

GAHC010039352017



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

Case No. : WP(C) 5576/2017

1:HRISHIKESH DAS
S/O SRI HITEN KUMAR DAS, HOUSE NO.28, VILLAGE-PILINGKATA, VIA-
BAKRAPARA, PO-BASISTHA, GUWAHATI, PIN-781029, DIST. KAMRUP M,
ASSAM

VERSUS

1:ASSAM PUBLIC SERVICE COMMISSION and 3 ORS.
REP. BY ITS CHAIRMAN, JAWAHAR NAGAR, GUWAHATI-781022

2:SECRETARY
ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
KHANAPARA-781022

3:THE PRINCIPAL CONTROLLER OF EXAMINATIONS
ASSAM PUBLIC SERVICE COMMISSION
JAWAHAR NAGAR
KHANAPARA
GUWAHATI-781022

4:THE STATE OF ASSAM
REP. BY THE COMMISSIONER AND SECRETARY
DEPTT. OF PERSONNEL A
DISPUR
GUWAHATI-78100

Advocate for the Petitioner : MR. N DUTTA

Advocate for the Respondent : SC, PERSONNEL DEPT.

**BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM**

JUDGMENT AND ORDER (Oral)

Date : 20-08-2018

Heard Mr. N. Dutta, learned senior counsel assisted by Mr. P. Phukan, learned counsel appearing for the writ petitioner. I have also heard Mr. C. Baruah, learned Standing Counsel, Assam Public Service Commission, appearing on behalf of respondent Nos.1, 2 and 3 as well as Mr. A. Thakur, learned Standing Counsel, Department of Personnel, Government of Assam, appearing for the respondent No.4.

2. The facts of the case necessary for disposal of this writ petition are these. The Assam Public Service Commission (APSC) i.e. the respondent No.1 herein, had issued an advertisement notice dated 03.07.2015 inviting applications for holding a Preliminary Examination of the Combined Competitive Examination(CCE), 2015 for screening the candidates for the Mains Examination to be conducted by the Commission for recruitment in various posts in the Assam Civil Service. In response to the advertisement dated 03.07.2015, the petitioner had submitted his candidature and had appeared in the Preliminary test. Having qualified in the Preliminary test, the petitioner was issued admit card bearing Roll No: 0904553 permitting him to write the Mains Examination. Based on his score in the CCE Mains Examination, the petitioner was also called for the viva-voce test which was held on 21.06.2017 but when the final select list of successful candidates was published, the name of the petitioner did not figure there-in. According to the writ petitioner, he had fared well in the examination and therefore, found the outcome of the selection process as unacceptable. As such, the petitioner had submitted an application under the Right to Information Act, 2005 on 04.07.2017 seeking the certified copies of the answer scripts of all the six papers in the CCE Mains Examination, 2015 viz. General Studies, General English, Education Paper I, Education Paper II, Sociology paper I and Sociology paper II, information regarding marks obtained by him in the Viva Voce test and also the

final cut-off marks for each category of post, which were furnished to him by the respondent No. 1 on 08.08.2017. After going through the answer scripts, the petitioner found that there was wrong evaluation and/ or marking in respect of a few answers given by him in the General Studies paper as a result of which he has been wrongfully deprived of at least 12 marks. The petitioner's case is that the "cut off" mark for the post of Inspector of Taxes in the "Open category" was 973 whereas he had scored 970 marks. As such, had he been awarded the correct marks in respect of all the answers given in the General Studies Paper then in that event, the petitioner would have certainly got the job of Inspector of Taxes. When the request of the petitioner for re-examination/re-evaluation of the marks, as made by the representation dated 25.08.2017, was turned down by the APSC, the petitioner had approached this Court by filing the instant writ petition.

3. The respondent Nos.1, 2 and 3 have stated in their counter-affidavit that the answer scripts had been evaluated by reputed examiners from well known colleges and Universities of Assam. It has further been mentioned that taking note of the petitioner's complaint, the views of the concerned Examiner was obtained by the Commission in the matter. According to the Examiner, the answers of the petitioner in the General Studies Paper, as mentioned in his petition, were not correct, appropriate, or satisfactory and therefore, the candidate did not deserve any more mark.

4. At the stage of admission hearing of this case, Mr. N. Dutta, learned senior counsel appearing for the writ petitioner had argued that the answers given by the petitioner in respect of Question Nos.3(ix), 4(ii), 4(xv), 4(xviii), 4(xix), 4(xxxii) and 4(xxxiii) of the General Studies paper have not been correctly evaluated by the Examiner as a result of which the petitioner has been deprived of the order of appointment for the post of Inspector of taxes. To buttress his aforesaid arguments Mr. Dutta had invited the attention of this Court to the answers, drawn from various authentic sources that have been brought on record, so as to contend that the answers given by the petitioner in respect of the aforesaid questions were correct but the Examiner had

wrongfully evaluated those thereby denying atleast 12 marks to the petitioner. The learned senior counsel has therefore, submitted that the disputed answers in the General Studies paper be re-evaluated so as to do proper justice in the case of the petitioner.

5. Mr. C. Baruah, learned Standing Counsel, APSC, on the other hand, has relied upon a decision of the Division Bench of this Court rendered in the case of **Ratul Kumar Das and Ors vs. State of Assam and Ors.** reported in **2009 (4) GLT 648** to contend that matters pertaining to conduct of examination fall within the exclusive domain of the Commission and this Court in exercise of powers conferred under Article 226 of the Constitution of India would not sit in appeal over the assessment of the answers made by the examiner. The learned Standing Counsel has also reiterated the stand of the Commission, as projected in the affidavit, that the answers given by the petitioner have been correctly evaluated by the Examiner and hence, he is not entitled to any additional marks in the General Studies Paper.

6. This court had taken note of the evaluation made by the Examiner in the answer script of the General Studies paper as well as the materials brought on record by the petitioner in support of his case that those answers had been wrongly evaluated. From a meticulous examination of the materials on record, this court was of the *prima facie* view that the evaluation of the disputed answers in the General Studies paper, as made by the Commission appointed Examiner, called for a re-check. As such, by the order dated 05.06.2018, this Court had granted time to the learned standing counsel, APSC to obtain instruction as to whether, even at this stage, the respondent No.1 Commission would be open to making an independent assessment of the controversial answers and award fresh marks to the petitioner on the merit of the answers. However, when the matter was listed again, Mr. Baruah had submitted on instructions from his client that it would not be possible for the respondent No.1 Commission to re-evaluate the answers of the petitioner in the General Studies paper since Rule 70 (iv) of the Rules of 2010 did not permit such an exercise.

7. Situated thus, by the order dated 19.06.2018 this court had referred the controversial answers to the Vice -Chancellor of Cotton University, Guwahati with a request to get those re-examined /re-evaluated through competent academicians of his choice and submit the results thereof to this court in sealed cover. Accordingly, the exercise had been carried out and the opinion of the "academic experts" has been sent back to this court in sealed cover. The seal cover envelope was opened in presence of the learned counsel for the parties whereafter, it transpired that the subject experts have opined that the petitioner was entitled to at least 10.5 more marks compared to what was awarded to him by the Examiner in respect of the answers to the question nos. 3(ix), 4(ii), 4(xv), 4(xviii), 4(xix), 4(xxxii) and 4(xxxiii) of the General Studies Paper.

8. The learned Counsel for both the parties have not disputed the correctness of the opinion given by the "academic experts" holding that the petitioner was entitled to 10.5 more marks but Mr Baruah has submitted that since there is no provision in the Rules to entertain such a plea, the Commission would refrain from making any further comment in the matter.

9. As noted above, the cut off mark for the post of Inspector of Taxes in the "open category" was 973 but the petitioner did not qualify for appointment to the post of Inspector of taxes as his final score fell short by 3(three) marks. As such, it is evident that if the 10.5 marks are added to the final score of the petitioner than his over- all ranking in the merit list will go up and he would become eligible for being appointed in the post of Inspector of Taxes as a candidate belonging to the "open category". Evaluation of the answer scripts being a matter ordinarily falling within the domain of the APSC, the core question in this writ petition would be as to whether, the issue raised by the petitioner in this proceeding would be amenable to judicial review of this court.

10. Mr Dutta has argued that unlike in the pre-amended Rules, the Assam Public Service Commission (Procedure and Conduct of Business) Rules, 2010 does not contain any provision for the Commission to re-assess the answer books. According to

Mr. Dutta absence of such a provision in the Rules coupled with the embargo created by Rule 70(iv) of the Rules 2010 prohibiting the Commission from entertaining any request for re-examination of the answer scripts has created an anomalous situation in as much as candidates such as the writ petitioner here-in have been left remediless. Mr. Dutta submits that once it has been found that the petitioner has been wrongfully denied 10.5 marks by the Examiner costing him the job of Inspector of taxes, he cannot be left remediless merely because the Rules of 2010 does not contain any provision permitting the Commission to redress his grievance.

11. Relying on the maxim "*ubi jus ibi remedium*" and the rule of equity, the learned senior counsel submits that this Court would have ample powers to remedy the situation and issue appropriate writ order or directions directing the respondents to give credit to the petitioner for the marks legitimately scored by him in the General Studies Paper and render justice in his case. In support of his aforesaid arguments Mr. Dutta has relied upon the following decisions :-

(1) **Kanpur University, through Vice-Chancellor and Ors vs. Samir Gupta and Ors**, reported in **AIR 1983 SC 1230**.

(2) **Rohit Purkayastha and Ors. Vs. Board of Secondary Education, Assam and Ors**. reported in **2000 (3) GLT 83**.

12. In the case of **Kanpur University** (supra) the question that had arisen before the Court was as to whether if the paper setter commits error while indicating correct answer to question, can students who answer the questions correctly be failed for the reason that though their answer is correct, it does not accord with the answer supplied by the paper setter to the University? The candidates, who had applied for admission to the medical Colleges in the State of Uttar Pradesh and whose name did not figure in the select list had approached the Allahabad High Court by filing writ petitions inter-alia contending that the answers ticked by them were correct and the key answer was wrong. BY referring to the answers in the standard text books which the students consult or are expected to consult, the High Court had accepted their contention and held that the respondents would be entitled to be given 4 marks

for each of the questions correctly answered by them. Aggrieved by the decision of the Allahabad High Court, the Kanpur University went in appeal before the Supreme Court. While dismissing the appeals preferred by the University, the Supreme Court had held that the key answers should be assumed to be correct unless it is proved to be wrong. It was found that the text books supports the case of the students fully and since the matter was beyond the realm of doubt, it would be unfair to penalise the students for not giving an answers which accords with the key answer, that is to say, with an answer which is demonstrated to be wrong.

13. In the case of **Rohit Purkayastha and others** (supra), a Division Bench of this Court was confronted with a similar situation where the appellants, who had appeared in Fine Arts Practical paper in the HSLC examination from a particular centre, had failed and alleging deliberate under-marking, they had approached this Court by filing a writ petition which was dismissed by the learned Single Judge after carrying out a scrutiny of the answer scripts whereby it was observed that the students did not give the correct answers according to the questions. However, in an appeal preferred by the students, the Division Bench had carried out a scrutiny of the answers and found that the answers of the students were mostly in accordance with the questions. Taking note of the circumstances of the case, the Division Bench had held that opinion of experts in such matters has to be generally accepted and accordingly directed the Board to appoint a committee of two qualified persons to check the answer scripts of the Fine Arts Practical paper so as to cross-check the marks as awarded to the appellants and if necessary the said committee may award the marks afresh as thought fit in accordance with the quality of answers made by the appellants.

14. From the decisions referred to here-in above, it is thus apparent that the jurisdiction of the High Court under Article 226 of the Constitution is expansive in a case of this nature. Whether the answer script needs to be re-evaluated or should it be referred for expert opinion would be a matter of discretion of the court to be exercised depending upon the facts and circumstances of each case. Such discretion, however, is required to be exercised with much circumspection and in a

manner consistent with the concept of justice, equity and good conscience.

15. The Roman jurisprudential maxim "*ubi jus ibi remedium*" means that where law provides a right, there has to be a remedy. In other words, where there is a right, there is a remedy. Referring to the Rule of *ubi jus ibi remedium* the Supreme Court has observed in the case of case of ***M/s Shiv Shankar Dal Mills And Others vs State of Haryana*** reported in (1980) 2 SCC 437, relied upon by Mr Dutta, that Article 226 grants extra-ordinary remedy which is essentially discretionary , although founded on legal injury and it was perfectly open for the court to exercise this flexible power as public interest would dictate or equity projects.

16. In the case of ***Union of India vs S.B.Vohra*** reported in (2004) 2 SCC 150, the Supreme Court had the occasion to examine the broad principles of judicial review wherein it has been observed that judicial review is a highly complex and developing subject but it is considered to be the basic feature of the Constitution. The court in exercise of its power of judicial review would zealously guard the human rights, fundamental rights and the citizen's right of life and liberty. The court would, however, exercise its power of restraint in relation to interference of policy and would not ordinarily exercise the power of a statutory authority.

17. In the case of ***Ratul Kumar Das and Ors*** (supra) the Division Bench of this Court has observed that it is not the job of the Court to sit in appeal in respect of examinations conducted by the statutory body neither should a Judge assume the role of a super examiner and in the absence of any strong compulsion, the Courts would not undertake review of action of the scrutinizers and head examiners in allowing higher or lower marks to any particular candidate. However, the ratio of the said decision, in my opinion, would not be applicable to the facts of the present case for the following reasons. Firstly, under the Rules of 2010 there is no scope for referring the matter for the opinion of the Head Examiner or scrutinizer as a result of which a candidate who is aggrieved by erroneous marking by the examiner is left remediless. That apart, unlike in the case of ***Ratul Kumar Das and Ors*** (supra) the re-evaluation of the answers given by the petitioner in General Studies paper in this case has not been

done by the Court but had been referred to the academic experts for their opinion. The opinion of such expert has been accepted by all the parties to this proceeding.

18. In the case in hand, the respondent No 1 Commission had refused to grant any relief to the petitioner taking the plea that Rule 70(vi) of the Rules of 2010 did not permit re-examination of the answer scripts. As such, the controversial answers were referred for re-evaluation through subject experts who have opined that the petitioner was entitled to 10.5 more marks for the answers given by him in the General Studies Paper. The subject experts are very knowledgeable persons who are teaching in a reputed University and their opinion has also been explained by putting up notes where necessary. The respondents have not contested the opinion of the academic experts. Situated thus, this court finds no good ground to reject opinion of the subject experts in the matter.

19. If the opinion of the subject experts is accepted, then there can be no escape from the conclusion that the petitioner has been wrongfully deprived of atleast 10.5 marks by the Examiner. Had those marks been added to his total then the final score of the writ petitioner would have been 980.5, in which event, he would have been entitled to be appointed to the post of Inspector of Taxes based on his merit position. Since, the "cut off" marks for the post of Inspector of taxes is 973, hence, it is obvious that persons scoring less than the writ petitioner have already been appointed as Inspector of taxes. Under the circumstances, this court is of the considered opinion that merely because the Rules of 2010 did not provide for any remedy to the candidate, the writ court would not be justified in refusing relief in this case. Once it is established on the basis of cogent materials on record that the petitioner had suffered legal injury due to error committed by the Examiner in evaluating the answers, denying him the benefit of the additional marks would not only be wholly un-fair but such an approach, in the opinion of this court, would also amount to travesty of justice. It is therefore, held that the writ petitioner would be entitled to the benefit of additional 10.5 marks to his grand total of 970 marks originally worked out by the Commission.

20. Taking note of the grievance expressed in the writ petition this Court, while issuing notice in the writ petition, had passed an interim order dated 11.09.2017 directing that one post in the cadre of Inspector of Taxes be kept vacant until further orders. Mr. Thakur has confirmed that in terms of the interim order dated 11.09.2017 passed by this Court, one post of Inspector of Taxes has been kept vacant awaiting further orders in this case. There is no other candidate who has come forward with a claim against the said post. Under the circumstances, it would be highly inequitable for this court to deny relief to the petitioner in the facts and circumstances of this case.

21. For the reasons stated herein above, this writ petition succeeds and is hereby allowed.

The respondents are directed to take immediate steps for issuance of order of appointment in favour of the writ petitioner in the post of Inspector of Taxes after observing all the necessary formalities. The aforesaid exercise be carried out within a period of 60 (sixty) days from the date of receipt of a copy of this order.

There would be no order as to cost.

JUDGE

Comparing Assistant