019 Procedure will not come into play. In case the advertisement was issued prior to 01.04.2019 and written examination has taken place but interview has not taken place till date, the prevailing 2019 Procedure has to be applied for the purpose of interview.

20. Accordingly, we strike down the expression, "*and any proceedings in relation to interviews, selections or competitive examination pending on the date of commencement of these Procedures may be continued and completed in accordance with the provisions of the Rules in force prior to such commencement.*", occurring in Clause 12.2 of the 2010 Rules. All pending interviews, selections and competitive examinations, even if occasioned by advertisement(s) issued prior to 01.04.2019, shall be guided by the 2019 Procedure as indicated above.

21. The writ petition is, accordingly, allowed to the extent as indicated above.

JUDGE

CHIEF JUSTICE (ACTING)

RK

Comparing Assistant