

Judgement Date : 13/06/2017

Case No : WP(C) 5480/2016

Smti. Nabanita Das 5 Ors. –vs- State of Assam & 17 Ors.

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

Heard Mr. D Das, learned senior counsel for the petitioner, Ms. D Bora, learned State counsel appearing for respondent No.1 and Mr. B Sinha, learned standing counsel, Assam Public Service Commission (APSC) appearing for respondent No.2. Also heard Mr. HRA Choudhury and Mr. M Choudhury, learned senior counsels appearing for the private respondents.

2. The three writ petitions are being disposed of by this common judgment and order.

3. The petitioners' by way of the present writ petitions are challenging the selection of 14 private respondents as District Malaria Officer (DMO) on the basis of a selection process, made in pursuance to an advertisement dated 15.12.2012, issued by the APSC. The petitioners' case in brief is that they were appointed as DMO under Regulation 3(f) of the Assam Public Service Commission (Limitation & Function) Regulation 1951. The petitioners' counsel submits that the advertisement having been issued on 15.12.2012 for appointment of 14 candidates to the regular post of DMO, the petitioner submitted representations for giving weightage to their service under Regulation 3(f) during the selection process made in pursuance to the advertisement dated 15.12.2012. As the respondents did not consider the representations of the petitioners', the petitioners' filed WP(C) No.2131/2015. WP(C) No.2131/2015 was disposed of vide order dated 09.04.2015, whereby a direction was issued to the effect that weightage may be given to the petitioners in the selection process made in pursuance to the advertisement dated 15.12.2012, due to their experience for services rendered under Regulation 3(f) of the Assam Public Service Commission (Limitation & Function) Regulation, 1951.

4. The petitioners' case is that written test was conducted on 26.04.2015 in pursuance to the advertisement dated 15.12.2012. The petitioners', however, were not called for interview/viva-voce test by the State respondents after the written test had been completed and being aggrieved by the same, the petitioners' filed WP(C) No.5635/2015. The petitioners' grievance in WP(C) No.5635/2015 was two fold. Firstly, the State respondents not having made any stipulation as to what would be the cut-off mark for written test in the advertisement dated 15.12.2012, the respondents committed an illegality in not calling the petitioners' for taking part in the viva-voce test on the ground that they had not secured the cut off marks in the written test. Secondly, though the petitioners' had given correct answers to question Nos.5, 57 and 62, the APSC had not given them the marks for the said correct answers on the ground that the answer keys had reflected different answers, which were actually wrong answers.

5. The petitioners' counsel submits that an analogous case, i.e. WP(C) No.5580/2016 had also been filed by some other aggrieved candidates, who had taken part in the selection process for the post of DMO, in pursuance to the advertisement dated 15.12.2012. The petitioners' counsel submits that this Court while disposing of WP(C) No.5580/2015, vide order dated 25.05.2016, had not considered the first point raised by the petitioners' herein, in WP(C) No.5635/2015, i.e. as to

whether the APSC could have made the cut off mark for the written test, as the same was not reflected in the advertisement dated 15.12.2015.

6. The counsel for the petitioner submits that the other ground taken by the petitioner in WP(C) No.5635/2015 i.e. with regard to not being given marks with regard to the answer keys in respect of question Nos.5, 57 and 62 has already been decided by this Court in WP(C) No.5580/2016 and accordingly, the petitioner does not have any further grievance with the said second point raised in WP(C) No.5635/2015.

7. The petitioners' counsel, however, submits that, the order dated 25.05.2015 passed in WP(C) No.5580/2015, not having decided the issue raised by the petitioner with regard to as to whether the APSC could have made the cut off mark during the selection process, which was urged by the petitioners in paragraph 22 of WP(C) No.5635/2015, the said question is still to be decided by this Court.

8. That the private respondents were recommended for appointment to the post of DMO by the APSC on 17.08.2016. Accordingly, the petitioners filed WP(C) No. 5105/2016 challenging the recommendation made. The petitioner's counsel submits that during the pendency of the WP(C) No.5635/2015, the State respondents declared the results of the selection process, made in pursuance to the advertisement dated 15.12.2012 and accordingly issued the impugned order dated 17.08.2016, wherein the 14 private respondents were declared to be selected candidates for appointment to the post of DMO.

9. That during the pendency of WP(C) No.5635/2015 and WP(C) No.5105/2016, the State respondents issued a notification dated 07.09.2016 by which the ad-hoc appointment of the petitioners under Regulation 3 (f) of the Assam Public Service Commission (Limitation & Function) Regulation 1951 was extended for a period of 4 months or termination of their service, whichever was earlier. The petitioners' being aggrieved by the impugned notification dated 07.09.2016, thereafter have filed the present writ petition which is WP(C) No.5480/2016.

10. The petitioners' counsel submits that as per the Clause N.B(A) of the advertisement dated 15.12.2012, the APSC had the power to shortlist the number of candidates who had applied for the post if the number of applications received was large. The same could be done on the basis of their marks obtained in the qualifying academic examination required for the post in pursuance to the advertisement or by holding written examination. The petitioners' counsel submits that the APSC having taken recourse to shortlisting the number of candidates by way of holding a written examination, the APSC could not have made a cut off mark in the written examination, as nothing was mentioned in the advertisement. The petitioners' counsel thus submits that subsequent denial of opportunity to the petitioners' to undergo viva-voce test, in the absence of any cut-off marks being mentioned in the advertisement dated 15.12.2012 was arbitrary and was liable to be set-aside.

11. The petitioners' should thus be allowed to take part in the viva-voce test and fresh selection should be made on the basis of marks obtained in the viva-voce test.

12. He, thus prays for setting aside the notification dated 17.08.2016 by which the private respondents have been selected as DMO and also prays for setting aside the notification dated 07.09.2016 regarding the extension/termination of the petitioners service.

13. The learned counsel for the petitioners in support of his submissions that the State respondents could not have changed the rules of the game during the process of selection, has relied upon the judgment of the Apex Court in K Manjusree Vs. State of AP, reported in (2008) 3 SCC 512 and Salam Samarjeet Singh Vs. High Court of Manipur, reported in (2016) 10 SCC 484.

14. Mr. HRA Choudhury and Mr. M Choudhury, learned Senior counsels for the private respondents submit that the prayer of the writ petitioner in WP(C) No.5480/2016 is for setting aside the notification dated 07.09.2016 extending/terminating the service of the petitioners as DMO under Regulation 3(f) of the Assam Public Service Commission (Limitation & Function) Regulation 1951. They also submit that the prayer of the petitioners in WP(C) No.5105/2016 is to set-aside the impugned recommendation of the 14 private respondents vide notification dated 17.08.2016. The counsels for the private respondents submits that the petitioner not having made a challenge to the advertisement and subsequent selection, which has been made in pursuance to the advertisement dated 15.12.2012, the present writ petition should be dismissed.

15. The counsels for the respondents also submit that the petitioners having participated in the selection process, they cannot be allowed to turn around and challenge the said selection process, just because that they have not been shortlisted for interview, as the shortlisting of the candidates is allowed as per the Assam Public Service Commission (Procedure and Conduct of Business) Rules, 2010 and as per the advertisement dated 15.12.2012.

16. The counsel for the respondents submit that the analogous matter i.e. WP(C) No.5580/2015, was disposed of vide order dated 25.05.2015 and that the Court, in that case, had directed that the APSC may hold a supplementary interview for similarly situated petitioners therein, if the petitioners therein scored more marks than the last shortlisted candidate for the interview. The respondents counsel submits that the order passed in WP(C) No.5580/2015 has by implication, validated the action of the APSC in making the cut-off marks and shortlisting the candidates for the purpose of interview.

17. They also submit that even if the petitioners were given the extra marks in respect of question Nos. 5, 57 and 62, the sum total of the petitioners' marks would be less than the marks of the last candidate called for interview.

18. Mr. B Sinha, learned standing counsel appearing for the APSC, submits that due to the large number of candidates, who had applied for appointment to the post of DMO, the qualifying marks were made by the APSC as allowed by Rule 28(iii) of the Assam Public Service Commission, (Procedures and Conduct of Business) Rules, 2010. The counsel for the APSC submits that the qualifying marks made in respect of the written test, for selecting the candidates who can take part in the interview, are as follows:

Category	Male	Female
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General	64%	64%
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OBC/MOBC	56%	58%
STP	52%	51%
ST(H)	51%	61%
SC	42%	42%

19. The counsel for the APSC submits that the Assam Public Service Commission (Procedure and Conduct of Business) Rules, 2010 allows the APSC to make the qualifying marks for written test for selection of candidates who are to be called for interview. He also submits that the present case is already covered by the order dated 25.05.2015 passed in WP(C) No.5580/2015. He also submits that as the marks of the petitioners herein in the written test are lower than the last shortlisted candidates, who were called for interview in pursuance to the advertisement dated 15.12.2012, there is no infirmity in not calling the petitioners for interview.

20. The counsel for the APSC submits that if the number of applications are large, the Commission may short list the number of candidates either on the basis of the marks obtained in the academic examination or by holding written examination. The counsel for the respondents submits that the APSC has taken the decision to hold written examination. for short listing of candidates for interview as per the advertisement dated 15.12.2012 and as per Clause 28(iii) of the Assam Public Service Commission (Procedure & Conduct of Business) Rules, 2010 (hereinafter referred to as the "2010 Rules"). Learned counsel for the APSC submits that Clause 28(iii) of the 2010 Rules has, however, to be read along with Clause 28(i) of the 2010 Rules.

21. The counsel for the APSC submits that though the APSC has used the word "cut-off" in its affidavit, the same has been corrected to be "qualifying" in the additional-affidavit. The APSC counsel submits that as the post to be filled up was 14, the APSC had to select 56 candidates for the viva-voce test as per Clause 28(i) of the 2010 Rules. However, the last three candidates in the general category had obtained the same marks while 2 candidates from SC category had obtained the same marks. As such, the total number of candidates selected for the viva-voce test to be held under Clause 29 of the 2010 Rules was 59 in total. The petitioners, however, could not come within the proportion of candidates to be called for interview as required under Clause 28(i), as their marks were below the marks obtained by the candidates called for interview. He thus prays that the writ petition being devoid of merit, the same should be dismissed.

22. I have heard the learned counsel for the parties.

23. Clause 28 of the 2010 Rules states as follows:-

"28. The following proportion shall be maintained for short-listing of candidates for interview keeping in view the existing Reservations Policy as advertised subject to availability of candidates.

(i) Generally, following proportion shall be maintained for short-listing eligible candidates for interview:

No. of posts advertised Proportion of candidates for interview

1 to 5 6 times

6 to 10 5 times

11 and more 4 times

(ii) In case of single post like Director, Principal of an Institution, Head of Department, etc., no short-listing/weeding out shall be necessary.

(iii) The Commission may also hold written examination for short-listing of candidates for interview.”

24. The question in the present case is whether the Rules of the game have been changed in the midst of the selection process. A reading of the 2010 Rules would go to show that the final selection to be made for appointment to the vacant post of DMO is to be made on the basis of Clause 29 of the 2010 Rules, i.e. by way of a viva-voce test. The holding of the written examination is only for the purpose of short-listing the candidates for interview. This is clear from the clause NB(A) of the advertisement dated 15.12.2012, which is as follows:-

“WHEN/IF THE NUMBER OF APPLICATIONS RECEIVED ARE LARGE, THE COMMISSION MAY SHORT-LIST THE NUMBER OF CANDIDATES EITHER

(A) ON THE BASIS OF THEIR MARKS OBTAINED IN THE QUALIFYING ACADEMIC EXAMINATION REQUIRED FOR THE POST IN TERMS OF ADVERTISEMENT

OR

(B) BY HOLDING WRITTEN EXAMINATION WHICH WILL BE NOTIFIED IN DUE COURSE.”

25. Clause 28(i) of the 2010 Rules states that the proportion to be maintained for short-listing eligible candidates for interview for 11 advertised posts or more should be 4 times the number of vacancies. In the present case, the vacancies being 14, the proportionate number of candidates to be called for interview would be 14X4, i.e., 56 candidates. However, due to the reasons mentioned by the counsel for the APSC herein, as a number of candidates had got the same number of marks, 3 extra candidates have been called for interview. The petitioners marks are however below the marks secured by the 59 candidates. The holding of a written examination for short-listing of candidates is allowed as per Rule 28(iii) of the 2010 Rules and the same has also been incorporated in the advertisement dated 15.12.2012. A reading of Clause 28 goes to show that Clause 28(iii) would have to be read in conjunction with Clause 28(i) of the 2010 Rules. Accordingly, even though no cut-off or qualifying marks was mentioned in the advertisement dated 15.12.2012, the requirement of Clause 28 of the 2010 Rules, requires that only the proportionate number of candidates for the vacant post advertised can be selected for the viva-voce test. Thus a reading of the Clause 28 of the 2010 Rules makes it clear that Clause 28(iii) cannot be applied in isolation. It has to be applied in conjunction with either Clause 28(i) or 28(iii). Thus, this Court finds no infirmity with the decision of the State respondents to select the 59 candidates to undergo the viva-voce test, as per clause 28(i), depending upon the number of marks secured by them. In fact, the Rules of the game has not been changed in the present case. The Rules of the game remained constant and no infirmity or illegality has been

committed by the State respondents in applying Clause 28(iii) in conjunction with Clause 28(i) of the 2010 Rules.

26. In that view of the matter, this Court does not find any merit in the writ petitions and accordingly the same are dismissed.