

WP(C) 1049/2012

BEFORE

THE HON'BLE MR. JUSTICE AMITAVA ROY

THE HON'BLE MR. JUSTICE P.K. MUSAHARY

(Amitava Roy, J)

Hyphenated by common grievances, the petitioners impeach the selection process conducted by the Assam Public Service Commission (for short hereinafter referred to as the Commission) for appointment to various posts as enumerated in the Advt. No.6/2006 dated 10.08.2006, thereby, initiating the exercise. Several bouts of litigious duel have meanwhile been staged on the desineness whereof, the final select list had been published on 05.02.2010 and appointments on the basis thereof have been made. The impugnement herein is renewed, endeavour to invalidate the process by a handful of unsuccessful candidates, it being for two of them, a second outing.

02. We have heard Dr. B. Ahmed, learned counsel for the petitioners, Mr. C. Baruah, learned Standing Counsel for the Assam Public Service Commission and Mr. P.S. Deka, learned Govt. Advocate for the official respondents.

03. In the factual backdrop of the lingering stand off spanning over almost six years, these petitions, for the sake of expeditious disposal of the issues raised have been heard finally at the motion stage, the Commission having filed its counter in response to the petitioners' imputations. No formal notice, therefore, is considered essential to the respondents.

04. A fascicle of the indispensable facts would furnish the needed factual backdrop. As adverted to hereinabove, in response to the advertisement dated 10.08.2006 published by the Secretary, Assam Public Service Commission intending to hold Preliminary Combined Competitive Examination for screening candidates for the main examination for recruitment to various posts as disclosed therein, the petitioners claiming themselves to be eligible, submitted their candidature and on being allowed to appear in the Preliminary Examination, passed the same. They, thereafter as scheduled, took the Combined Competitive (Main) Examination on 07.07.2008 and in the results that followed barring the petitioner No.1 in WP(C) No.1049/2000 and the petitioner in WP(C) No.2539/2012, the petitioners were shown to have passed. The candidates successful in the Combined Competitive (Main) Examination, thereafter appeared in the viva voce test conducted by the Commission and the final select list published on 17.06.2009 did not contain the name of any of the petitioners. Two of them, namely- Shri Dhrubajyoti Das and Shri Hamen Bharali being aggrieved instituted WP(C) No.3054/2009 challenging the process of selection. Other unsuccessful candidates also separately instituted writ petitions impugning the process which were registered as WP(C) No.2765/2009, WP(C) No.3382/2009, and WP(C) No.3702/2009 et al. The core issue in all these assailments was the propriety or otherwise of the evaluation of the answers provided by the candidates in the Combined Competitive (Main) Examination as well as the overall validity or otherwise of the exercise undertaken.

05. WP(C) No.2755/2009 was eventually disposed of by the judgment and order dated 01.09.2009 by a Division Bench of this Court interfering with the final select list dated 17.06.2009 and leaving it open to the Commission to take further steps on the basis of the observations and findings recorded in the decision. Subsequent thereto, the Commission published a select list of candidates on 05.02.2010 in which as well the names of the petitioners did not figure. Though, immediately after the judgment and order dated 01.09.2009 was rendered, the Commission had filed a Special Leave Petition against the same before the Hon'ble Apex Court, it was withdrawn on 10.05.2010 following the publication of the

select list dated 05.02.2010.

06. As it transpires from the averments in the present writ petition, taking a cue from the observation of the Division Bench of this Court in its judgment and order dated 01.09.2009 that the increase and decrease in the marks of the candidates by the scrutinizers/examiners did not inspire confidence and that transparency and fair play demanded a better methodology, some of them being prompted by their urge to be apprised of the details of the mode of evaluation of the answer scripts, submitted applications under the Right to Information Act, 2005 for obtaining their mark-sheets and answer scripts of the Combined Competitive (Main) Examination. As allegedly, the Commission refused to provide the photocopies of the answer scripts to them, they instituted WP(C) No.3054/2009 before this Court praying for a direction to it to furnish the same to them and vide order dated 06.11.2009 the prayer was acceded to. Though the Commission being aggrieved, approached the Hon'ble Apex Court by filing Special Leave Petition being SLP (C) No.30858-308561/2009, the same was finally disposed of on 09.08.2011 affirming the order of this Court whereby, the examining bodies were directed to permit the examiners to have inspection of their answer books subject to the clarifications regarding the scope of the Right to Information Act and the safeguards and conditions subject to which such information should be furnished.

It was thereafter, that the petitioners could obtain the photocopies of their answer scripts sans the signatures of the examiners/scrutinizers. The petitioners have alleged that the perusal of their answer scripts having revealed serious anomalies in the evaluation of their answers both in the perspective of the procedure applied therefor, thus rendering the whole process doubtful and dubious to the core as well as extinction of their otherwise bright prospects of getting selected, they have approached this Court seeking its intervention in the exercise of its extra ordinary writ jurisdiction to annul the entire selection with a direction to the Commission to recast the results on the basis of actual marks obtained by them and other candidates in their original answer scripts. They have not only expressed doubt on the existence of a panel of examiners/scrutinizers as required under Rule 55(2-II) of the Procedure and Function of Assam Public Service Commission but also have asserted that in some cases questions have been left unevaluated and in others marks originally secured have been enhanced and/or reduced to achieve collateral purposes.

07. By an additional affidavit filed by the petitioners, some documents pertaining to their queries under the Right to Information Act, 2005 with regard to the evaluation of the answers scripts and the replies thereto have been brought on record.

08. The respondent Commission in its counter, in substance, has not only questioned the maintainability of the writ petition for non impleadment of the selected candidates who have meanwhile joined their posts during April/May, 2010 (except 3/4 candidates due to pendency of cases before this Court) on the basis of the final select list dated 05.02.2010, they have asserted that the issues presently raised and pertaining to the evaluation of the answers scripts of the candidates had not only been urged in the earlier writ petition being WP(C) No.2755/2009, but also answered by this Court in its judgment and order dated 01.09.2009 by taking note inter alia of the Commission's affidavit providing necessary clarifications in connection therewith. The Respondent-Commission in endorsement of these assertions has in particular referred to the observations in paragraph 20 and 33 of the decision dated 01.09.2009, whereby, this Court declined to undertake a review of the evaluation made by the scrutinizers/and the head of the answer scripts and the process of awarding higher or lower marks to the candidates. The respondent-Commission thus pleaded that in the backdrop of an exhaustive adjudication of the identical issues in WP(C) No.2755/2009, the instant challenge is patently untenable and the petitions are thus liable to be dismissed in limine. The affidavit-in-reply filed by the petitioners in WP(C) No.1049/2012 is in essence reiteration and reaffirmation of the assertions in the writ

petitions.

09. Dr. Ahmed has assiduously argued that it being evident from the materials on record and in particular the affidavit-in-opposition filed by Mr. S asadhar Nath (Respondent No.10) in the WP(C) No.2755/2009 that the evaluation of the answer scripts of the candidates in the Combined Competitive (Main) Examination had not been undertaken by any panel of examiners as required to be drawn up under the Procedure and Function of Assam Public Service Commission and instead by the Chairman and the Secretary of the Commission with the help of unauthorized persons of their choice resulting in a travesty of a public participatory process, interference therewith is unavoidably called for to instill the confidence of the public in the recruitments purportedly made. Referring to the answer scripts of some of the petitioners, the learned counsel has sought to impress upon us that it would be evident therefrom that not only some answers have not been evaluated, the marks originally awarded had been reduced without any conceivable reason or justification. Dr. Ahmed has urged as well that the process is vitiated by the vice of selective re-evaluation of the answer scripts to include identified candidates on extraneous considerations. While expressing apprehension that in the process of purportedly evaluating the answer scripts, the Commission had acted upon Rule 6 of the Assam Public Service Commission (Procedure and Conduct of Business) Rules, 2004 (hereinafter for short referred to as 2004 Rules) which had neither been finalized nor published, the learned counsel has argued that having regard to the cut off marks of open category candidates i.e. 891, the petitioner No.2 who had been at the first instance awarded 892 and ought to have been selected was denied selection, his score having been arbitrarily reduced to 846 in course of the hostile re-evaluation of his answers. As the Commission has not denied the factum of re-evaluation of the answer scripts as otherwise apparent, in the absence of any explanation for the moderation of the marks and non-evaluation of the answers provided, the select list dated 05.02.2010 ought to be adjudged non est in law and a direction ought to be issued to the Commission to recast the same after awarding marks to the candidates to which they are legitimately entitled, he urged.

10. Mr. Baruah, in response has reiterated his demur to the maintainability of the writ petition on the ground of non-impleadment of necessary parties and unexplained delay. According to him, the issues raised in the present proceedings, have already been answered by this Court in its judgment and order dated 01.09.2009 passed in WP(C) No.2755/2009 and that therefore the petitioners are estopped from pursuing the same afresh. The learned counsel has dismissed as well the relevance of the affidavit-in-opposition of the Respondent No.10 filed in WP(C) No.2755/2009, he not having been arrayed as a respondent in the proceedings in hand. While clarifying that 2004 Rules had never been acted upon by the Commission, he has reiterated that meanwhile most of the selected candidates barring 3/4 have already been appointed and have been rendering their services since April, 2010 and thus at this distant point of time, no interference as sought for even otherwise ought to be made. On being queried by this Court, Mr. Baruah has submitted on instructions that a fresh process for appointment to identical posts has meanwhile been initiated and the Combined Competitive (Main) Examination in connection therewith is underway from 27.05.2012. Without prejudice to the above, Mr. Baruah has urged that the imputations qua evaluation and re-evaluation of the answer scripts are wholly baseless and the impugnement as would be evident being wholly speculative in nature, ought to be repudiated with exemplary costs.

11. The pleadings on record and the competing argument have been duly noted. This selection process which was initiated by the advertisement dated 10.08.2006, the records exhibit, had been subjected to a host of assailments by the candidates unsuccessful in the Combined Competitive (Main) Examination on remonstrances pertaining to reservation in appointments to the posts involved, evaluation of the answer scripts as well as general conduct of the process, the same

allegedly not being in accordance with the norms and the Rules of the Commission applicable thereto. After the comprehensive adjudication of these issues vide judgment and order dated 01.09.2009 passed in WP(C) No.2755/2009, the select list dated 05.02.2010 was published following the exercise in terms of that verdict as claimed by the Commission and appointments on the basis thereof have almost in full been made during April, 2010. The records admittedly show that the appointees are rendering services in their posts since then till date without any break. Neither there has been any interdiction in their continuance in service nor has at any point of time, any judicial forum made their appointments subject to determination afresh on identical issues or those ancillary thereto. As pointed out on behalf of the Commission, though the petitioners herein have impeached the selection process as a whole seeking its nullification, none of the appointees has been impleaded in the present proceedings.

12. The above notwithstanding, the pursuit in hand does predicate an insight into the determination made in WP(C) No.2755/2009 (Ratul Kumar Das & Ors. V. State of Assam and Ors.). The validity of the same process came under forensic scrutiny of this Court following the publication of the final select list dated 17.06.2009 of the successful candidates. Vitiating on the ground of wrong methodology qua reservation of women, evaluation of answer scripts, allotment of additional marks etc. was alleged in meticulous details. The Hon'ble Division Bench culled out the following areas of scrutiny from the pleaded matrix namely -

(1) Correctness/fairness in the evaluation of answer scripts of candidates in the main written examination and award of higher marks to some of the candidates including respondent No.7 & 8 therein.

(2) Preparation of the list of eligible candidates for interview as well as the final list of successful candidates in the light of the understanding of the Commission of the law with regard to vertical and horizontal reservation qua the Assam Women (Reservation of vacancies in Services and Posts), Act, 2005 (hereinafter for short referred to as the Women Reservation Act)

13. The Hon'ble Division Bench dealt exhaustively with the averments of Respondent No.10 as recited in his affidavits with particular reference to his assertion that the increase and decrease of marks in the process of evaluation of the answer scripts had affected the fortune of many candidates. The reply of the Commission in its affidavit to this plea in particular was also taken note of. Apart from its contention that though the Respondent No.10 had been amongst others present in the meeting in which the select list of candidates dated 17.06.2009 had been finalized and that he did not record his dissent thereto and instead signed the minutes of the proceedings, the Commission elaborated the procedure followed in evaluating the answer scripts up to the stage of tabulation of results with reference to the Assam Public Service Commission (Procedure & Conduct of Business) Rules, 1986 (for short hereinafter referred to as the 1986 Rules). It averred inter alia that a panel of examiners/scrutinizers and head examiners had been appointed by it in respect of the Combined Competitive (Main) Examination with addition of few more names due to the time lag in between. It underlined that in terms of proviso to Rule 42 of the 1986 Rules award of marks and re-evaluation was permissible and that creation of marks per se without any other material to indicate any extraneous or oblique purpose did not invalidate the modifications so made.

14. The Hon'ble Division Bench profusely dealt with the various provisions of the 1986 Rules bearing on the conduct of the written examination and interview contemplated thereby and observed in paragraph 31 of its judgment as hereunder:

31. In order to explain the precise procedure that was adopted in the conduct of the written examination, an affidavit has been filed by the Controller of Examination on 13.08.2009 stating that after the answer scripts are received from the respective examiners, subject wise scrutiny of the said answer

scripts is required to be carried out. Such scrutiny is to be done initially by the scrutinizers and, thereafter, by the head examiner engaged for a particular subject. In the affidavit filed, it has been stated that the entire process of scrutiny is to take place in the office of the Commission and in the course of such scrutiny apart from ascertaining as to whether all the answers given have been evaluated and whether the totaling of the marks is correct, the scrutinizers and thereafter the head examiner(s) also undertake an exercise to find out whether any candidate has been awarded high/low marks. It has been further stated, in the affidavit, filed that if anomalies on any of the aforesaid counts is found by the scrutinizer the matter is brought to the notice of the head examiner who either removes the anomalies detected by making the necessary corrections or such task, at times, is performed by the scrutinizer himself under the instructions of the head examiner. The Controller of Examination in the affidavit filed has further stated that the above procedure had been followed in the instant Combined Competitive (Main) Examination conducted by the Commission.

15. The text of the judgment reveals that the Controller of Examination did personally appear before the Court and had explained that the scrutiny of all the answer scripts and the referred thereof to the head examiners wherever considered necessary, had been done underlining that this practice had been in vogue in the Commission since long past. In this premise, the Hon'ble Division Bench while observing that in the matter of conduct of examinations either for recruitment to public service or examinations conducted by any University, the role of the Court normally was minimal enunciated as follows:

33. In matters pertaining to conduct of examinations either for recruitment to public service as also in the case of examinations conducted by an University, the role of the Court normally is minimal. The Courts are not to act as appellate bodies in such matter. Neither the Judges should assume the role of super examiners. In the absence of any strong compulsion the Courts will not undertake a review of the actions of the scrutinizers and head examiners in allowing higher or lower marks to any particular candidate. The Court will also not carry out a review of the entire process to find out whether similar exercise of increase or decrease of marks should have been done in case of all candidates. In the present cases the materials on record including the statement made by the Controller before the Court sufficiently indicates that all the answer scripts had been subjected to scrutiny and reference to the head examiner, when considered necessary were made. Consequently, any review of the process is bound to result in a roving enquiry which must be avoided. That apart, the Court does not possess the necessary expertise in matters of evaluation of answer scripts. Such a task, therefore, must be left to the experts in the field.

That in such matters, the Judges should not assume the role of super examiners and that any review of the process in the form of a roving inquiry must be avoided was thus underlined in essence. It was observed further that a process of scrutiny of the answer scripts and in appropriate cases re-examination thereof by the head examiner takes place in any examination and such steps are inherent in the exercise to objectively assess the merit of the candidates and thus must be allowed. That a possibility of abuse inherent in the process cannot per se constitute a ground for judicial review of the decision making process was emphasized. The Hon'ble Division Bench recorded its satisfaction that the materials laid before it did decisively indicate that all the answer scripts were scrutinized by the scrutinizers and only those as felt necessary were laid with the head examiners.

Vis- -vis the cavil of Respondent No.10 the Hon'ble Division Bench concluded that in absence of any positive proof to the effect that the supervisor(s) and head examiner(s) had conducted themselves on extraneous grounds and reasons, no adverse conclusion could be drawn merely because they had increased or decreased the marks in some cases. In coming to this conclusion, their Lordships amongst others took into account the fact that the Respondent No.10 had participated in the conduct of the interview without expressing of any dissent at any earlier stage of the proceedings. The select list dated 17.06.2009 however was interfered

with as in the comprehension of their Lordships a wrong methodology in effecting reservation under the Reservation for Women Act, had been adopted, thus afflicting the same with an incurable legal infirmity. The Commission as a corollary was left at liberty to take further steps in the matter in the light of the observations and findings recorded in the decision. To reiterate the Commission did thereafter recast the select list, whereafter, the one dated 05.02.2010 was published and has been already acted upon.

16. The march of events disclose that parallelly some of the unsuccessful candidates had also approached this Court with a series of writ petitions complaining against the refusal of the Commission to furnish photocopies of their answer scripts applied for by them, the order dated 03.07.2009 of the State Information Commissioner, Assam to that effect notwithstanding. By judgment and order dated 06.11.2009 whereas these petitions were allowed, the Commission's challenge against the aforesaid order dated 03.07.2009 was dismissed. This determination was upheld by the Hon'ble Apex Court in Civil Appeal No.6454/2011 vide its judgment dated 09.08.2011. Submission at the Bar indicates that the petitioners herein were furnished with photocopies of their answer scripts thereafter in the month of December, 2011. Subsequent thereto, the instant petition had been filed on 27.02.2012, after a time lag of almost two months.

17. The foregoing narration is an unmistakable testament to a comprehensive analysis of the assailment of the process on the ground of anomalous incongruent, arbitrary and mala fide evaluation/re-evaluation of the answer scripts leading to ouster of deserving candidates and induction of undeserving candidates on impertinent considerations to achieve oblique objectives. By the judgment and order dated 01.09.2009 though certain observations had been recorded underlining the desirability of a better methodology of scrutiny and evaluation of the answer scripts, no interference with the exercise on this count was made. This was, in spite of vociferous and pronounced reservations made by one of the members of the Commission, i.e. Respondent No.10 in WP(C) No.2755/2009. The reasons for non interference had been cited in details.

As adverted to hereinabove, the petitioners have admitted that the aspect of evaluation/re-evaluation of the answer scripts had been a live issue in the earlier process of adjudication. That re-evaluation is an integral part of the conduct of the written examination had also been accepted by this Court in its decision rendered on 01.09.2009. Requirement of proof of deliberate wrong evaluation on extraneous factors for interference was insisted upon by their Lordships as well. No such apparent anomaly or mistake deliberately made on extraneous considerations either to hamper or to promote the prospect of any candidate was brought to the notice of this Court. In a way, thus having regard to the expanse and amplitude of the adjudication undertaken in the earlier proceeding, the afresh examination of the issue of premeditated, arbitrary and motivated evaluation/re-evaluation of the answer scripts to exclude and/or include identified candidates on irrelevant considerations is presently barred by the spirit of the principle of constructive res judicata.

As already recorded a new process for fresh appointments to identical posts has already been initiated by the Commission and the Combined Competitive (Main) Examination has commenced from 27.05.2012. The continuance of the appointees of the process initiated in the year 2006 and the on going new process are factors as well that cannot be lightly brushed aside.

18. Be that as it may, a perusal of the answer scripts at page 221 of the paper book in which according to the learned counsel for the petitioner, some segments of question No.3 had not been evaluated lacks in persuasion to sustain the plea of incomplete evaluation of the said answer. Not only, the photocopy of the said answer script does not offer an unassailable testimony in endorsement of this contention, the apprehension expressed by Dr. Ahmed that this document may not even be the replica of the answer-sheet of the candidate concerned renders this assertion per se unworthy of further scrutiny. The attention of this

Court has been drawn to the answer scripts at pages, 342,368 and 392 of the paper book to highlight reduction of marks originally awarded to the candidates concerned. Apart from the fact that re-evaluation has been recognized to be an integral, essential and inseverable segment of the conduct of the written examination, these answer scripts do not as such proclaim any blatant illegality or mistake to even infer in support of the petitioners' plea of deliberate wrong evaluation and reduction of marks for the ouster of these candidates from the selection process. The impugment of the selection process by the petitioners on the ground of mala fide, biased and insidious evaluation/re-evaluation of the answer scripts of the unsuccessful candidates to favour a chosen few and to exclude others, though equally or more deserving, thus is not only impermissible in the backdrop of the adjudication contained in the judgment and order dated 01.09.2009 passed in WP(C) No.2755/2009, but also is otherwise unsustainable being speculative and conjectural in nature without any tangible foundation or basis therefor. The process of the kind involved ought not to be repeatedly exposed to the vagaries of such reckless and omnibus allegations based on hypothesis and suppositions lest the much needed finality thereof is a casualty.

In the exercise of power of judicial review not only such a venture is impermissible, such attempts to discard a public participatory process conducted by a constitutional entity ought to be emphatically discouraged. This closing observation, it is made clear is not in any way to undermine or discount the observations recorded in the judgment and order dated 01.09.2009 bearing on the quality and credibility of such a process to engender public confidence but to sound a caveat to the proponents of such assailments on untenable pleas to proscribe identical processes to avail a gambling chance under the cover of judicial proceedings.

19. The petitions lack in merit and are dismissed. In the facts and circumstances of the case, the parties, are left to bear their own costs.