

(2006) 09 GAU CK 0052**Gauhati High Court****Case No:** None

Mukul Saikia and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision: Sept. 15, 2006**Citation:** (2007) 2 GLR 81 : (2007) 1 GLT 96**Hon'ble Judges:** D. Biswas, J; B.P. Katakey, J**Bench:** Division Bench**Final Decision:** Dismissed**Judgement**

B.P. Katakey, J.

The appellants who are writ petitioners WP(C) No. 2026 of 2001, 2036 of 2001 and 4932 of 2001, by present appeals have challenged the common judgment and order dated 14.8.2003 passed by the learned Single Judge dismissing a batch of writ petitions including the present concerned writ petitions.

2. The Writ Petition No. 2026 of 2001 as well as 2036 of 2001 have been filed by the appellants in Writ Appeal No. 8 of 2005 praying for a direction to the State respondents to fill up 27 posts of Child Development Project Officer (C.D.P.O)/probation officer pursuant to the advertisement dated 19.8.1997 and also to fill up all anticipated vacancies that had arisen on or after the date of advertisement till the completion of selection process from amongst the candidates whose names appeared in the select list dated 17.7.2000. The Writ Petition(C) No. 4932 of 2001 has been filed by the appellants in W.A. No. 471 of 2003 challenging the Cabinet memorandum dated 16.6.2000 circulated by the Commissioner and Secretary, Government of Assam, Social and Welfare Department under Rule 17 of Assam, Rules of Executive Business relating to the regularisation of 18 C.D.P.Os./probation officer, who are appointed under Regulation 3(f) of Assam Public Service Commission (Limitation of Function) Regulations 1951 and also praying for a direction to the official respondents to appoint the writ petitioners/appellants in the vacant/newly created post of C.D.P.Os./probation officer. Both the

writ appeals have been taken up for hearing and disposal as in both the writ appeals the common judgment and order passed by the Single Judge has been challenged.

3. We have heard Mr. P.K. Goswami, learned senior counsel appearing on behalf of the appellants in both the appeals, Mr. A.K. Phukan, learned Advocate General, Assam appearing on behalf of the State respondents, Mr. R. Dubey, learned Counsel appearing on behalf of the respondent Nos. 4,6,7,14 to 21 and Mr. A.M. Bazurbaruah, the learned Counsel appearing on behalf of the respondent Nos. 5, 9,10,11,12,18 and 19 in Writ Appeal No. 471 of 2003.

4. Mr. Goswami, learned senior counsel appearing on behalf of the appellants has submitted that though vide advertisement dated 19.8.1997, 27 posts of C.D.P.Os in Social Welfare Department were advertised by the APSC and the selection was held on the basis of the said advertisement, there being 16 numbers of additional existing vacancies available on the date on which the select list was published, i.e., on 17.7.2000, the said existing vacancies are to be filled up from out of the candidates selected by the Assam Public Service Commission (APSC) as the anticipated or existing vacancies can be filed up from the select list so prepared. The thrust of the argument of the learned senior counsel, therefore, is that the State respondents can fill up the vacancies from out of the select list prepared in excess of the post advertised. Challenging the regularisation of the private respondents in writ appeal No. 471 of 2003, the learned senior counsel has submitted that the policy decision taken by the Government to regularize their services, who were initially appointed temporarily and de hors the rules, under Regulation 3(f) of the 1951, regulation and who could not be successful in the selection made by the APSC and whose names do not figure in the select list dated 17.7.2000, is contrary to the provision contained in the recruitment rules and also it amounts to giving the benefit of regularisation of service the persons who have not been selected by the APSC in the selection made pursuant to the advertisement dated 19.8.1997. According to the learned senior counsel the said action on the part of the official respondents amounts to encouragement of back door entry into the service. The learned senior counsel in support of his contention has placed reliance on Roshni Devi and Others Vs. State of Haryana and Others, Virender S. Hooda and Others Vs. State of Haryana and Another, Suvidya Yadav vs. State of Haryana, (2002) 10 SCC 269 and Sandeep v. State of Haryana, 2001 (1) ALD (Crl.) 620 (SC),

5. The learned Advocate General Assam, appearing on behalf of the State respondents on the other hand has contended that since the advertisement dated 19.8.1997 was relating to 27 posts of Child Development Project Officer/Probation Officer in Social Welfare Department, no post in excess of those posts advertised can be filed up from out of the candidates selected vide select list dated 17.7.2000 and if the other anticipated or future vacancies are filed up from out of the candidates in the said select list, it will amount to depriving the other persons who in the meantime have qualified to be considered for selection and appointment. It

has further been submitted that as soon as the posts advertised are filled up or the validity of the select list expires, whichever is earlier, the persons whose names appear in the select list cannot claim appointment thereafter as the select list gets exhausted on such happening. Controverting the submission of the learned senior counsel for the appellant relating to the regularisation of 18 C.D.P.Os., the learned Advocate General has submitted that the appellants in the writ petition, i.e., W.P.(C) No. 4932 of 2001 did not challenge either the policy decision of the Government or the notification issued thereafter regularizing the service of such 18 C.D.P.Os./probation officers and therefore, the said question was not rightly gone into by the learned Single Judge. It has further been submitted that what the appellants in the writ petition has challenged is the Cabinet memorandum dated 16.6.2000 only and not the cabinet decision or the policy decision taken by the Government and, hence, the contention of the learned senior counsel for the appellant is not tenable. The learned Advocate General has further submitted that the decision to regularize those 18 C.D.P.Os., who were initially appointed under Regulation 3(f) of 1951 Regulation, was taken in view of the fact that they have already rendered more than four years of service satisfactorily and as their continuation in service was necessary to implement the time bound scheme of the Government of India for which ICDS projects are created in Assam. Moreover they were regularized against the posts meant for promotees. The learned Advocate General has contended that the action on the part of the Government in regularizing the services of such employees cannot be termed as arbitrary.

6. The learned Counsel appearing on behalf of the private respondents in W.A No. 471 of 2003 supporting the submission of the learned Advocate General, have submitted that the post advertised being 27, the select list prepared on 17.7.2000 get exhausted as soon as those advertised 27 vacancies were filled up. According to the learned Counsel, though the writ petitioners/appellants were selected by the APSC, they cannot as a matter of right claim that they should be appointed against any future vacancies or in any vacancies which were not advertised, on the ground that they were selected in the select list dated 17.7.2000. It has further been contended by the learned Counsel that the post against which the private respondents were regularized were not the post advertised in the advertisement dated 19.8.1997 and, therefore, the petitioners cannot claim : that they should be appointed against those posts pursuant to their selection vide select list dated 17.7.2000, which get exhausted on appointment of 27 advertised posts, more so when those 18 vacancies in the cadre of C.D.P.Os. were meant to be filled up by way of promotion. The learned Counsel for the respondents have also contended that the decision to regularize the services of the respondents were taken by the Government by relaxing the rules as contemplated under clause 11 of the Assam Social Welfare (recruitment and promotion) Service Order, 1994, which decision in fact has not been challenged by the appellant writ petitioner either in the writ petition or in the appeal filed before this court. The learned Counsel for the private

respondents in support of their contentions have placed reliance on the decision of the Apex Court in Madan Lal and Others Vs. State of Jammu and Kashmir and Others, and Ludhiana Central Co-operative Bank Ltd. Vs. Amrik Singh and Others,

7. The learned Single Judge has rejected both the contentions of the writ petitioners on the ground that the vacancies advertised being 27, no vacancies beyond such advertised vacancies can be filled up and the petitioners have challenged only the Cabinet memorandum dated 16.6.2000 without challenging the Cabinet decision taken on 13.8.2000 as well as the notification regularizing the services of the respondents dated 16.11.2001.

8. Admittedly by advertisement dated 19.8.1997, 27 posts of C.D.P.Os./ probation officers in the Social Welfare Department were advertised. The appellant/writ petitioners have claimed that as more posts of C.D.P.Os./probation officers were available and more vacancies arose after the advertisement, those vacancies are to be filled up from amongst the candidates selected in the select list dated 17.7.2000 prepared by the APSC pursuant to the advertisement dated 19.8.1997. According to the appellants as they were selected and their names appear in the said select list, those posts are to be filled up by the candidates in accordance with the position in the select list. The writ petitioners/ appellants are claiming appointment against the vacancies other than the vacancies advertised, which according to the petitioner/appellant existed on the date when the select list dated 17.7.2000 was published.

9. The Apex Court in Surinder Singh and Others Vs. State of Punjab and Another, has held that it would be improper exercise of the power to make appointments over and above those advertised and it is only in the rare and exceptional circumstances and in emergent situation that this rule can be deviated from. It has further been held that even in case of deviation it should be clearly spelled out as to under what policy such a policy decision is taken and exercise of such power has to be tested on the touchstone of reasonableness. The Apex Court has further held that it is not a matter of course that the authority can fill up more posts than advertised. The Apex Court keeping in view the said principle of law while analyzing the facts and circumstances of the said case, has found that neither any exceptional circumstances existed nor was there any emergent situation for the State to deviate from the principle of limiting the number of appointments to the posts advertised and, hence, upheld the decision of the High Court in setting aside the appointments of persons over and above those advertised.

10. In Madanlal (supra) the Apex Court has also held that when the requisition is made by the Government for a particular number of posts and the advertisement was issued for filling up of those posts, recruitment has to be restricted to the post advertised and the select list prepared on the basis of such advertisement get exhausted, as soon as the advertised vacancies are filled up or the life of the select list in terms of the rules ended, whichever is earlier. It has further been held that

thereafter if further vacancies are to be filled in, a fresh process of recruitment is to be initiated giving a fresh opportunity to all the open market candidates to compete. In Ludhiana Central Cooperative Bank Ltd. (supra), the Apex Court has held that a person whose name finds in a select penal has no vested right to get appointment to the post in spite of existence of the vacancies but at the same time the appointing authority cannot afford to ignore individual claims at its whims or fancy and in operating such a penal or making appointments on the basis of the penal, the appointing authority cannot merely pick and choose of the candidates.

11. The Apex Court in Roshni Devi (supra), in the peculiar facts and circumstances of that case, has modified the direction issued by the Full Bench of Punjab and Haryana High Court thereby allowing more vacancies to be filled in then for which the requisition was sent by the department to the service selection board. In the said case though the requisition for filling up particular number of vacancies was sent, the advertisement was issued without mentioning the number of vacancies and a select list though was prepared on the basis of the merit but out of the said list the selection board recommended the names of candidates in respect of different departments without adhering the position in the merit list but at random. After the appointment of those recommended candidates some persons who occupy higher position in the merit list approached the High Court which was allowed by directing the Government to appoint and accordingly appointments were made appointing those writ petitioners. The said decision of the High Court was not challenged but subsequently some other persons challenged the appointments of all the persons on the ground that the appointments were made beyond the vacancies for which requisition was sent. When the writ petition was placed before a Division Bench, being confronted with the earlier decision of the High Court, the same was referred to the Full Bench and accordingly Full Bench has held that the Government cannot make any selection in excess of the number of posts for which requisition has been placed before it and, therefore, directed the State to examine the cases of the persons who were appointed even though they do not attain the percentage of marks required for the selection and not within the number of posts for which requisition was issued and to pass necessary order in accordance with law. The effect of the said direction is that the right accrued to the parties pursuant to the earlier judgment passed by the Division Bench of the High Court and the persons who have been appointed, their appointments have been annulled. The Supreme Court keeping in view the peculiar facts and circumstances of the case has directed that the appointments already made out of the list prepared will not be annulled and also further directed to fill up those vacancies existed in the year 1995, if any, from out of the list prepared on 15.10.1989 strictly on the basis of the merit position. The Supreme Court, however, did not approve the action on the part of the State Government in not assailing the judgment of Punjab and Haryana High Court in earlier batch of writ petitions, i.e., in Sudesh Kumari case as well as strongly deprecated preparation of unusual larger list in comparing to the vacancy position.

The said decision cited by the learned senior counsel for the appellant being related to the peculiar facts and circumstances of the said case, is not applicable in the present case as the facts in the present case are completely different from the facts of that case.

12. In Virender S. Hooda (supra), on which the learned senior counsel for the appellant has placed reliance, the Apex Court has held that when a policy has been declared by the State as to the manner of filling up of the post in terms of the rules and instructions issued to the public service commission from time to time, so long as these instructions are not contrary to the rules, the State respondents ought to follow the same. In the said case though public service commission advertised 12 posts of Haryana Civil Service (Executive Branch) and the select list was prepared and published, as some of the selected candidates did not join pursuant to the offer made to them, some wait listed candidates claimed that they should be appointed on the basis of the merit list, pursuant to Government circular issued in that respect, which provides that the vacancies which arose within six months from the date of recommendation by the commission should be filled up from the wait list maintains by the commission. The Apex Court in view of the said policy decision of the government has directed to consider the case of the appellants/writ petitioners of that case for appointment pursuant to the selection. In the instant case it is not the case of the appellants/ writ petitioners that any such policy decision was taken by the Government of Assam to the effect that the vacancies which existed, beyond the vacancies advertised or occurred till the select list is prepared, are to be filled up from amongst the candidates selected in the select list pursuant to the advertisement made for filling up of particular number of vacancies. The appellants/writ petitioners have also failed to place, any rule framed by the Government in that regard. The facts of the present case being completely different from the fact of Virender S. Hooda case, the said decision cannot be applied in the present case.

13. In Suvidya Yadav (supra), on which the learned senior counsel for the appellant has also placed reliance, the Apex Court, keeping in view the fact that after issuance of the advertisement by the public service commission for a certain number of posts of Principal, as the State Government before finalization of selection made a fresh requisition to the public service commission indicating vacancies available, which "were in excess of those advertised posts, has held that the recommendation of the names by the public service commission pursuant to such subsequent requisition and in excess of number of post advertised is valid and, therefore, all the persons who were recommended are entitled to be appointed. The facts of the said case being completely different from the facts of the present case and in the present case admittedly the number of posts advertised being 27 and there being no further requisition during pendency of the selection indicating more posts than the post advertised, the said decision of the Apex Court is not applicable in the facts of the present case. The decision in Sandeep Singh (supra) on which the reliance has been

placed by the learned senior counsel for the appellants is also applicable in the facts and circumstances of this case.

14. In the instant case, as discussed above, the vacancies advertised was 27 and all those 27 vacancies have already been filled up by the candidates strictly in accordance with the merit position and keeping in view the policy of reservation. The appellants/writ petitioners have not contended that appointments to 27 posts were not made as per the merit position. The claim of the appellants/writ petitioners is that the vacancies which occurred during the selection process and existed on the date of publication of the select list, are to be filled up by the candidates selected by select list dated 1-7.7.2000. In view of the law laid down by the Apex Court to that effect, as discussed above, the life of the select list get exhausted as soon as the number of posts advertised are filled up. No direction can, therefore, be issued by this court to fill up posts other than the posts advertised, more so when neither there is any policy decision of the Government to fill up those posts, beyond the posts advertised by of the candidates selected vide select list dated 17.7.2000 nor any Rules framed by the Government in that regard. Hence, the learned Single Judge has rightly rejected the claim of the writ petitioners/appellants in that regard.

15. The second contention of the learned Counsel for the appellants/writ petitioners that the private respondents, who were appointed under Regulation 3(f) of 1951 Regulations, were illegally regularized though they were not selected by the APSC and their names do not appear in the select list dated 17.7.2000 has been rejected by the learned Single Judge on the ground that neither the policy decision of the Government nor the subsequent notification regularizing the services of the private respondents has been challenged by the petitioners in the writ petition. The appellants/writ petitioners in the writ petition has challenged only the Cabinet memorandum dated 16.6.2000 without even bothering to challenge the policy decision of the Government to regularize the services of such respondents and also the notification regularizing their services. The appellants even in the appellate stage did not pray for amendment of the writ petition challenging the said policy decision as well as the notification even though the learned Single Judge has refused to go into the said question in the absence of any challenge in that regard. That being the position the learned Single Judge has rightly refused to entertain such contention in the absence of any challenge to the said policy decision as well as the notification regularizing the services of the private respondents. Hence, we are also unable to go into the question of legality or otherwise of the said decision in the absence of challenge to such policy decision and the notification.

16. In view of the aforesaid discussions, we do not find any infirmity in the judgment passed by the learned Single Judge. The writ appeals are, therefore, dismissed being devoid of any merit.

17. No costs.