

**(2019) 06 GAU CK 0021**

**Gauhati High Court**

**Case No:** Writ Petition (C) No. 7302 Of 2015

Dilip Kumar Dhar

APPELLANT

Vs

State Of Assam And 2 Ors

RESPONDENT

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**Date of Decision:** June 11, 2019

**Acts Referred:**

- Constitution Of India, 1950 - Article 12, 226

**Hon'ble Judges:** Kalyan Rai Surana, J

**Bench:** Single Bench

**Advocate:** Md.M H Choudhury

**Final Decision:** Dismissed

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### **Judgement**

1. Heard Mr. M.H. Choudhury, learned counsel for the petitioner. Also heard Ms. D.S. Neog, learned standing counsel for the Cooperation Department.

2. By this writ petition under Article 226 of the Constitution of India, the petitioner is seeking a direction to the respondent No.3 i.e. the Deputy Registrar of Cooperative Societies, Nagaon to allow him to serve as peon in his establishment and to pay the arrear as well as current salary to the petitioner.

3. The learned counsel for the petitioner, by referring to the pleadings and documents annexed to the writ petition and affidavit-in-reply has submitted that the father of the petitioner, namely, Devendra Chandra Dhar was serving as peon in the office of the respondent No.3 and he died in harness on 11.09.2003, leaving behind a large family consisting of seven members including the petitioner. It is submitted that the petitioner had made a prayer on

22.09.2003 for appointing him as Grade-IV employee in the vacant post of his father. Thereafter, the respondent No.3 had appointed the petitioner on

07.12.2004 and accordingly, the petitioner had joined his service in the said post on the same date. The learned counsel for the petitioner has submitted

that the appointment letter of the petitioner was retained by the respondent No. 3. However, the respondent No.3 had recorded the date of joining of

the petitioner in the post of peon in his establishment w.e.f. 07.12.2004 was in the application submitted for admission of the petitioner to General

Provident Fund. Accordingly, the office of the Accountant General, Assam had allotted GPF Account No. COP/5993 to the petitioner. It is submitted

that thereafter by order under Memo No. CDNE.2/83/Pt.-II/98 dated 19.01.2005, the respondent No. 3 had released the petitioner, working as peon in

his office, in the afternoon of the same day to allow him to join his new place of posting. The learned counsel for the petitioner further submits that it is

mentioned in aforesaid order dated 19.01.2005, that the petitioner was released in pursuance to the order No. CDNE.2/83/Pt.-I/121 dated 17.01.2005,

which was an order transferring the petitioner to the office of the Asstt. Registrar of Cooperative Societies, Morigaon as Peon. Accordingly, the

petitioner had joined as Peon and the Asstt. Registrar of Cooperative Societies, Morigaon had submitted his joining report dated 11.02.2005 to the

respondent No.3. The learned counsel for the petitioner has relied on the letter under Memo No. GPF/EDP-Cell/Allot/ 4072 dated 19.01.2005 issued

by the office of the Accountant General, (A&E) Assam regarding allotment of the GPF account of the petitioner working under the control of the

Asst. Registrar of Co-operative Societies, Morigaon.

4. It is submitted that the petitioner had served in the office of the Asstt. Registrar of Cooperative Societies, Morigaon for about one month and he

was again transferred to the establishment of respondent No.3. It is submitted that on his transfer, the Asstt. Registrar of Cooperative Societies,

Morigaon had issued a last pay certificate in respect of the petitioner bearing Memo No. CM.5/94/86 dated 24.02.2005 and the same was forwarded

to the respondent No.3. It is submitted that the petitioner had served in the establishment of respondent No.3 from March, 2005 to July, 2005 and his

last pay statement as received through RTI application dated 24.07.2015 disclosed that the petitioner had served under the respondent No.3 from

March to July, 2005. Thereafter, the earlier incumbent working as respondent No.3 was transferred from Nagaon and the new incumbent to the office

of respondent No.3 did not allow the petitioner to serve in his establishment and instead he kept giving the petitioner false assurance that he will allow

him to join. After having verbally approached the respondent No.3 on a number of occasions, the petitioner submitted his representation dated

05.10.2015 to the respondent No.3. However, as he was not allowed to join and receive his salary, the present writ petition was filed.

5. It is further submitted by the learned counsel for the petitioner that the stand taken by respondent No.3 in his affidavit-in-opposition is not

sustainable. It is submitted that the respondent No. 3 had sought to project that one post of peon was lying vacant in the establishment of respondent

No.3 and that there were six applicants for appointment on compassionate ground and the District Level Selection Committee (DLC), after

scrutinizing and evaluating the applications, by Minutes of Meeting held on 17.10.2007, had recommended the name of one Minendra Das whose

name appeared at serial No 5 of the said list. Accordingly, upon recommendation, the State Level Committee (SLC) by Minutes of Meeting held on

20.12.2008, recommended the appointment of Minendra Das. The learned counsel for the petitioner has submitted that on a perusal of the

comparative statement of all the six applicants for appointment on compassionate ground, it is disclosed that while the father of the petitioner had died

on 11.09.2003, his application was filed on 12.10.2003 i.e. seven month one day after the date of death of his father. However, the father of the

selected candidate i.e. Minendra Das had died on 14.09.1996 and he had applied for appointment on compassionate ground on 14.03.2004 i.e. seven

years six months after the date of death of his father.

6. It is submitted that the appointment of Minendra Das was contrary to the guidelines framed in the case of Achyut Ranjan Das Vs. State of Assam

and Ors., 2006 (4) GLT 674. Moreover, it is submitted that in the affidavit-in-opposition the respondent No. 3 had referred to an enquiry regarding

illegal appointments made by the then respondent No.3 which was being conducted pursuant to direction dated 08.09.2017 by the Registrar of

Cooperative Societies, Assam (respondent No.2), but as on the date of filing of the affidavit-in-opposition, no report had been submitted. Accordingly,

it is urged that the respondent No.3 had acted illegally to prevent the petitioner from working in the office of respondent No.3 w.e.f. month of August,

2005 and resultantly, the stoppage of pay and other emoluments of the petitioner was arbitrary and not sustainable. It is submitted that as the petitioner

was appointed as Peon, there was no vacancy in the Office of the respondent No.3 and the DLC and SLC could not have selected and appointed the

said Minendra Das on compassionate ground.

7. The learned counsel for the petitioner has submitted that as the petitioner was given employment on compassionate ground by the respondent No.3

and accordingly, the petitioner was allotted GPF account number and he was also transferred twice during his short working tenure, there was no

basis to allege that the petitioner was working without a formal appointment made by respondent No.3. Therefore, the non-availability of a formal

appointment letter was a mere irregularity which can be regularized by the respondent No.3.

In support of his submission, the learned counsel for the petitioner has relied on the case of Govt. of Andhra Pradesh Vs. K.

Brahmanandan, (2008) 5 SCC 241.

8. The learned standing counsel for the Cooperation Department has referred to the affidavit-in-opposition filed by the respondent No.3 and it is

submitted that the petitioner had applied for appointment on the compassionate ground on 12.10.2003 but there was no record of formal engagement/

appointment of the petitioner. However, the then respondent No.3, namely, Sri Anjan Jyoti Bora, as the Drawing and Disbursing Officer, had allowed

the petitioner to draw salary from the month of March to July 2005. It is submitted that the respondent No.3 had no power to appoint the petitioner,

which was the sole prerogative of the Government and in this case the then respondent No.3 had allowed the petitioner to draw salary without

approval of the Government. In this regard, the learned counsel for the petitioner by relying on the photocopy of the attendance register of the office

of respondent No.3 has submitted that the name and signature of the petitioner is not recorded in the attendance register for the month of December, 2004 to June, 2005. It is submitted that the transfer of the petitioner from the office of respondent No.3 to the office of the Asstt. Registrar of Cooperative Societies, Morigaon and his retransfer to the Office of respondent No.3 or the allotment of GPF number could not be sufficient to regularize the illegal appointment of the petitioner by the then respondent No.3. It is submitted that as the petitioner was not formally appointed, there was no infirmity in not allowing the petitioner to work w.e.f. August, 2005 and consequently, as the appointment of the petitioner was illegal, he was not entitled to his salary and other emoluments after July, 2005 even if it is assured that the petitioner had attended his duty. It is also submitted that as the case of the petitioner was ultimately rejected by the SLC in its meeting dated 20.12.2008, therefore, the petitioner was not entitled to be appointed as Grade-IV Staff on the establishment of respondent No.3 on compassionate ground or to any other relief in this writ petition.

9. In this case there is no material available on record to show that the respondent No.3 had lawfully appointed the petitioner as a Grade-IV Staff i.e.

peon in his establishment. There is also no appointment letter on record and there is also no document available on record to show that the

appointment of the petitioner as peon was in a transparent manner and in accordance to the rules relating to appointment of a public servant. In this

case the initial appointment of the petitioner, purportedly made on 07.12.2004 was not done by way of a selection process by inviting any similarly

situated person for appointment on compassionate ground. As per the case projected by the petitioner, the petitioner had applied for appointment on

compassionate ground on 22.09.2003 and it is projected that the petitioner was allowed to join duty on 07.12.2004. The minutes of DLC meeting and

the comparative statement of the candidates reflects that the petitioner had applied for appointment on compassionate ground on 12.10.2003, which

was formally placed before the DLC and the comparative statement along with the recommendation by the DLC was taken up in the meeting of the

SLC held on 20.12.2008 and the candidature of the petitioner was not considered. Therefore, had there existed any record of the petitioner being

appointed on compassionate ground in the establishment of respondent No. 3, there would have been no vacancy in the post of peon in the establishment of respondent No. 3 for reconsidering the case of the petitioner with others for appointment on compassionate ground. The absence of signature of the petitioner in the copy of the attendance register, as produced along with the affidavit-in-opposition filed by the respondents cannot be over-looked or brushed aside.

10. The DLC and the SLC had considered the case of the petitioner for appointment on compassionate ground, and the candidature of the petitioner was rejected by disclosing that the case of another applicant, namely, Minendra Das was recommended for appointment on compassionate ground, but the petitioner has not challenged his appointment. Moreover, assuming that the petitioner was appointed as peon on and from 07.12.2004, in this writ petition, it is not disclosed as to why the petitioner had not withdrawn his application dated 12.10.2003 for seeking appointment on compassionate ground. Accordingly, as the petitioner had allowed his application dated 12.10.2003 for appointment on the compassionate ground to reach its logical conclusion by the rejection of his candidature by the DLC in its meeting held on 17.10.2007, where recommendation of another candidate was made and such recommendation had attained finality by its approval by the SLC in its meeting held on 20.12.2008.

11. Accordingly, as the selection and appointment of another candidate recommended by the DLC and approved by the SLC for appointment on compassionate ground has not been challenged, this Court does not find that the petitioner is entitled to any relief in this writ petition.

12. Moreover, the respondent No. 3 is admittedly not the appointing authority of peon in his establishment on compassionate ground was the competent authority of the Government had not approved such appointment. Accordingly, it is not open to this Court either to direct the respondent No. 3 to appoint the petitioner or to pay his salary. Moreover, in the absence of any challenge to the minutes of the DLC held on 17.10.2007 and SLC dated 20.12.2008, where the name of another candidate was recommended for appointment and that such appointment had attained finality, there would remain no available vacancy to be filled up.

13. This Court is unable accept that the appointment of the petitioner by the respondent No.3 w.e.f. 07.12.2004 was lawful as there is no material available on record to show that such appointment was made by following any transparent selection process. Under such circumstances, the legal principle as enunciated in the case of Municipal Corporation, Jabalpur Vs. Om Prakash Dubey, (2007) 1 SCC 37,3 wherein it has been stated as under:-

“11. The question which, thus, arises for consideration, would be: Is there any distinction between 'irregular appointment' and 'illegal appointment'? The distinction between the two terms is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is State within the meaning of Article 12 of the Constitution of India, the recruitment would be an illegal one; whereas there may be cases where, although, substantial compliance of the constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of the rules might not have been strictly adhered to.”

14. In paragraph 16 of the case of K. Brahmanandan (supra), the Apex Court had stated as under:

“16. Appointments made in violation of the mandatory provisions of a statute would be illegal and, thus, void. Illegality cannot be ratified. Illegality cannot be regularized, only an irregularity can be.”

15. Accordingly, the case of K. Brahmanandan (supra) is not found to help the petitioner in any manner.

16. Accordingly, the petitioner is not found entitled to any relief in this writ petition. Hence, this writ petition stands dismissed. Accordingly, the rule stands discharged. No cost.