

THE HIGH COURT OF MEGHALAYA AT SHILLONG.

WP(C) No. 170 of 2015

Dr. Sudip Dey,
Son of (L) Sudhir Chandra Dey,
R/o Lumparing (Middle), Shillong-793004,
East Khasi Hills District, Meghalaya

:::::: Petitioner

-Versus-

1. North Eastern Hill University
Represented by its Vice-Chancellor,
NEHU Campus, Shillong-793022,
Meghalaya.
2. The Registrar,
North Eastern Hill University,
NEHU Campus, Shillong-793022,
Meghalaya.
3. Selection Committee for appointment
to the Post of Professor (UR) in the Department
of Sophisticated Analytical Instrumentation
Facility (SAIF), represented by its
Chairman, North Eastern Hill University (NEHU),
Shillong-793022, Meghalaya.
4. The Executive Council,
Represented by its Chairman, North
Eastern Hill University, Shillong-793022,
Meghalaya.

:::::: Respondents

BEFORE THE HON'BLE MR JUSTICE SR SEN

For the Petitioner : Mr. H.S. Thangkhiew, Sr. Adv.
& Mr. N. Mozika, Adv.

For the Respondents : Mr. K. Khan, SC, NEHU

Date of hearing : **30.11.2016, 01.12.2016 & 06.12.2016**

Date of Judgment & Order : **15.12.2016**

JUDGMENT AND ORDER

Heard Mr. H.S. Thangkhiew, learned Sr. counsel assisted by Mr. N. Mozika, learned counsel for the petitioner and Mr. K. Khan, learned Standing counsel for the respondents/NEHU

2. The brief fact of the petitioner's case in a nutshell is that:

"This Writ Petition is filed by the petitioner for non-consideration of his selection by the Selection Committee 3(three) times on the self created criteria in total disregard and willful violation of the Judgment and Orders of this Hon'ble High Court dated 25/04/2014.

The brief fact of the case is that the humble Petitioner is presently serving as a Scientific Officer (Senior Grade) in the Department of Sophisticated Analytical Instrumentation Facility (SAIF), NEHU, Shillong. The humble Petitioner had applied for the post of Professor, SAIF, North Eastern Hill University (NEHU), under the open specialization in response to an advertisement dated 7th December 2011, published by the Respondent University.

The Screening Committee had screened the application of the Humble Petitioner along with the other candidates and called him for interview, which was held on 20.04.2012 but the Selection Committee did not recommend the selection of the Petitioner on the ground that the Petitioner has 'no management experience' and 'lack of knowledge of analytical equipments other than SEM' and hence he was not found suitable, whereas the actual fact was that the two criteria 'no management experience' and 'lack of knowledge of analytical equipments other than SEM' were not there in the advertisement since the post was advertised under "open" specialization. The said rejection was challenged by the Humble Petitioner vide W.P. (C) No. (SH) 191 of 2012 before the then Shillong Bench of the Gauhati High Court and as the Selection Committee had virtually laid down a standard or basis for selection by themselves without the sanction of Law."

Pursuant to the said Judgment and Order the Respondents again called the Petitioner for interview on 14.02.2013 and the Selection Committee once again laid down criteria of 65/100 as minimum mark for selection of the humble petitioner instead of 50% as minimum and did not consider his selection despite the directions of

the Hon'ble Gauhati High Court to consider the case of the Petitioner strictly in accordance with the criteria and the respective weightage as prescribed by the extent Rules/Regulations. Being highly aggrieved with the said decision of the Selection committee the Humble Petitioner filed a Writ Petition before this Hon'ble High Court being WP (C) No. 110 of 2013 praying for his appointment, the Hon'ble High Court set aside and quashed the proceedings of the Selection Committee dated 14.02.2013 and was pleased to direct the Selection Committee of the Respondent University to consider the case of the humble Petitioner vide Judgment and Order dated 25.04.2014.

In the said Judgment and Order the Hon'ble High Court had directed the Selection Committee to consider the appointment of the Petitioner "strictly in accordance to the clear cut findings of the earlier Order passed by the Gauhati High Court and also by correcting the infirmities and illegalities pointed out by this court." It has been further stated that, "In case of a lone candidate there is no comparative assessment of merits and the lone candidate is to be subjected as to whether the lone candidate had the qualifications as provided in the advertisement..."

The humble Petitioner begs to state that had the selection committee considered the aforementioned direction of this Hon'ble High Court , in letter and spirit, they would have selected the humble Petitioner because he had the requisite qualification as provided in the advertisement, because it was confirmed from the fact that a duly constituted screening committee was found him qualified as per the advertisement and that is why he was called for interview.

Pursuant to the said Judgment and Order dated 25.04.2015, the Respondent again conducted a fresh interview on 16.02.2015 wherein the Vice Chancellor/ Respondent No. 3 was the Chairman but he did not apprise the contents of the Judgments and Order of the High Court to the members of the Selection Committee deliberately to deprive the Petitioner from appointment. However, the Selection Committee, awarded score of 51 out of 100 to the humble Petitioner which is more than the minimum (50 out of 100) prescribed by UGC. Despite this, the selection committee once again rejected the selection of the humble Petitioner most arbitrarily stating that, "The visitor's nominee and subject experts after thoroughly interviewing the candidate (Dr. S. Dey) are unable to recommend him for the post of Professor in SAIF" and in fact the selection committee has no power under the UGC Regulation, 2010 to select or reject a candidate only on

the basis of interview performance and as per Clause 6.0.1 of the UGC Regulation, 2010, “the overall selection procedure shall incorporate transparent, objective and credible methodology of analysis of the merits and credentials of the applicants based on weightage given to the performance of the candidate in different relevant dimensions and his/her performance on a scoring system proforma, based on the Academic Performance Indicator (API) as provided in this regulation in Tables I to IX of Appendix III.”

Moreover the selection committee ought to have placed its decision before the Executive Council for necessary approval but without the approval and knowledge of the members of the Executive Council the Respondent No.2 vide impugned letter No: 21-44/Estt – II (B)/12-1543 dated 18th February 2015 had informed the Humble Petitioner that he has not been selected for the post of Professor in SAIF, NEHU, Shillong.

The humble Petitioner was obliged to file a Contempt Petition before this Hon’ble High Court bearing COP No. 14 of 2015, this Hon’ble High Court while taking up the hearing of the said contempt petition observed that there has arisen fresh cause of action for filing a fresh Writ Petition but however the petition was dismissed vide Order dated 19/06/2015. The humble petitioner therefore prays before this Hon’ble High Court to kindly give direction to the Respondent University to appoint him to the post of Professor in SAIF, North Eastern Hill University, Shillong, with retrospective effect without conducting any further interview.

Hence, this instant Writ Petition”.

3. Mr. H.S. Thangkhiew, learned Sr. counsel for the petitioner submitted that the petitioner is having a brilliant academic career and the UGC Regulation, 2010 empowers the Selection Committee to select or reject a candidate only on the basis of interview performance of the candidate and assessed by the Visitor’s nominee and the subject experts. Regulation 6.2.0 provides that Table II (a) and Table II (b) shall be the norms for CAS promotions and Table II (c) of the Appendix III is applicable for direct recruitment. He further submits that the petitioner had applied for the post of Professor, SAIF North Eastern Hill University, Shillong under the open specialization in response to an

advertisement dated 7th December, 2011, published by the Respondent University. The interview was held on 20.04.2012 where the petitioner was the lone candidate who appeared for the interview; however the Selection Committee did not recommend the selection of the petitioner on the ground that he was not found suitable as he has no management experience and lack of knowledge of analytical equipments other than SEM, whereas in the advertisement the post was advertised under open specialization and the two criteria mentioned above were not available in the advertisement. He also submits that the rejection of the Selection was challenged by the petitioner in the WP(C) No. (SH) 191 of 2012 before the Shillong Bench of the then Gauhati High Court and after hearing the parties the Hon'ble High Court vide its judgment and order dated 06.11.2012 was pleased to allow the said writ petition holding that the ground for rejection of the candidature of the petitioner was illegal. However, the respondents called the petitioner for interview on 14.02.2013 and thereafter he was informed by the respondents vide letter dated 28.03.2013 that the Executive Council had considered the recommendation of the Selection Committee, which did not find the petitioner suitable for the post of Professor erroneously without any ground whatsoever leading to the miscarriage of justice. The petitioner being aggrieved by the decision of the Selection Committee dated 14.02.2013 and the Executive Council dated 28.03.2013 filed a fresh writ petition before this Hon'ble High Court which was registered as WP(C) No. 110 of 2013 praying for his appointment by the respondents and this Hon'ble High Court after hearing the parties set aside and quashed the proceedings of the selection committee dated 14.02.2013 and was pleased to direct the Selection Committee of the respondent University to consider the case of the petitioner vide judgment and order dated 25.04.2014. The respondent University thereafter conducted a fresh interview for the petitioner on 16.02.2015 wherein the Selection Committee, awarded the petitioner the score of 51 out of 100 which is more than the minimum 50 out of 100 prescribed by the UGC. Despite this, the Selection Committee once again

rejected the selection of the petitioner arbitrarily stating that “The visitor’s nominee and subject experts after thoroughly interviewing the candidate (Dr. S. Dey/Petitioner) are unable to recommend him for the post of Professor in SAIF”.

The learned counsel further argued that, according to the provision of the University the decisions of the Selection Committee have to be placed before the Executive Council for necessary approval, but unfortunately it was not done and in utter violation of the said Rules of the University and without the knowledge of the members of the Executive Council the respondent No. 2 vide impugned letter dated 18th February, 2015 had informed the petitioner that he has not been selected for the post of Professor in SAIF, NEHU, Shillong. The respondent No. 3 addressed a letter to the Advocate of the petitioner that the matter was still under consideration and had regretted not to furnish immediate reply and informed the petitioner that the same would be done in due course of time but the other respondent did not respond to the Legal Notice. The petitioner also obtained the information through RTI pertaining to the pass mark dated 01.05.2013 which is marked as Annexure-XX of the rejoinder affidavit on behalf of the petitioner in reply to the affidavit-in-opposition filed by the respondents.

4. In reply Mr. K. Khan, learned Standing counsel for the respondents/NEHU submits that the cut-off mark mentioned in the RTI reply is a mistake on the part of the respondents. He also argued that others who have secured 50 marks and above were also not considered in the previous years and prayed that the petition may be dismissed and if the petitioner desires, he may sit for a fresh examination.

Furthermore, the learned Standing counsel for the respondents/NEHU also relied on ***Basavaiah (Dr.) v. Dr. H.L. Ramesh & Others: (2010) 8 SCC 372*** and ***Dalpat Abasaheb Solunke & Others v. Dr. B.S. Mahajan & Ors: (1990) 1 SCC 305.***

5. After hearing the submissions advanced by the learned counsel as quoted above and on perusal of the RTI reply dated 01.05.2013 at Annexure-XX of the rejoinder affidavit, it is clearly found mentioned that the pass mark is 50%.

The content of the RTI reply is reproduced herein below for ready reference:

“Reply: As per UGC Regulation in the final assessment the candidate should obtain minimum 50% in the expert assessment”.

6. On further perusal of the Annexure-9 at Page 49 of the writ petition under the heading **“To consider the recommendation of the Selection Committee for the post of Professor in SAIF”** clearly mentioned that those who obtained less than 50% marks in expert assessment cannot be recommended for promotion or selection. The contents of the Annexure-9 are reproduced herein below for ready reference:

“ADMINISTRATIVE MATTERS

6:1 Selection Committee:

(i) To consider the recommendation of the Selection Committee for the post of Professor in SAIF

NO:EC:154:2013:6:1:(i): *The Council noted that, the University in compliance of the Order of the Hon’ble High Court in letter and spirit and in adherence to the extant rules and regulations of Act/Statute/Ordinance of the University in terms of Section 18 of the NEHU Act, 1973 and Statute 2(b)(1),(2) and (3) and Statute 13(2)(ii), Statute 20(2) and Ordinance OE – 3(3), and (10) has considered afresh the candidature of Dr. Sudip Dey for appointment to the post of Professor as per the weightage and criteria prescribed for the post of Professor. Dr. Sudip Dey was interviewed by duly constituted Selection Committee on 14.02.2013 within the stipulated date vide Hon’ble High Court order dated 17.12.2012. The Executive Council **RESOLVED** to approve the recommendation made by the Selection Committee as placed in the meeting which is reproduced hereunder:*

“The candidate scored 37 out of 80 in expert assessment and therefore not recommended.”

UGC Regulation 2010 Clause 6.2.0 prescribes similar norms for CAS and direct recruitment. Further, Clause 6.3.2 and 6.3.11 provide that a candidate obtaining score of less than 50% in expert assessment cannot be recommended for promotion/selection.

*In view of the fact that the candidate scored less than the minimum prescribed by UGC as well as the Selection Committee the Executive Council **RESOLVED** not to appoint Dr. Sudip Dey as Professor.”*

7. On further perusal of Para 7 of the affidavit-in-opposition dated 07.10.2015 filed on behalf of the respondents No. 1, 2, 3 and 4, it is clear that the respondents has not disputed that RTI information is not correct. For ready reference the same is reproduced herein below:

“7. That with regard to the statement made in paragraph 10 & 11 of the Writ Petition, the answering Respondent states that there are no comments to make as the same is matter of record. The information sought by the petitioner under the RTI Act were duly furnished to the petitioner by the respondent University on 1.5.2013. The answering respondents states that under the NEHU Ordinances OE-3, Clause -8 every Selection Committee shall be competent to adopt its own procedures regarding the mode of assessment of the candidates presented before it. In the case of the Writ Petitioner, considering the nature and responsibility of the post, the Selection Committee duly constituted by NEHU had fixed the cut off mark at overall 65/100 while adhering to the basic criteria of expert assessment recommendation as required for direct recruitment as per UGC guidelines. In the instant case, the petitioner was required to secure 50% marks out of 80 in the Expert assessment but the Petitioner could obtain only 37/80 in the assessment. Thereafter in the final assessment the Petitioner secured 52 out of 100 wherein the cut off mark, and hence the Petitioner’s case was not recommended.”

8. Further, on perusal of the affidavit dated 03.11.2016 at Para 2 it appears that the respondents after thought make a “U” turn and tried to contradict the averments made in Para 7 of the affidavit-in-opposition filed on behalf of the respondents No. 1, 2, 3 and 4. Para 2 of the affidavit is reproduced herein below:

“2. That the writ petitioner has annexed Executive resolution No. 154:2013:6;1 where in the Selection Committee had fixed the minimum 65 out of 100 (Page 47 Annexure VIII). The answering respondent states that UGC Regulation 2010 clause 6.2.0 has laid down two norms for Selection Committee; one procedure for direct recruitment and the other through Career Advancement Schemes Regulation. Quote, “Table II(c) of appendix III provides norms for direct recruitment of teachers to different cadres, while Tables II (a) and II(b) provide for CAS promotions of teachers in universities and colleges respectively which accommodate these differences.” The writ petitioner has enclosed table II (c) at page 50 Annexure X, where no minimum mark has been prescribed for direct recruitment of teachers. Also

the writ petitioner has enclosed table II(a) and II(b) at page 78 and 79 where minimum mark of 50 % has been prescribed for promotion of teacher under the CAS scheme. As such the answering respondent states that when the Executive Council's resolution No. 154:2013:6:1 was inadvertently discussed, the table II(a)(b) and (c) was not brought to the notice of the Executive Council. As such any decision by the Executive Council contrary to the provision of the UGC Regulation and the table II(a)(b) & (c) will not be binding and has no legal force. Similarly information given to the petitioner by the Public Information officer under the RTI contrary to the UGC regulation and the table II (a)(b) and (c) will also be not binding and will have no legal force".

9. Therefore, after perusal of the RTI reply dated 01.05.2013 at Annexure-XX of the rejoinder affidavit and the Annexure-9 at Page 49 of the writ petition under the heading "To consider the recommendation of the Selection Committee for the post of Professor in SAIF" it is apparent that the pass mark was 50% and there is no denial in Para 7 of the affidavit-in-opposition filed on behalf of the respondents No. 1, 2, 3 and 4, however there is a "U" turn and after thought averments which has been mentioned in Para 2 of the affidavit dated 03.11.2016. Therefore, I am unable to accept the averments made in Para 2 of the affidavit dated 03.11.2016. It is not a disputed fact that the petitioner obtained 51% out of 100 marks.

10. It is difficult to justify with a prudent logic that an examination will be conducted without a pass mark. If any question is set up or an examination is conducted without a pass mark, it amounts to illegal and purely arbitrary. No examiner or council has any authority to conduct an examination without reflecting the pass mark.

11. Further on perusal of the judgment and order dated 06.11.2012 passed in WP(C). No. 191 (SH) of 2012, I find that the matter has already been settled and the specific direction has been given by this Court. Para 10 and 11 of the said judgment makes elaborate discussion. So, further discussion is

unwanted and the respondent's authority should have considered the observations and directions given in Para 10 and 11 of the said judgment. Para 10 and 11 of the said judgment and order dated 06.11.2012 is reproduced herein below for ready reference:

“10. *Even a cursory look at the advertisement will show that management experience and knowledge of analytical equipments other than SEM as the eligibility criteria/qualification for the post of professor in SAIF do not find a place anywhere in the advertisement or the extant rules/ regulations of the respondents- University: such criteria should have been made explicit in the advertisement, if prescribed by the extant rules/regulations, and cannot be inferred by the Selection Committee by necessary implication. In other words, the power to include such criteria cannot be assumed by the Selection Committee even by necessary implication: the Selection Committee had virtually laid down a standard or basis for selection by themselves without the sanction of law. Such inclusion of criteria or norms not explicitly provided for in the rules/regulations would amount to legislating a rule of selection. In the course of hearing, I have repeatedly asked Mr. K. Khan, the learned standing counsel for the University-respondents, to tell me whether the requirements to have management experience and knowledge of analytical equipments other than SEM fall within the four corners of qualification prescribed in the advertisement and if so, in which category of E.Q.-1 would they fall, he is unable to say so and, in my opinion, rightly so. In my judgment, what the Selection Committee has done in the instant case was to add some more qualifications/eligibility criteria in addition to what have been prescribed by the advertisement/rules/regulations. The law is well-settled that the recommendation of Selection Board or Committee is normally not interfered with by the Court in exercise of its jurisdiction under Article 226 of the Constitution as the members comprising the Committee or Board are experts in their fields. But then, it is also an equally settled proposition of law that the decision of the Selection Committee can be interfered with on limited grounds, namely, that there was illegality or material irregularity in the constitution of the Committee or in its procedure vitiating the selection or proved mala fides affecting the selection etc.,- See **Dalpat Abasaheb Solunke v. Dr. B.S. Mahajan, (1990) 1 SCC 305**. In **A. Peeriakaruppan (Minor) case** (supra), where the Selection Committee had not divided the interview marks under various heads nor were the marks given on itemized basis, but the marks were found to be given in lump sum, the Apex Court held the decision of the Committee to be illegal. In this case also, the Selection Committee have given a go-by to the API for direct recruitment given in Table 1A and the principles of weightage to be given adumbrated in Table 4, and have in the process acted arbitrarily and have taken into consideration extraneous matters in finding the petitioner to be unsuitable for the post in question thereby vitiating the entire selection*

process. This certainly calls for the interference of this Court under Article 226 of the Constitution.

“11. Once it is found that management experience and knowledge of analytical equipments other than SEM are not the qualifications stipulated by the advertisement, the insistence of these qualifications by the Selection Committee on the pain of rejection of the candidature of the Petitioner, would amount to introduction of additional criteria/qualifications for appointment to the post in question without any authority of law: this is an ultra vires action. Even assuming without admitting that such power is there, selection criteria have to be prescribed in advance. The issue was reviewed by the Apex Court in **K. Manjusree** case (supra) wherein the legal position was reiterated in the following manner:

“33. The Resolution dated 30-11-2004 merely adopted the procedure prescribed earlier. The previous procedure was not to have any minimum marks for interview. Therefore, extending the minimum marks prescribed for written examination, to interviews, in the selection process is impermissible. We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules may regulating the selection, can prescribe by rules, the minimum marks for both written examination and interviews, or prescribes ‘minimum marks for written examination, but not for interview, or prescribe minimum marks for written examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of the selection process. If the Selection Committee prescribed minimum marks only for the written examination, before the commencement of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates also should secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview.”

In any view of the matter, I am of the considered view that the impugned selection process suffers from the vice of arbitrariness, illegality and/or non-application of mind calling for the interference of this Court”.

12. Similar view has been expressed vide judgment and order dated 25.04.2014 passed by this Court in WP(C) No. 110 of 2013. Para 18 of the said judgment has made it clear that the selection process of the Selection Committee had suffered illegalities. For ready reference Para 18 of the said judgment and order dated 25.04.2014 is reproduced herein below:

“18. For the foregoing discussions and reasons, this Court is of the considered view that the selection process of the Selection Committee held on 14.02.2013 suffers from inherent and apparent illegalities and called for interference. Accordingly, the selection process of the Selection Committee held on 14.02.2013 is hereby set aside and quashed. The Court has no alternative except to direct the Selection Committee to consider afresh the case of the petitioner for appointment to the post of Professor in SAIF, NEHU, Shillong by strictly, in accordance to the clear cut findings of the Hon’ble Gauhati High Court in the judgment and order dated 06.11.2012 passed in WP(C)No.191(SH) of 2012 and also by correcting the infirmities and illegalities pointed out by this Court in the above paras in conducting the selection process within a period of two months from the date of receipt of a certified copy of this judgment and order.”

13. In Contempt case bearing Cont.Cas (C) No. 14 of 2015 arising out of WP(C) No. 110 of 2013 the respondents informed the Court that the selection has been carried out in accordance with the judgment passed by this Court.

14. Now coming further, the learned counsel for the respondents/NEHU had stated that, due to shortage of time they could not fix the pass mark. This in my opinion is unwanted which may be further considered as a falsehood and also misleading the Court. As such, it cannot sustain. One must remember that no Expert/Selection Committee or any Examiner has any right to play with the career of the applicant or a student. Rules and criteria are to be framed before the game starts and not after the game is over. In spite of the direction of this Court, time and time again, it appears that the respondents have violated the directions and bypassed the Court’s observation which is totally illegal. Therefore, I express my displeasure and disappointment and the same will definitely amount to contempt of Court. It is the sacred duty of the

respondents/NEHU to go through the judgments passed by the Hon'ble High Court.

15. I would like to put a question to the respondents, whether they are really adamant not to give appointment to the petitioner? If it is so, they are very much wrong since nobody is above the law. I have no intention to interfere with the expert assessment but; if the expert assessment is arbitrary without fixing any pass mark, it will definitely become illogical and illegal. In such circumstances, the Court has no option, but to interfere. In this instant case, since the exam was conducted as argued by the respondents without fixing any pass mark, definitely, the decision of the expert assessment is bound to be arbitrary and lose the principle of parity. Therefore, the respondents are directed to appoint the petitioner for the post he applied for within 30(thirty) days from the date of receipt of a copy of this judgment and order.

16. With this observation and direction the instant writ petition is allowed to that extent and stands disposed of.

JUDGE

D. Nary