(1998) 2 GLT 410

Gauhati High Court

Case No: Writ Appeal No. 634 of 1997

Pradyut Sarma and Others		APPELLANT
	Vs	
Assam Public Service Commission and Others		RESPONDENT

Date of Decision: June 4, 1998

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 19 Rule 3
- Constitution of India, 1950 - Article 233
- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 60, 63, 78(2), 81
- Penal Code, 1860 (IPC) - Section 212

Citation: (1998) 2 GLT 410

Hon'ble Judges: V.D. Gyani, Acting C.J.; N.S. Singh, J

Bench: Division Bench

Advocate: A.S. Choudhury, R. Majumdar, I. Hussain and S. Seal, for the Appellant; J. Ahmed, Government Advocate for Respondent No. 1 and B.J. Talukdar, N. Dutta, H.B. Sarma, M. Bhuyan and H. Das, for the Respondent

Final Decision: Dismissed

Judgement

V.D. Gyani, Actg. C.J.

1. This Writ Appeal is directed against the judgment and order dated 26.9.97 passed by a learned Single Judge of this Court in Civil Rule No. 2693 of 1997 thereby dismissing the petition. Basic facts leading to the presentation of the writ petition are:

2. In pursuance of the advertisement dated 26.1.95 published in local Daily, applications were invited for a Combined Competitive Examination 1994-95 for screening candidates

for the main examination for State Service and other allied services under the Government of Assam. The writ Petitioners-Appellants were amongst the applicants. As can be seen from the advertisement, 114 posts were advertised out of which 70 were earmarked for Class I and 19 and 3 posts respectively for Class II and Class III services. The select list was published by the State Public Service Commission, Respondent No. 1 on 19.4.97. It is the writ Petitioner-Appellants claim and case that they had done exceedingly well both at the written and viva voce tests, the select list as published on 19.4.97 which was a shock to them was challenged on the ground of improper evaluation, favouritism and violation of norms of recruitment.

3. It was also the Appellants case that as against 114 posts as initially advertised, the select list contained 144 posts, but on scrutiny it was found that 30 more additional post was sought to be filled up in Class II and Class III over and above the posts as initially advertised. It was contended that this addition was made after commencement of the selection process and even holding of viva voce test had been completed on 1.2.97.

4. The other contentions advanced was regarding availability of vacant post which according to the Appellants was 160 posts while only 70 were sought to be filled up.

5. It was also pointed out that the Respondent Nos. 4, 5 and 6 in the writ petition were shown to be selected as Scheduled Caste candidates which they are not. Extraneous consideration, political affiliations and affections was given additional play in selecting some of the candidates whose selection was challenged on close relationship with the Chief Minister. In short, their case was that the entire selection process was vitiated.

6. During pendency of the petition, the Chairman Public Service Commission was impleaded as a party in his individual capacity and questioning of his holding of office of Chairman. State Public Service Commission. The Respondents in their affidavit-in-opposition while denying the allegations made by the writ Petitioners-Appellants maintained that these allegations are nothing but some baseless allegations made by frustrated mind of unsuccessful candidates. The selection was made on the basis of performance of the candidates of written and viva voce test and the select list was based on merit and no other consideration. The Secretary, State Public Service Commission explained the position of number of vacancies as notified by the State Government and the circumstances keeping in view the back log that required to be filled up in respect of reserve quota. Learned Single Judge has recorded its definite finding that on perusal of the record, the statements made by the Respondent No. 1 was found to be correct and the allegations made by the Petitioners in this regard was baseless. As for selection of Respondents 4, 5 and 6 (in the writ petition), it was submitted that their performance was evaluated by a penal of examiners consisting of experts in their respective fields. The demand by the writ Petitioner to scrutinise the answer scripts of the above Respondents was turned down. The learned Single Judge on the basis of affidavit filed by the Respondents found it as a fact that the private Respondents have been duly selected on the basis of merits and performance. In the ultimate analysis, the learned

Single Judge dismissed the petition holding that the writ Petitioners have failed to make out a case for invoking the writ jurisdiction of the Court.

7. We have heard Mr. A.S. Choudhury, learned Counsel appearing for the Appellant Mr. J. Ahmed, and Mr. B.J. Talukdar for the Respondents. During the course of hearing, one of the Appellants filed an affidavit along with certain press clippings report and the contents appearing in the local Press. Annexures-A and B are news items dated 22.4.98 relating to order dated 21.4.98 passed by this Court. The order dated 21.4.98 itself is the part of the Court''s record and one has not to go by the Press report about the order. Annexure-C is an editorial comments about poor image of the APSC. Annexures-Fl and Gl is again the translated version of news item published in Assamese in local press. These news items also relate to the order dated 21.4.98 passed by the Court. Annexure-E is the translated copy of the news item published in local daily on 26.4.98 alleging burning of answer scrips of 1995 ACS examination by the Public Service Commission. This news as usual begins with "it is learnt....." Annexure-H-1 relates to the resolution of the Railway Selection Board and the removal of the Chairman of such Selection Board by the Railway Minister. Annexure-I is yet another news item published in a local daily on 28.4.98 alleging rampant corruption that prevails in the State Public Service Commission. With all these news items as noted above, let us now turn to the affidavit filed by one of the Appellants and particularly the last paragraph thereof which reads as follows:

That the statements made in paragraphs 1 to 5 are true to my knowledge and information derived from news papers records of the case and rests are my humble submissions before this Hon''ble Court.

Such affidavits do not carry any conviction, they failed to meet bare minimal requirements of Order 19 Rule 3 Code of Civil Procedure. When a deponent states, that certain facts are true to his knowledge, information, the law requires that he must satisfy which particular facts arc true to his knowledge and which part of his affidavits are true to the deponent''s information. The affidavit filed by one of the Appellants on 27.4.98 does not meet the minimal requirements of Order 19 Rule 3 Code of Civil Procedure. The Supreme Court in Shivajirao Nilangekar Patil Vs. Dr Mahesh Madhav Gosavi and Others, has very categorically and clearly laid down that where evidence were adduced by affidavit, such affidavit must be properly verified either on personal knowledge or from other sources. But the basis of such knowledge or source of information must be clearly stated. Order 19 Rule 3 of the CPC must be strictly observed. Incidentally, this was also a case of malpractices in examination.

8. The Apex Court also dealt with the evidentiary value of the affidavit in Sudha Devi Vs. M.P. Narayanan and Others, . The Supreme Court while holding that the Affidavit with defective verification has not only no probative value, but it also deprecated the practice of filing such affidavit. (See Savithramma, Vs. Cecil Naronha and Another, So much for the affidavit dated 24th April, 1998.

9. The Appellants also called in question the holding of office of Chairman by Respondent No. 17 of State Public Service Commission, by amending the petition. Too apparently it was a collateral attack made in view of allegations of favouritism and nepotism, that was shown in the selection process. The law on the point is well settled. A writ of Quo Warranto, cannot be issued in collateral proceedings. The challenge must be made directly and not in collateral proceedings. While challenging the selection of candidates to the State Civil Services, the Appellants incidentally by introducing an amendment also challenged the appointment of the Chairman, State Public Service Commission, the kind of challenge is not permissible under the law.

10. The de facto doctrine is found on good sense and sound policy. It is aimed at the prevention of public and private mischief and the protection of public and private interest. It avoids endless confusion and needless chaos. Sir Asutosh Mookerjee in Pulin Behari v. King Emperor 1912 Cal.L.J. recognised this doctrine which is now well established and held:

the acts of the officers de facto (sic) by them within the (sic) official authority in the interest of the public or third persons and not for their own benefit, are generally valid arid binding, as if they were the acts of officers de jure.

Sir Asutosh Mookerjee, J. tracing the history of this doctrine noticed that even in 1431 the de facto doctrine was quite well known and recognised by English Judge.

An officer de facto is one who by some colour or right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact. His colour of right may come from an election or appointment made by some officer or body having colourable but no actual right to make it; or made in such disregard of legal requirements as to be ineffectual in law; or made to fill the place of an officer illegally removed or made in favour of a party not having the legal qualifications or it may come from public acquiescence in the officer holding without performing the precedent conditions, or holding over has been terminated ; or possibly from public acquiescence alone when accompanied by such circumstances of official reputation as are calculated to induce people, without inquiry, to submit to or invoke official action on the supposition that the person claiming the office is what he assumes to be. An intruder is one who attempts to perform the duties of an office without authority of law, and without the support of public acquiescence.

No one is under obligation to recognise or respect the acts of an intruder, and for all legal purposes they are absolutely void. But for the sake of order and regularity, and to prevent (sic) confusion in the conduct of public (sic) in security of private (sic) de facto (sic) the office de jure or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be. In all other cases the acts of an officer de facto are as valid and effectual. While he is suffered to retain the office as though he were an officer by right, and the same legal

consequences will flow from them for the protection of the public and of third parties. There is an important principle, which finds concise expression in the legal maxim that the acts of officers de facto cannot be questioned collaterally.

To the same effect is the view expressed in Black''s Law Dictionary:

A person may be entitled to his designation although he is not a true and rightful incumbent of the office, yet he is no mere usurper but holds it under colour of lawful authority. And there can be no question that judgments rendered and other acts performed by such a person who is ineligible to a judgeship but who has nevertheless been duly appointed, and who exercises the power and duties of the office is a de facto judge, and his acts are valid until he properly removed.

12. In Gokaraju Rangaraju Vs. State of Andhra Pradesh, the appointment of an Addl. Sessions Judge declared to be invalid on ground of violation of Article 233, judgments pronounced by him prior to such declaration were considered valid, and this is what the Supreme Court pointed out:

So long as the office was validly created, it matters not that the incumbent was not validly appointed. A person appointed as a Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge, would be exercising jurisdiction in the Court of Sessions and his judgments and orders would be those of the Court of Session, notwithstanding that his appointment to such Court might be declared invalid. On that account alone, it can never be said that the procedure prescribed by law has not been followed. It would be a different matter if the constitution of the Court itself is under challenge. We are not concerned with such a situation in the instant cases. We, therefore, find no force in any of the submissions of the learned Counsel.

13. It would be seen that the validity of appointments of the State Public Service Commission on the ground of discretion as alleged and the scathing attack made on his eligibility to hold the office in violation of Article 233 of the Constitution, apart from the finding of facts recorded by the learned Single Judge that these allegations have not been substantiated, the same cannot be challenged in collateral proceeding, there has to be a frontal direct attack in an independent enquiry. A writ of Certiorari cannot be allowed to be converted into a Writ of Quowarranto.

14. Now coming to the allegation made by the writ Petitioner-Appellants, assuming for the sake of argument that there is a germ of truth in this allegation, although it is only an assumption, the Respondents have very emphatically and categorically denied these allegations. Taking these allegations on their face value question is, who are the persons making these allegations? Those who appeared at the competitive test and failed therein, those who in their self-estimation and valuation consider themselves to be far better and superior to some of the candidates in the select list. It is their self- estimation and evaluation. They are free to do so, but having offered themselves to be evaluated and

assessed by the State Public Service Commission, the fact remains that they have not emerged successful. This glaring fact cannot be list site o. They are trying to build up their case with the support of certain news items and press clippings. Evidentiary value of such material has already been discussed above.

15. Now let us take their case of alleged favouritism shown to some of the selected candidates, we can do no better then citing a judgment of the Supreme Court which provides a complete answer to the allegations made by the writ Petitioner Appellants. This case as reported in Madan Lal and Others Vs. State of Jammu and Kashmir and Others, It was a case of selection of Civil Judges. A written test and oral interview was held. The petition was filed by some of the candidates who had taken written test and appeared at the oral interview, but were not successful, the Supreme Court says-

Therefore, the result of the interview test on merit cannot be successfully challenged by a candidate who takes a chance to get selected at the said interview and who ultimately finds himself to be unsuccessful. It is also to be kept in view that in this petition, we cannot sit as a Court of appeal and try to re-assess the relative merits of the concerned candidates who had been assessed at the oral interview nor can the Petitioners successfully urge before us that they were given less marks though their performance was better. It is for the interview committee which amongst others consisted of a sitting High Court Judge to judge the relative merit of the candidates who were orally interviewed in the light of the guidelines laid down by the relevant rules governing such interviews. Therefore, the assessment on merits as made by such an expert committee cannot be brought in challenge only on the ground that the assessment was not proper or justified as that would be the function of an appellate body and we are certainly not acting as a Court of appeal over the assessment made by such an expert committee.

16. Rejecting the allegations of bias and prejudice, it does not go beyond raising mere suspicion having no factual basis, however, filed an affidavit as has already been noted above. In a similar situation the Supreme Court has observed:

In the light of what is stated above, that while dealing with contention No. 1, this contention also must fail. The Petitioners subjectively feel that as they had fared better in the written test and had got mere marks therein as compared to concerned selected Respondents, they should have been given more marks also at the oral interview. But that is in the realm of assessment of relative merits of concerned candidates by the expert committee before whom these candidates appeared for the viva voce test. Merely on the basis of Petitionor''s apprehension of suspicion that they deliberately given less marks at the oral interview as concerned to the rival candidates. It cannot be said that the process of assessment was vitiated. This contention is in the realm of more suspicion having no factual basis. It has to be kept in view that there is not even a whisper in the petition about any personal bias of the members of the interview committee against the Petitioners. They have also not alleged any mala fides on the part of interview committee in this connection. Consequently, the attack oh the assessment of the merits of the

Petitioners cannot be countenanced. It remains in the exclusive domain of the expert committee to decide whether more marks should be assigned to the Petitioners or to the concerned Respondents. It cannot be the subject matter of an attack before us as we are not sitting as a Court of appeal over the assessment made by the committee so far as the candidates interviewed by them are concerned. In the light of the affidavit in reply filed by Dr. Girija Dhar to which we made reference earlier, it cannot be said that the expert committee had given a deliberate unfavourable treatment to the Petitioners. Consequently, this contention also is found to be devoid of any merit and is rejected.

17. This case also takes care of selecting more candidates from one community. The observation made by the Supreme Court in para 17 of the judgment is apposite. The same is quoted below:

This contention is equally devoid of any merit. The submission of the learned senior counsel for the Petitioners is that a mere look at Annexure-C will show that the merit list of open category candidates recommended for appointment comprises of majority of candidates belonging to the community only and therefore, the committee has shown special liking for such candidates who are preferred by inflating their marks in the oral interview. To say the least, it is a mere conjecture on the part of the Petitioners. The very first candidate in the order of merits is Roll No. 100 who docs not belong to the other community. He is one Sh. Vinod Chatterji. Similarly, there are also other candidates in the said merit list of 16 candidates who do not belong to the other community. Once the interview process is found to be proper and justified and not being vitiated by any mala fides, the result of the viva voce test may project a picture in which more candidates from the community may get selected on merit but that is neither here, nor there. The validity of the viva voce cannot be judged simply on the basis of the result thereof unless there is anything to show that the entire selection process was vitiated on account of malafides or bias or that the interview committee members had acted with an ulterior motive from the very beginning and the whole selection process was a camouflage. No such alleptions have been made by the Petitioners against the selectors who sat in the interview committee. Consequently, even this contention is found to be devoid of any factual basis and stands rejected.

18. In essence and substance the allegation of favouritism as made by the writ Petitioner Appellants is based on newspaper reports as can be seen from paragraphs 16, 17, 18 and 19 of this appeal. The names of all selected candidates quoted therein were enumerated before us. The Appellants had gone to the extent of pleading that all the newspaper are of the opinion that an enquiry should be conducted into the whole affair of selection/appointment in the A.C.S. and allied services.

19. Now adverting to the legal position as regards newspaper report and comments, Section 60 read with Section 63 of the Evidence Act itself provide a complete answer. Of course it deals with oral evidence and in writ petitions, evidence by affidavit is permissible and we have already seen above the state of affairs and the affidavit filed in this matter.

Law requires directory one, that is to say, if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it. If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds. The least that was expected of the writ Petitioner Appellants in the circumstances of the case was to file a separate affidavit sworn by some-one who holds the opinion which has been referred to in paragraph 18 of the appeal memo. At any rate, if the Appellant wanted to rely on these ï¿½news items and press-clippings, their affidavit in support should have been more precise and tarce strictly applying with the requirements of law, which it is undoubtedly not. The Supreme Court had occasion to deal with the evidentiary value of news items published in news papers in Samant N. Balkrishna and Another Vs. V. George Fernandez and Others, It was a case where a speech attributed to Mr. George Fernandez as published in a local daily from Bombay, "The Maratha". The Supreme Court ruled out the news item observing that it is the function of the news paper to publish and further held:

A news item without any further proof of what had actually happened through witnesses if of no value. It is at best a second-hand secondary evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbed. Such news items cannot be said to prove themselves." It may be added that the Supreme Court indicated that they may be taken into account with further evidence if the other (evidence is forcible. But in the instant case the sole evidence is the Devi''s paper report and nothing else. The affidavit in support is woefully defective.

20. There is yet another case in Laxmi Raj Shetty and Another Vs. State of Tamil Nadu, It was a case of murder. The Manager of Kamataka Bank, Main Branch at Madras was murdered on 28th October, 1985 after committing robbery. Laxmi Raj Shetty was sentenced to death, while his father Shivaram Shetty, a retired Sergeant Major of the Indian Air Force, re-employed as Security Officer, Kamataka Bank, Main Branch, Mangalore was convicted u/s 212 IPC for having harboured his son. The case essentially hinges on circumstantial evidence as almost invariably happen. There were press reports published in Indian Express and local news papers "Malai Murasu" and Makkal Kura". These news items were used by the accused with a view to render the truth of the prosecution case improper, particularly the reference made at Madras. The accused in his statement recorded u/s 313 Code of Criminal Procedure while denying the charge had not only tendered the news paper reports from the above news papers but ailso summoned the editors of the Tamil dailies and the news report of Indian Express and Dina Thanthi to prove the contents of the facts stated in the news item, but on the date fixed-for their evidence they dispensed with their examination. It was in this context the Supreme Court held:

We can not take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in the news paper is not one of the documents referred to in Section 78(2) of the Evidence Act, 1872

by which an allegation of fact can be proved. The presumption of genuineness attached u/s 81 of the Evidence Act to a newspaper report cannot be treated as proof of the facts reported therein.

Reiterating the principle as laid down in George Fernandez (Supra), the Supreme Court further held:

It is now well-settled that a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in Evidence in the absence of the maker of the statement appearing in Court and deposing to have perceived the facts reported.

Although it was a criminal case, but the underlying principle as regards the evidentiary value of a news paper report as laid down by the Supreme Court in these cases applies with equal force to the case at hand.

21. Viewed from any angle, no ground is made out for interfering with the judgment rendered by the learned Single Judge. The appeal is therefore liable to be dismissed. It is accordingly dismissed.