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**(2023) 08 GAU CK 0064**

**Gauhati High Court**

**Case No:** Writ Appeal No. 79 Of 2018, 72 Of 2019

Dipti Mali,

APPELLANT

Vs

Dr. Mausomi Madhab

RESPONDENT

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**Date of Decision:** Aug. 25, 2023

**Acts Referred:**

- Assam Police Service Rules, 1966 - Rule 5, 6(5)
- APSC (Procedure and Conduct of Business) Rules, 2010 - Rule 67
- Assam Public Service (Combined Competitive Examination) Rules, 1989 - Rule 3(1), 3(2), 3(14)

**Citation:** (2023) 08 GAU CK 0064

**Hon'ble Judges:** Sandeep Mehta, CJ; Susmita Phukan Khaund, J

**Bench:** Division Bench

**Advocate:** U. K. Nair, D.P. Borah, B. Chakravarty, H.K. Baishya, R. K. Borah, P.P. Dutta

**Final Decision:** Allowed

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**Judgement**

Sandeep Mehta, CJ

1. Heard Mr. U. K. Nair, learned senior counsel, assisted by Mr. D.P. Borah, Advocate, representing the appellant, Smti. Dipti Mali, in WA No.

79/2018; Mr. B. Chakraborty and Mr. H. K. Baishya, learned counsel representing the private respondent No. 1; Mr. R. K. Borah, learned Additional

Senior Government Advocate, Assam, representing respondent nos. 2 and 5; and Mr. P. P. Dutta, learned Standing Counsel, APSC, representing

respondent nos. 3 and 4. In WA No. 72/2019, heard the submissions of Mr. P. P. Dutta, learned Standing Counsel, APSC representing the appellants;

Mr. B. Chakraborty and Mr. H. K. Baishya, learned counsel representing respondent no. 1; Mr. R. K. Borah, learned Additional Senior Government

Advocate, Assam, representing respondent nos. 2 and 3 and Mr. U. K. Nair, learned senior counsel, assisted by Mr. D.P. Borah, Advocate, representing the respondent no. 4 (proforma respondent).

We have also gone through the impugned judgment and other material placed on record of both the appeals.

2. These two intra-Court writ appeals are directed against the judgment and order dated 23.08.2018, passed by the learned Single Judge, whereby

WP(C) 4848/2015 preferred by the respondent/writ petitioner Dr. (Mrs.) Mausomi Madhab was accepted and the respondents Assam Public Service

Commission (APSC) and the State Government were directed to consider the case of the writ petitioner for appointment under the Assam Police

Service over and above the selection of the respondent no. 5 therein.

3. It may be noted that the said direction given by the learned Single Judge vide the impugned judgment was stayed by the Division Bench Court by

order dated 27.03.2018, passed in WA 79/2018 and, as a consequence, the appellant, Smti. Dipti Mali, continues to serve in the Assam Police Service

pursuant to her selection in the questioned selection process held in the year 2014.

4. The controversy presented for adjudication by this Court can be encompassed in a very brief frame as below:

The appellant in WA 79/2018, Smti. Dipti Mali, and the respondent/writ petitioner, Dr. (Mrs.) Mausomi Madhab, being candidates of SC (Female)

reserved category, participated in the Combined Competitive Examination undertaken by the APSC in the year 2013 pursuant to the advertisement

dated 11.08.2013 for filling up 241 posts in ten categories of Assam State Services. The following conditions incorporated in the advertisement are the

bone of contention between the litigating parties:

“II) MAIN EXAMINATION:

(B) (f) The candidates will be allotted Cadre strictly on the basis of merit cum preference opted by the candidates in their applications for the Main Examination.

(g) The Commission shall not recommend a candidate for a post which he/she has not opted for.

In the application form submitted for the competitive examination, the appellant Dipti Mali selected APS (Jr. Grade) as her 2nd option in the

order of preference amongst the categories of posts, whereas the respondent/writ petitioner Dr. (Mrs.) Mausomi Madhab chose APS (Jr.

Grade) as her 9th option.

Pursuant to the written examination, while preparing the select lists for making recommendations, the options/ preferences given by the candidates

were analysed, upon which it was found that the appellant, Dipti Mali, had given 2nd option in the order of preference to Assam Police Service (Jr.

Grade) and she was recommended for the said service thereby filling up the available posts reserved for Scheduled Caste (Female) candidates. As a

consequence, no vacancy remained available for the respondent, Dr. (Mrs.) Mausomi Madhab and, thus, she was not recommended for the Assam

Police Service. As Dr. (Mrs.) Mausomi Madhab failed to secure selection in any of the categories of services despite having scored more marks in

the written examination as compared to the appellant, Dipti Mali, she, i.e., Dr. (Mrs.) Mausomi Madhab approached this Court by way of the

captioned writ petition seeking a direction upon the respondent authorities to consider her candidature purely on the basis of merit while ignoring the

preference/option given by her in the application form.

The learned Single Bench, considered the submissions advanced at the Bar, the pleadings and the material available on record and concluded that

merit could not have been sacrificed only on account that the writ petitioner, i.e. Dr. (Mrs.) Mausomi Madhab had mentioned the cadre of Assam

Police Service (Jr. Grade) as her 9th option in order of preference as compared to respondent no. 5 in the writ petition (Dipti Mali), who mentioned

the said service as her 2nd option in order of preference. The learned Single Judge held that the Assam Police Service Rules, 1966 (hereinafter

referred to as "Rules of 1966" for short) would hold the field in the present case and, hence, the conditions incorporated in the advertisement that

the candidates will be allotted cadres on the basis of preference/option given in the application form could not work to the detriment of a candidate

who secures higher marks and such candidate could not be denied selection. The conclusions drawn by the learned Single Judge at paragraphs 18 and

19 of the impugned judgment are reproduced herein below for the sake of ready reference:

"18. In the present case, Rule 6(5) of the Assam Police Service Rules, 1966 clearly requires that selection should be made only on the basis of

merit. Thus, just because the petitioner has placed the Assam Police Service as her 9th option in order of preference, the same does not mean that a

less meritorious candidate can supersede the petitioner. To supersede the petitioner, the Public Service Commission would have to show that the

petitioner has been selected for any other Service, in which she has given a higher option than the 9th option. However, the petitioner has not been

selected for any other Service, i.e., with regard to her option Nos. 1 to 8. Thus, the petitioner would have to be considered for her 9th option along

with all other eligible candidates and the selection would have to be made strictly on merit, as required by the Rules 6(5) of the Assam Police Service

Rules, 1966. The story would have been different if the petitioner had not made any option for the Assam Police Service.

19. In view of the reasons stated above, this Court is of the view that merit cannot be sacrificed on the basis of a low or high option exercised in order

of preference for a particular State service. Preference cannot be the basis of selection of a candidate at the expense of merit. Accordingly, the

selection of the respondent No.5 being bad in law, is set aside.

5. It may be noted that during pendency of the writ petition before the learned Single Judge, there was a direction to keep one post vacant, but the

Court is informed that as on date no vacancy for the corresponding year is available under the Assam Police Service.

6. Mr. U. K. Nair, learned senior advocate representing the appellant, Smti. Dipti Mali, in WA 79/2018 vehemently and fervently urged that the view

taken by the learned Single Judge, while interfering in the decision of the APSC while recommending the name of the appellant in the Assam Police

Service against a post reserved for SC (Female) category candidates, in the order of merit and on the basis of preference, is wholly unsustainable in

the eyes of law. He contended that there was clear indication in Column 6(B)(f) of the advertisement (supra) that the candidates would be allotted

cadres strictly on the basis of merit cum preference opted by them in the application forms for the main examination. In Columns 6(B)(f) & (g) of the

advertisement (supra) it was clearly indicated that the Commission shall not recommend a candidate for a post which he/she has not opted for. He

urged that the APSC had filed its affidavit-in-opposition in the writ proceedings wherein it was specifically pleaded that the positions of the candidates,

considering their preference and their merit based on the total marks secured in the written examination and viva voce, were taken up by following the

Assam Public Service (Combined Competitive Examination) Rules, 1989 (hereinafter referred to as "Rules of 1989" for short). In the evaluating

process, the Cadre of Assam Civil Service (ACS) was placed in the first position, whereas the cadre of Assam Police Service (APS) was placed in

the second position. While making the evaluation, apart from merit, preferences of the candidates were also examined. While examining the

preferences, the choices given by the candidates are not examined independently and horizontally for each and every candidate. Rather, the

candidates in order of merit and with the said post as 1st preference are taken up first. If a candidate with higher marks opts for a post other than

ACS as his/her 1st preference then he/she would not be recommended for ACS cadre. If, after considering the positions of the candidates in order of

merit with ACS as 1st preference, vacancies in the ACS cadre remain unfilled, then the candidates who marked ACS as their 2nd preference, would

become entitled for consideration in order of merit. The process would continue in this manner till the vacancies get exhausted. The same process was

applied in filling up the cadres in the Assam State Services while undertaking the selection process in question. It was categorically stated by the

APSC in its affidavit-in-opposition that the writ petitioner opted “APS (Jr. Grade)” as her 9th preference and the last candidate selected in SC

(Female) category opted “APS (Jr. Grade)” as her 2nd preference. It was further stated that there were only two posts reserved for SC

(Female) in the cadre of “APS (Jr. Grade)” where, apart from the selected candidate (Dipti Mali), another candidate bearing Roll No. 0500188,

who secured 988 marks and gave 2nd preference for “APS (Jr. Grade)” was selected.

Emphasising upon the assertions as made in the affidavit of the APSC, Mr. Nair submitted that the view taken by the learned Single Judge is contrary

to the Rules of 1989. He also referred to Rule 67 of the “APSC (Procedure and Conduct of Business) Rules, 2010 (hereinafter referred to as

“Rules of 2010” for short), which reads as follows:

“67. After completion of the interview/Personality Test, the marks obtained in Interview/Personality Test shall be added to the marks obtained by

the candidates in the written examination. Thereafter, on the basis of total so obtained the merit list shall be prepared and placed before the

Commission by the Principal Controller of Examinations for final preparation of the select list service/post-wise, on the basis of order of preference

given by the candidates and Reservation Rules in force.”

and urged that this Rule concludes the controversy in favour of the writ appellant (Dipti Mali) beyond the pale of doubt. He also drew the attention of

the Court to Clause (1) of Rule 3 of the Rules of 1989, which reads as follows:

“3. (1) Notwithstanding anything contained in the Assam Civil Service (Class-1) Rules, 1960, the Assam Taxation Service Rules, 1962, The Assam

Police Rules, 1966, the Assam Labour Service Rules, 1970, the Assam Transport Service Rules, 1983, The Assam Supply Service Rules, 1970, the

Assam Excise Service Rules, 1961 and any other Service Rules relating to services and posts mentioned in Schedule I, the Commission shall hold

Combined Competitive Examination every year for selection of candidate for recruitment to the services in accordance with procedure laid down in

the Schedule-II.

Mr. Nair contended that this non-obstante Clause clearly stipulates that notwithstanding anything contained in the Assam Police Rules of 1966, the

selection process shall be held by the APSC in accordance with the procedure laid down in Schedule-II of the Rules of 1989. Attention of the Court

was also drawn to Clause 2 and 14 of Schedule-II of the Rules of 1989, which read as follows:

“2. A candidate shall be required to indicate in the application form for the Main Examination, his/her order of preference for various

Services/Posts for which he/she would like to be considered for appointment in case he/she is recommended for appointment by Assam Public

Service Commission.

14. Due consideration will be made at the time of making appointment on the result of the examination to the preference expressed by the candidate

for various services at the time of his/her application. The appointment to various services will also be governed by the Rules/Regulation in force as

applicable to the respective services at the time of appointment.

7. It was submitted that a conjoint reading of Rule 3(1) and Clauses 2 and 14 of Schedule-II of the Rules of 1989 makes it abundantly clear that Rules

of 1989 supersede the provisions of Rules of 1966 insofar as the manner and procedure of making selection to the posts/cadre of APS (Jr. Grade)

when such selections are made through combined competitive examinations held by the Assam Public Service Commission.

In support of his submissions, Mr. Nair placed reliance on the judgment rendered by Hon'ble the Supreme Court in the case of Union of India vs.

M.V.V.S. Murthy, reported in 1987 (Supp) SCC 371 and, more particularly, the observations made in paragraphs 4 and 5 of the said judgment, which

read as follows:

“4. We have heard Additional Solicitor General for the appellant and Mr. Ramamurthy for the respondent. There is no dispute that it is open to a

candidate to compete for one or more services/posts by specifying his order of preference when taking the Central Civil Services examination.

Column 22 of the application form makes provision for communicating of such preference. It is not in dispute that at the relevant time the order of

preference could be altered within 30 days of the result of the written part of the examination and a request for alteration in the order of preference in

the manner indicated above could be considered by the Ministry of Home Affairs if the request was received before the finalisation of the results of

the Services and the appropriate Ministry was satisfied that undue hardship would be caused otherwise. The procedure has been changed

subsequently but that is not material for this appeal.

5. Indisputably the respondent confined his preference only to the Indian Administrative Service. The note appearing below Column 22 in the

application form reads thus:

In respect of the services/posts not covered by the entries above, it will be assumed that you have an equal preference for those services/posts. You

will, therefore, be considered for any of those services if you cannot be allotted to the services of your preference.

The real meaning of this note appears to us to be that if preferences given by the candidate are not available to be accommodated on the basis of the

results of the candidate's preference in the selection examination, instead of being rejected he would be available to be considered for the other

services. As already pointed out, the Civil Services examination is a combined examination for several services and when a vacancy is not available

within the field of the candidate's choice, it is open to the Central Government to consider the candidate for other services. The effect of this note is

not that preferences given by a candidate securing a place lower to the respondent would not be entitled to his preference because he has been placed

below the respondent in ranking. If ranking alone is to be the test, preferences would have no meaning. On the other hand, the procedure that

preferences are acceptable with reference to the position in the final list till vacancies in the services preferred are exhausted is the most logical one

and meets the requirements of the scheme. Merely because the respondent was placed at the 280 th place in the merit list and some one else placed

at No. 291 was being offered the Indian Police Service keeping in with his preference, would not give the respondent any cause of action. In course

of hearing of this matter, we had called upon the Central Government to provide the details of vacancies in the Indian Police Service and the

information as to whether any candidate who had not opted for Indian Police Service had been offered such service. An affidavit has been filed to

indicate that there were 74 general vacancies, 14 vacancies reserved for Scheduled Caste candidates and 8 vacancies for Scheduled Tribe candidates

in the Indian Police Service in 1983 and not a single candidate who had not opted for Police Service had been given such service. That being the

position the respondent who had not opted for the Police Service, should really have no grievance to make. Rules 2 and 17 of the Civil Services

Examination Rules, 1983 which are relevant in the matter of allocation of services are also against the respondent and support the stand of the Central

Government.

8. Mr. Nair urged that in a similar fact scenario, Hon'ble the Supreme Court, in the case of M.V.V.S. Murthy (supra) clearly laid down that if

preferences given by the candidate concerned are not available to be accommodated on the basis of results of the candidate's preferences in the

selection examination, instead of being rejected, he would be available to be considered for the other service. He contended that in the said case

Hon'ble the Supreme Court categorically held that if ranking alone is to be the test, preference would have no meaning. The procedure that

preferences are acceptable with reference to the position in the final merit list till vacancies in the services preferred are exhausted, is the most logical

and meets the requirements of the scheme. The Hon'ble Supreme Court further observed that because the respondent was placed at the 280th

place in the merit list and someone else placed at No. 291 was being offered the Indian Police Service keeping in with his preference, would not give

the respondent any cause of action. He thus urged that the situation in the case in hand is squarely covered by the ratio of the above Hon'ble the

Supreme Court decision and, hence, the view taken by the learned Single Judge in accepting the writ petition of Dr. (Mrs.) Mausomi Madhab, i.e.

respondent/writ petitioner is unsustainable in the eyes of law.

9. The APSC has also filed WA 72/2019 challenging the judgment and order dated 23.08.2018, passed by the learned Single Bench. Mr. P.P. Dutta,

learned Standing Counsel, APSC, urged that the APSC followed the lawful procedure prescribed in the Rules of 1989 and the Rules of 2010 in making

the selections. He also adopted the submissions of Mr. Nair and sought reversal of the impugned judgment urging that the provisions of the applicable

Rules were not applied in the correct perspective while accepting the writ petition filed by the respondent Mrs. Mausomi Madhab. He also urged that

no vacant post is available in the SC (Female) reserved category for the recruitment year in question.

10. Per contra, Mr. H. K. Baishya and Mr. B. Chakravarty, learned counsel representing the respondent/writ petitioner Dr. (Mrs.) Mausomi Madhab,

vehemently and fervently contended that the merit secured by the candidate cannot be sacrificed merely on the basis of the preference marked in the

application form. They urged that there is no dispute that the respondent/writ petitioner secured higher marks in the competitive examination as

compared to the appellant Mrs. Dipti Mali. Hence, the respondent/writ petitioner could not have been denied selection in the Assam Police Service

cadre merely because she made a wrong choice/preference. As per Mr. Baishya, priority should have been given to the merit of the candidates and

preferences should have been kept in the back seat. He urged that the Assam Police Rules of 1966, to be specific, Rule 5 thereof clearly stipulates

that the selection to the service would be made on the basis of merit of the candidates. As per the Mr. Baishya, since the respondent/writ petitioner

Dr. (Mrs.) Mausomi Madhab stood higher in the merit in the written examination as compared to the appellant, Dipti Mali, the respondent/writ

petitioner was entitled to be selected and appointed on the post reserved for the SC (Female) category in the Assam Police Service. On these

grounds, they implored the Court to dismiss the appeals and affirm the order passed by the Single Bench.

11. We have given our thoughtful consideration to the submissions advanced at the Bar and have gone through the material available on record.

12. At the outset, we may note that the advertisement dated 11.08.2013 clearly provided that the Combined Competitive Examination, 2013, for the

posts advertised, including the posts in the cadre of Assam Police Service (Jr. Grade) would be conducted in accordance with the Assam Public

Service (Combined Competitive Examination) Rules, 1989.

Rule 3(1) of the Rules of 1989, which has been reproduced (supra), starts with a non-obstante clause clearly prescribing that so far as the process of

selection by APSC is concerned, the Rules of 1989 would have overriding effect on the Assam Police Service Rules, 1966 and other similar Service

Rules.

Thus, there cannot be two views on the aspect that the selection process in question would be governed by the Rules of 1989 and the Rules of 2010.

Rule 67 of the Rules of 2010, which has also been reproduced hereinabove, provides that merit list shall be prepared on the basis of total marks

obtained by the candidates and the final select list shall be prepared service/post-wise on the basis of the order of preference given by the candidates

and the Reservation Rules in force. Meaning thereby that the first round of evaluation would be made strictly on the basis of 1st preference and merit

of the candidates and if vacancies remain thereafter, the 2nd preference along with merit would be looked into. Clauses 6(B)(f) and 6(B)(g) of the

advertisement, which have been reproduced above also have a material bearing on the controversy at hand. The writ petitioner applied for selection

with a clear understanding of the applicable Rules and the mandatory conditions of the advertisement and, thus, she is estopped from challenging these

very conditions after having lost out in the process of selection.

Two SC (Female) vacancies were notified in the cadre of APS (Jr. Grade), for which the appellant as well as the respondent/writ petitioner had

applied. Both the vacancies had been filled in before the respondent/writ petitioner, Dr. (Mrs.) Mausomi Madhab, came into fray because she had

given preference of APS (Jr. Grade) as her 9th option. The tabulation given in the affidavit-in-opposition filed by the APSC before the learned Single

Bench clearly indicates that there were two more candidates of SC (Female) category, who secured higher marks (886 and 894 marks respectively)

than the respondent/writ petitioner (879 marks), but as they gave lower preferences to the cadre of APS (Jr. Grade), they too could not be selected in

that cadre because of the order of preference opted by them. This important aspect, as indicated in the affidavit of APSC, has not been controverted

by the respondent/writ petitioner.

13. The Hon'ble Supreme Court, in the case of M.V.V.S. Murthy (supra) has laid down in clear terms that if ranking alone is to be the test then

preference would have no meaning. The same view was reiterated in the case of Union of India vs. Probir Ghosh and Others, reported in (2022) 12

SCC 250.

14. The view taken by the learned Single Judge in the impugned judgment that the Assam Police Rules, 1966 would prevail in the selection process at

hand and, thus, the respondent/writ petitioner is entitled to selection by ignoring the preference given by her in the application form is unsustainable in

the eyes of law, because the non-obstante clause contained in Rule 3(1) of the Assam Public Service (Combined Competitive Examination) Rules,

1989, applicable to the selection process in question, seems to have escaped notice of the learned Single Judge while drawing the conclusions in the

impugned judgment. As the provisions of the Rules of 1989 have an overriding effect on other service rules, including the Assam Police Rules, 1966,

the respondent/writ petitioner, having participated in the selection process with open eyes, could not have taken a U-turn so as to question the validity

of the process after having participated therein.

The respondent/writ petitioner is clearly estopped from raising this challenge after having participated in the selection process under the prevailing

rules and the conditions incorporated in the recruitment advertisement. Entertaining such a challenge would lead to a consequence that the rules of the

games are being changed after the ball is set into motion. Such a course of action is impermissible in law as laid down by the Hon'ble Supreme

Court in the case of K. Manjusree v. State of Andhra Pradesh, reported in AIR 2008 SC 1470. Allowing such a process would result into changing

the criteria and introducing a new mode of selection after completion of the selection process, which is totally illegal. The view taken by the

Hon'ble Supreme Court in the case of K. Manjusree (supra) was reiterated by the Hon'ble Supreme Court in the case of Salam Samarjeet

Singh v. High Court of Manipur, reported in (2016) 10 SCC 484.

15. In this background, we are of the firm opinion that the view taken by the learned Single Judge while accepting the writ petition and in interfering in

the selection of the appellant, Dipti Mali, in the cadre of APS (Jr. Grade) in pursuance of the selection process held vide advertisement dated

11.08.2013, is invalid in the eyes of law and does not stand to scrutiny.

Accordingly, the impugned judgment and order dated 23.08.2018 passed in WP(C) 4848/2015 is hereby reversed and set aside.

As a consequence, both the writ appeals are allowed.

No order as to costs.