

(2003) 07 GAU CK 0025

Gauhati High Court

Case No: Writ Appeal No. 52 of 2003

Principal-cum-Secretary, B.
Barooah College

APPELLANT

Vs

Utpal Choudhury and Others

RESPONDENT

Date of Decision: July 22, 2003

Acts Referred:

- Assam Aided College Management Rules, 1976 - Rule 19
- Assam Education Department Selection Rules, 1981 - Rule 10, 3

Citation: (2003) 3 GLR 637

Hon'ble Judges: P.P. Naolekar, C.J; Ranjan Gogoi, J

Bench: Division Bench

Advocate: A.K. Bhattacharjee, P.C. Borgohain, Barmanand and R.B. Deka, for the Appellant; A. Hazarika, Addl Sr. G.A., K.N. Choudhury and and Deepak Bora, for the Respondent

Final Decision: Dismissed

Judgement

Ranjan Gogoi, J.

Aggrieved by the order of the learned Single Judge nullifying the decision of Special Body (Governing Body) of the B. Barooah College to re-advertise the post of Lecturer in Botany and the further direction issued for the appointment of the writ petitioner to the said post, the Special Body has filed the instant appeal.

2. The facts necessary to decide the appeal may be briefly stated as hereunder :

On 19.3.1999, an advertisement was issued inviting applications for filling up the post of Lecturer in Botany in the B. Barooah College. The writ petitioner, who is the Respondent No. 1 in the present appeal, along with many other candidates submitted their applications and an interview was held for selection of candidates for the said post on 31.5.1999. Pursuant to the aforesaid selection, a select list of three candidates was prepared, wherein the name of the Respondent No. 1 was

arrayed at Sl. No. 2. The Selection Board was reconvened on 13.8.1999 to award marks to the candidates in respect of teaching experience, which aspect was overlooked in the earlier selection held on 31.5.1999. On the basis of the aforesaid exercise re-done by the Selection Committee, a fresh select list was prepared maintaining the earlier position. In the meeting of the Special Body held on 21.8.1999, the select list prepared by the Section Committee was approved and a decision was taken to move the Director of Higher Education, Government of Assam, for grant of necessary approval for appointment of the person whose name appeared at Sl.No. 1 of the select list, i.e., on Soneswar Rao. The Director of Higher Education, Government of Assam was accordingly moved by the college authority on 8.10.1999, and it is on 28.2.2000 that the Director accorded the necessary approval for appointment of Shri Soneswar Rao to the post of Lecturer in Botany. Thereafter, on 7.8.2000, appointment was offered to the aforesaid person, i.e., Shri Soneswar Rao, who, however, on receipt of the offer of appointment, informed the college authority that he would not be joining in the post. Thereafter, on 29.9.2000, a resolution was adopted by the Special Body of the College to re-advertise the post and in the said resolution it was recorded that the decision to re-advertise was being taken as the validity of the earlier select list had expired on 31.5.2000, i.e., on the expiry of one year from the date of selection.

3. Aggrieved by the aforesaid resolution of the Special Body dated 29.9.2000, the writ petition out of which the instant appeal has arisen, was filed on 23.10.2000. thereafter, on 28.10.2000, an advertisement was issued inviting applications for filling up the same post of Lecturer in Botany. The writ petitioner filed an application for amendment of the pleadings made in the writ petition to specifically challenge the aforesaid advertisement. The amendment prayed for was allowed. On 6.11.2000, notice of motion was issued on the writ petition field and an interim order was passed by this Court to the effect that the proceedings pursuant to the advertisement dated 28.10.2000, may continue but no appointment shall be made without leave of the Court. On 30.10.2000, the writ petitioner - Respondent No. 1 filed an application pursuant to the second advertisement and in the consequential selection held on 27.11.2000, he appeared at the interview and in the Select List prepared, his name was arrayed at Sl. No. 4. In the meantime, the writ proceedings at the instance of the Respondent No. 1, were finalised by the impugned judgment and order dated 8.1.2003 passed by the learned Single Judge. By the aforesaid judgment and order, the learned Single Judge had decided that the Select List prepared pursuant to the first Selection Process held on 31.5.1999 being current and valid at the time when the candidate at Sl.No. 1 refused the offer of appointment, the said offer should have been made to the Writ petitioner-Respondent No. 1, who was at Sl.No. 2 of the Select List. As the Select List in question was held to be valid and operative, the resolution dated 29.9.2000 of the Special Body to re-advertise the post and all consequential actions thereto were held to be invalid. Accordingly, the learned Single Judge thought it proper to direct the

Special Body to offer appointment to the writ petitioner Respondent No. 1 to the post in question. Aggrieved by the aforesaid directions, the instant appeal has been filed.

4. We have heard the very elaborate argument advanced on behalf of the appellant by Mr. AK Bhattacharyya, learned senior counsel and the resistance offered to the said arguments by Mr. KN Choudhury, learned senior counsel appearing on behalf of the Respondent No. 1. The arguments advanced on behalf of the rival parties may be briefly noted for due appreciation and our decision on the merits of the controversy.

5. The argument advanced by Mr. AK Bhattacharyya, learned senior counsel appearing on behalf of the appellant is that under the Assam Aided Colleges Management Rules, 1976 (hereinafter referred to as the 1976 Rules) resolution of the Governing Bodies of Aided Colleges in all matters including appointment are required to be forwarded to the Director and appointment can only be made with the prior approval of the Director. Under Rule 19(iv), the Governing Body has been vested with the powers to make appointment in accordance with the procedure prescribed by the Rules. The further argument advanced is that while the Assam Aided Colleges Employees Rules, 1960 (hereinafter referred to as the 1960 Rules) and the Assam Education Department Selection Rules, 1981 (hereinafter referred to as the 1981 Rules) contain elaborate procedures for recruitment/appointment of Lecturers in Aided Colleges, it is the 1960 Rules, which will hold the field as the instant selection and appointment were not in accordance with the procedure prescribed by the 1981 Rules. As under the 1960 Rules, the Select List had validity period of one year from the date of selection, the decision of the Special Body of the College to go for re-advertisement of the post in question consequent on the expiry of the select list on 31.5.2000, according to the learned counsel, is in consonance with the provisions of the 1976 Rules read with the procedure prescribed by the 1960 Rules. No infirmity, therefore, can be attached to the decision of the Special Body of the College. That apart, it has been contended by the learned counsel for the appellant that in the instant case, no approval of the Select List was either contemplated or accorded by the Director of Higher Education. The approval of the Director was in respect of the proposed appointment of the candidate at Sl.No. 1, which is in conformity with the provisions of the 1976 Rules read with the procedure prescribed by the 1960 Rules. The Rules of 1981, which contemplate publication of the Select List and the validity of the same for a period of one year from the date of publication would also have no application as the Select List in the present case was never published.

6. Additionally, it has been urged on behalf of the appellant that the decision of the Special Body to re-advertise the post was a sequel to its decision to have a better and wider choice of candidates and the object being laudable, the action must be sustained. That apart, it has been argued that no indefeasible right had accrued to

the Respondent No. 1 writ petitioner for being appointed so as to justify the issuance of a Writ of Mandamus by the learned Single Judge. Lastly, it has been contended that the writ - petitioner - Respondent No. 1 having participated in the second selection process pursuant to the advertisement dated 28.10.2000, would not be entitled to any discretionary relief at the hands of the Writ Court. To buttress the submission on the last point noted, reliance has been placed on a judgment of the Apex Court in the case of [Suneeta Aggarwal Vs. State of Haryana and Others](#), A decision of the Apex Court in the case of [Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another](#), has been relied upon to contend that the learned Single Judge had erred in directing the Special Body to appoint the writ petitioner whereas another judgment of the Apex Court in the case of [State of Punjab Vs. Raghbir Chand Sharma and Another](#), has been cited in support of the contention that the writ petitioner was not entitled to a direction for appointment consequent upon the post falling vacant upon the offer of appointment being refused by the candidate at Sl. No. 1 of the select list.

7. Controverting the argument advanced on behalf of the appellant, Mr. K.N. Chaudhury, learned senior counsel appearing on behalf of the Respondent No. 1 at the outset argued that the decision taken by the Special Body that the validity of the select list had expired on 31.5.2000, i.e., on the expiry of the period of one year from the date of the first selection, is self contradictory, inasmuch as, appointment was offered to the candidate at Sl. No. 1 of the select list on 7.8.2000 after the Director of Higher Education, Assam had accorded approval on 2.8.2000. The learned counsel for the respondent has contended that the 1976 Rules, which is statutory in character, is primarily concerned with the management of the Aided Colleges and it is in that context that there is some indication in the said Rules with regard to the power of the Governing Body to make appointments of teaching and non-teaching staff. The 1976 Rules, however, do not contain any express provision with regard to the procedure to be adopted for appointment. This is so, according to the learned counsel, as the said matter is covered by the 1960 Rules. However, the 1960 Rules, though continued to remain in force, must be understood to have been replaced by the 1981 Rules in so far as the procedure for appointment of Lecturers as provided by the subsequent Rules of 1981 is concerned. Learned counsel for the respondent, by placing reliance on a circular dated 17.6.1998 issued by the State Government, has contended that the procedure for appointment of Lecturers contemplated by the 1981 Rules have been replaced by the procedure and norms laid down in the aforesaid circular dated 17.6.1998. In so far as the selection of Lecturers is concerned, the Circular of 1998 had altered the composition of the Selection Committee and the said circular contemplated selection of Lecturers, college-wise, instead of an enblock recruitment for all Aided Colleges as contemplated by the 1981 Rules. The 1981 Rules being non-statutory, the provisions thereof have been replaced by the circular and the present selection has been made following the procedure prescribed by the circular. Learned counsel for the respondent has

argued that Rule 3 of the 1981 Rules thus stands replaced by the norms prescribed by the circular of 1998. Once the selection is held according to the norms set by the Circular of 1998, the validity of the select list prepared will be guided by the provisions of Rule 10 of the 1981 Rules. The approval of the Director of Higher Education, Assam to the proposed appointment, contains an inbuilt approval of the selection made and such approval having been granted by the director on 2.8.2000, the select list must be deemed to be in force for one year with effect from 2.8.2000. As the candidate at Sl.No. 1 refused the appointment, in the absence of any justifiable cause or strong and cogent reasons, appointment should have been offered to the Respondent No. 1 (Writ Petition) by virtue of his position in the select list. As the same had not been done, the impugned directions passed by the learned Single Judge are wholly justified and needs no interference. Reliance in this regard has been placed on a judgment of the Apex Court in the case of R.S. Mittal v. Union of India (1995) Su 230 2 SCC 230 . Besides two other decision of the Apex Court in the cases of [Purushottam Vs. Chairman, M.S.E.B. and Another](#), and The State of U.P. v. Ram Swarup Saroj (2003) 3 SCC 699 have also been pressed into service.

8. The very wide and elaborate arguments advanced by the learned senior counsels for both the parties have received our due attention. There is no dispute that while the 1976 Rules are statutory in character, the 1960 and 1981 Rules are non-statutory. The gaps in the statutory Rules can be and are normally filled up by executive orders and administrative instructions, which may partake the character of Rules". The 1976 Rules, it must be noted, deals primarily with the management of the Aided Colleges and it is from the aforesaid limited perspective that powers and duties of the Governing Bodies of Aided Colleges are dealt with by the 1976 Rules. Rule 19(iv) of the 1976 Rules confers on the Managing Committee of an Aided College the powers to make appointment subject to the Rules in force. In the absence of any repeal, the 1976 Rules continued the provisions of the 1960 Rules and therefore the procedure for appointment will be the one prescribed by the 1960 Rules. In so far as the appointment of Lecturers of Aided Colleges is concerned, the 1981 Rules also contain an elaborate procedure for appointment and the said Rules being subsequent, it must be understood that the procedure under the 1981 Rules will hold the field in preference to the procedures prescribed by the 1960 Rules. To the same effect would be the Circular of 1998 noted by us in the preceding paragraph, which must be understood to have substituted the constitution of the Selection Board prescribed by the 1981 Rules and has further prescribed a detailed procedur for evaluation of candidates. The composition of the Selection Board, which held its deliberation on 31.5.1999 shows that the said composition conforms to the requirements spelt out by the Circular. The Circular does not abrogate the latter provisions of the 1981 Rules particularly in so far as the same relates to publication of the select list. Under Rule 10, the select list is to be approved by the Government and is to remain valid for one year from the date of its publication. Though the select list in the instant case has neither been specifically approved nor

has been published, it is possible to read that such approval and publication were granted by the Director of Higher Education on 2.8.2000. When the proceedings of selection along with the proposal for appointment of the candidate at Sl.No. 1 of the Select List had been forwarded to the Director, Higher Education, Assam, the approval of the Director to the proposed appointment would signify his approval to the selection process and the select list prepared. The publication of the select list or its coming into force upon such approval must thus be counted from the date of approval. Viewed from the aforesaid perspective, the select list prepared pursuant to the deliberation held by the Selection Committee on 31.5.1999 must be deemed to have come into force from 2.8.2000 and under Rule 10 of the 1981 Rules, it was to remain valid for a period of one year with effect from the said date. We, therefore, see no infirmity in the conclusion reached by the learned Single Judge on this aspect of the matter, with which conclusion we respectfully concur.

9. The candidate at Sl. No. 1 refused the offer of appointment, which was offered to him by the college authority on 7.8.2000. The select list as still in force at that point of time. The writ petitioner-respondent No. 1 being at Sl. No. 2 of the list of selected candidates, was entitled to a fair consideration of his case for appointment. It was a defeasible right, which could be denied for strong and compelling reasons. Instead what was done by the Special Body is that a decision was taken to re-advertise the post on the ground that the select list had lost its force, a conclusion, which has not been approved by us. As the sole ground for the refusal to appoint the writ petitioner - respondent No. 1 was that the select list had lost its force, as expressly recorded in the resolution of the Special Body dated 29.9.2000, the argument advanced that the decision to re-advertise the post was in furtherance of the desire of the Special Body to have a wider and better choice of candidates has been rightly negated by the learned Single Judge. It is an after thought, which has been pleaded and argued, though the same was clearly not in the mind of the Special Body at the relevant point of time. The argument advanced that no mandamus ought to have been issued to appoint the writ petitioner-respondent No. 1, attractive as it is at first blush, must be rejected. Reluctance of the Writ Court to issue a mandamus to appoint any particular person must always be understood in the right context. Such reluctance is on account of the recognition by the Courts that the employer is the right person to decide as to the circumstances when an appointment is required to be made in the exigencies of service, but if an employer has expressed its intention to go ahead with the appointment, as evident in the instant case and such an action is proposed to be taken in defiance of the legitimate rights of a person entitled, the inhibitions of the Writ Court must give way and this is what has precisely happened in the present case.

10. The law laid down by the Apex Court is the case of [Director of Settlements, Andhra Pradesh and Others Vs. M.R. Apparao and Another](#), cannot, therefore be understood to constitute a legal bar to the grant of relief to the writ petitioner - Respondent No. 1. The further judgment cited on behalf of the appellant in the case

of [State of Punjab Vs. Raghbir Chand Sharma and Another](#), is distinguishable from the facts of the present case, inasmuch as, in the case of State of Punjab v. Raghbir Ch. Sharma (supra) the candidate at Sl. No. 1 of the select list was appointed and subsequently he resigned. As appointment pursuant to the selection was made", this Apex Court held that the select panel had spent its force. That apart, in the said case, the Apex Court took note of the fact that Circular dated 22.3.1957 would not apply to the panel of the nature under consideration and further that even as per the said Circular, no claim for appointment could be asserted after the expiry of six months. The attempt on the part of the appellant to persuade this Court to take the view that as the Respondent No. 1 (writ petitioner) had taken part in the selection process he would be disentitled to any relief, also does not appeal to us, inasmuch as, there is no material on record to even remotely suggest that the Respondent No. 1 (writ petitioner), had, at any point of time, waived his right to challenge the validity of the second selection process. The facts of the case of [Suneeta Aggarwal Vs. State of Haryana and Others](#), on which reliance has been placed are again distinguishable. The appellant in that case, i.e., Suneeta Aggarwal though placed at Sl. No. 2 in the select list by the Selection Committee, was recommended for appointment, which recommendation was not accepted by the Vice Chancellor, who had ordered for re-advertisement of the post. Though the order of the Vice Chancellor for re-advertisement of the post was passed on 5.8.1996, the appellant Suneeta Aggarwal did nothing to challenge the said decision and took part in the interview, which was held on 10.1.1997. It is on the said date, i.e., on 10.1.1997 that she simultaneously challenged the action of the Vice Chancellor by filing a writ petition. The findings of the Apex Court that the appellant did not challenge the order of the Vice Chancellor declining to approve her selection and instead ordering for re-advertisement, must be understood in the said facts. In the instant case, the appellant had challenged the resolution of the Special Body to re-advertise the post even before the re-advertisement was issued in the newspapers. The resolution itself was challenged and when the re-advertisement appeared in the newspapers, the same was challenged without any delay, by means of an amendment. As by the interim order passed by this Court on 6.11.2000, the selection process was allowed to continue, the Respondent No. 1 (writ petitioner) had no choice but to participate in the said second selection process. The facts of the present case would hardly permit this Court to come to any conclusion regarding waiver on any right by the Respondent No. 1 (writ petitioner) so as to hold that the writ petitioner - respondent No. 1 would not be entitled to any relief.

11. For all the aforesaid reasons, we are inclined to take the view that the judgment and order dated 8.1.2003 passed by the learned Single Judge in WP(C) 5823/2000 ought to be affirmed and this Writ Appeal should be dismissed, which we hereby do. Having regard to the totality of the facts and circumstances of the case, we also think it would be proper to impose costs on the appellant, which we quantify at Rs. 5,000.