Devika Kumbang and Others Vs State of Assam and Others

Court: Gauhati High Court

Date of Decision: Jan. 1, 2005

Acts Referred: Assam Elementary Education (Provincialisation) Rules, 1997 â€" Rule 3
Constitution of India, 1950 â€" Article 14, 16, 162, 226, 309

Citation: (2005) 1 GLT 83

Hon'ble Judges: H.N. Sharma, J

Bench: Single Bench

Advocate: N.C. Das and H. Thakuria, for the Appellant; A.K. Goswami, S.C. for Education Deptt., for the Respondent

Final Decision: Dismissed

Judgement

H.N. Sarma, J.
This writ petition, invoking jurisdiction under Article 226 of the Constitution of India, the Petitioners, 20 in numbers, have

approached this Court praying for setting aside the order issued vide Memo No. EAA. 121/ 2001/15 dated 04.09.2001 (Annexure-6 of the

petition) passed by the Director of Elementary Education, Government of Assam, Kahilipara (Respondent No. 2) and for further direction to pay

their pending salaries from the month of December, 2000 to June 2001 and from the month of August, 2001 till the date of filing of the writ

petition.

2. I have heard Mr. N.C. Das, learned Sr. counsel assisted by Mr. H. Thakuria, for the Petitioners and Mr. A.K. Goswami, learned Standing

Counsel, Education Department for the Respondents.

3. The case of the Petitioners, as projected in this writ petition, inter alia, is that, in pursuance of an advertisement made in June, 1996 the

Petitioners applied for the post of L.P./M/ E. School Teachers in the State of Assam and they were interviewed on the 5th, 6th and 7th July, 1997

for the purpose of selection for appointment to the said posts. It is the case of the Petitioners that all the Petitioners were duly selected by the

Under Secretary to the Govt. of Assam, Education Department and their names appeared in the select list Annexure-1 prepared by the Under

Secretary to the Government of Assam, Education Department. On the basis of such selection, the Petitioners were appointed by the Deputy

Inspector of School Jonai under Dhemaji District as Assistant Teachers in different L.P. Schools of Jonai Sub-Division in the Scale of pay of Rs.

3130-6600/ - per month by separate appointment orders issued for each of the Petitioners dated 28.12.98, 29.03.00 and18.11.98 respectively.

Although the Petitioners claimed at para 4 of the writ petition that they were appointed by the Deputy Inspector of Schools, Annexure-2 series

disclose that appointment letters were in fact issued by Sri A.C. Pegu, Director of Elementary Education, Kahilipara. It is further contended that

pursuant to the aforesaid appointments the Petitioners joined in their respective schools as Assistant Teachers on different dates and were

discharging their duties. It is further stated that as the authority did not pay their monthly salaries pursuant to the W.T. Message No.

Sec/Edu/1/98/103 dated 12.04.99, the Petitioners approached the higher authority who ultimately vide W.T. Message dated 12.09.2000 and

17.11.2000 requested the District Officer to take necessary action for payment of the salary to the teachers from the current year. Thereafter the

Under Secretary to the Govt. of Assam, Education Department vide letter No. A(1)E.360/ 2001/16 dated 20.06.2001 asked the Deputy

Inspector of Schools, Jonai to take necessary steps for payment of salaries of the thirty numbers of teachers, list of which was enclosed with the

said letter, provided, the posts are in existence and retained up-to-date. In compliance to the aforesaid order, the Petitioners were paid their

salaries for the month of September, 2000 and for the months of November 2000 to June 2001. Thereafter, the Director of Elementary Education,

Assam by an order under Memo No. EAA.121/ 2001/15 dated 04.09.2001 directed the Respondent No. 3 to issue and communicate formal

orders of cancellation of appointments in respect of 295 appointees in provincialised L.P. Schools of Jonai Sub-Division along with 30 selected

candidates of Jonai who were appointed by the outgoing Director of Elementary Education with a further direction to concerned

Headmaster/Headmistresses the respective schools not to allow the aforesaid teachers to attend the duty. In the said order, the Director also, inter

alia, pointed out that as many as 295 teachers were illegally appointed in the provincialised L.P. Schools by the Deputy Inspector of Jonai Sub-

Division against non-extent posts. The writ Petitioners praying for the reliefs as aforesaid, have challenged the said order dated 04.09.2001 in this

writ petition.

4. During the course of arguments, Mr. N.C. Das, learned Sr. counsel submitted that the Petitioners were duly selected by the Under Secretary to

the Govt. of Assam, Education Department pursuant to a valid advertisement made for filing up the vacancies as it existed then and the impugned

order was passed without giving an opportunity of hearing to the Petitioners. It was also submitted that the Petitioners are continuously working

since the date of their appointment and as such they should be allowed to continue in their service quashing the impugned order. Lastly, it is

submitted by Mr. Das that since there are existing vacant posts of L.P. School Teachers and since the Petitioners were duly selected, they can very

well be accommodated in the existing vacancies even though they were appointed in non-existing posts.

5. Controverting the aforesaid submissions made on behalf of the Petitioners, Mr. A.K. Goswami, learned Standing Counsel relied on the affidavit-

in-opposition filed by the Respondents and submitted that the Petitioners were appointed in non-existent posts and their appointments are void-ab-

initio and accordingly the Controlling Officers have directed vide impugned order to cancel their appointments. It is further submitted that an

enquiry was conducted by the higher authority regarding the appointment of the Petitioners and in the said enquiry it is established beyond

reasonable doubt that the letter referred to in the appointment letters indicating the sanctioning of the posts were take and fabricated and no such

sanctioning letter was issued from the office of the Director of Elementary Education and the appointments of the Petitioners were made in non-

existent posts and accordingly the aforesaid appointments of the Petitioners are void-ab-initio and no illegality has been committed in passing the

impugned orders.

6. In the affidavit-in-opposition filed on behalf of the Respondent No. 2 it is, inter alia, stated that the order of allotment and sanction number

quoted in the appointment letters/allotment letters were not issued by the office of the Director of Elementary Education, Assam and the Petitioners

were appointed against non-existent posts. After thorough enquiry made by the Sub-divisional Officer (Jonai) and also by the Senior Officers of

the Directorate of Elementary Education, Assam it was established beyond reasonable doubt that all the 295 appointees including the present

Petitioners were appointed illegally in non-existent posts which would cause illegal payment towards their salary out of the State exchequer to the

tune of Rs. 4,53,600/ - annually for which there is no budget provision.

7. In the above parameters of the rival contentions made by the parties, it is to be seen whether the appointments of the Petitioners are valid in law

or illegal and void. Appointment of L.P. School Teachers are regulated and guided by a set of statutory rules known as Assam Elementary

Education (Provincialisation) Rules, 1977. Rule 3 of the said Rules provides the method of recruitment of candidate of appointment as L.P. School

Teachers. In the Schedule 1(A-B) of the said rules, necessary provisions have been incorporated regarding the allotment of marks during the

process of selection. The validity of the select list, so prepared by the authority, shall not be extended beyond one year from the date of

publication. The selection of candidate is required to be made by the Sub-divisional Level Selection Board constituted with the following members:

a. An educationist/social worker -- Chairman (to be nominated by the Government)

b. 7 Social Workers of the Sub-division-Members (to be nominated by the Government)

c. 7 expert educationist-Members.

d. The District Elementary Education Officer-Member.

e. The Deputy Inspector of Schools of the Sub-division-Member/Secretary.

8. There is no role to play by the Deputy Secretary or by the Under Secretary to the Govt. of Assam, Education Department in the process of

selection, which required to be made as per Rule 3 of the Rules. In the instant case, it is the case of the Petitioners that they were selected by the

Under Secretary to the Govt. of Assam, Education (Elementary) Department and in pursuant to the said selection the outgoing Director

appointment them on the eve of his retirement The Under Secretary is a person, and so far the selection of L.P. School Teacher is concerned, the

said Officer is not authorized or empowered by the statutory rules to make any selection and has no jurisdiction vested on him by law to take part

in the selection process. That apart, it is the Deputy Inspector of Schools who is the appointing authority or such L.P. School Teachers and not the

Director. In the instant case, the Petitioners were selected by the Under Secretary, to the Govt. of Assam, Education Department, and they were

appointed by the Director of Elementary Education, Government of Assam.

9. When by a statutory rule certain specified authorities are empowered to function, the said power and function cannot be allowed to be

performed by other person not empowered by such rule. There is no provision for delegation of such power to other authority. On the face of

existing mandatory provision for selection/recruitment of teachers no authority has power or jurisdiction to make the appointment violating the

statutory procedure. Entire process leading to the appointment of the Petitioners in the instant case is undoubtedly an unfair, unauthorized and

illegal action on the part of those officers. It has been submitted that the then Director of Elementary Education, Government of Assam Mr. A.C.

Pegu, just on the eve of his retirement issued those appointment letters and it is further submitted that some appointment letters were also issued

even after his retirement on back date. The enquiry made by the District Authority as well as the Education Department disclose that the

appointment letters were fake and the sanctioning letter of the posts mentioned in the appointment letters were never issued from the office of the

Director. Public offices have been misused by such officials in the aforesaid fashion. This is nothing but fraud on public power played by officials

who are constitutionally bound to keep and maintain the public trust reposed on them.

10. The person who is not selected under the statutory rules does not posses any qualification to be appointed as an L.P. School Teacher. The

very basis of claim of the Petitioners in the instant case is non-existent, the Petitioners not having duly selected in accordance with Rule 3 of the

Service Rule, do not earn any qualification to be appointed as L.P. School Teachers. That apart, the appointment letters and allotment of posts

were found to be fake and the posts in which the Petitioners were appointed were found to be non-existent. The appointments in question being in

infraction of rules, such appointments confer no valid right upon the Petitioners.

11. Now the question, which arises, is, whether in the aforesaid factual situation, the impugned order would be bad for alleged violation of the

principles of natural justice. In the case reported in State of M.P. and Others Vs. Shyama Pardhi etc. etc., it has been laid down by the Apex

Court, inter alia, that ""appointment in violation of statutory rules as per se illegal and termination of the service of such appointee without giving any

opportunity will not violate the principle of natural justice."" In another case, reported in Aligarh Muslim University and Others Vs. Mansoor Ali

Khan, it has been laid down by the Apex Court at para 21 that ""there can be certain situation in which an order passed in violation of natural

justice need not be set aside under Article 226 of the Constitution of India. For example, if the quashing of the order which is in breach of natural

justice is likely to result in revival of another order which is in itself illegal as in Godde Venkateswara Rao Vs. Government of Andhra Pradesh and

Others, In Aligarh Muslim University (supra) the Apex Court further noticed that in Lachman Utamchand Kirpalani Vs. Meena alias Mota, the

breach of principles of natural justice was itself treated as prejudice and that no other ""de facto"" prejudice needed to be proved. But, since then the

rigour of the rule has been relaxed not only in England but also in our country, we may gainfully refer to another decision reported in 1996 2 GLT

462, Dhyanesh Karmakar and 5 Ors. v. State of Tripura.

12. The appointment in question of the Petitioners have been made dehors the statutory rules, rather in flagrant violation of the recruitment rules

and is violative of Articles 14 and 16 of the Constitution of India. If the impugned order is set aside, it will have the effect of revival of the illegal

order of appointment which is violative of Articles 14 and 16 of the Constitution of India. Appointing person dehors the rules and to regularize their

services later on, is not only violative of Articles 14 and 16, but it also denies the legitimate right to apply and complete for the posts to eligible

candidates. At this stage, the learned Counsel for the Petitioners prays for an order to consider the case of the Petitioner for regularisation in their

respective posts by the Respondent State in view of the service rendered by them for a considerable period on sympathetic and humanitarian

consideration. I am afraid, if this prayer is accepted in the backdrop of the instant case, the same would throw away the necessary requirement of

statutory rules necessitating the process of selection to hold a public post and to regularize the illegal appointments made through backdoor, in utter

violation of the statutory rules holding the field. Dealing the question of propriety or permissibility of regularization of service of an employee

appointed in violation of the statutory rules, a three judges bench of the Apex Court in B.N. Nagarajan and Others Vs. State of Karnataka and

Others, has held that regularization in violation of the statutory rules is not permissible, in exercise of the executive power of the State which has the

effect of overriding the Rules framed under proviso of Article 309 of the Constitution and that, therefore, no regularization in exercise of the

executive power under Article 162, in contravention of the statutory Rules, is permissible. Again, in Nanjundappa v. T. Thimmiah reported in

(1972) 1 SCC 499, the Apex Court at para 26 held that:

If the appointment itself is in fraction of the rule or it is in violation of the provisions of the Constitution, illegality cannot be regularized. Rectification

or regularization is possible of an act which is within the power and province of the authority but there has been some non-compliance with

procedure or manner which does not go to the roof of the appointment.

13. In the instant case, the illegal appointments of the Petitioner in non-existent posts showing fake sanction order and without any selection as per

statutory rules goes to the roof and the same is per se illegal and void ab initio conferring no right upon the appointees. The Petitioners in course of

the arguments could not show and establish that their appointments were valid in law and/or/ they have acquired valid right to continue in their

services pursuant to such illegal orders.

14. The appointments of the Petitioners having been made in violation of the statutory rules as well as being in violation of Articles 14 and 16 of the

Constitution of India, and that too in non-existent posts by issuing fake sanction letter in a designed way causing below to the State exchequer are

void-ab-initio and by virtue of the impugned order necessary directions were given to the concerned officers to issue formal order of termination

and in view of the discussions made hereinabove, the impugned order cannot be held to be illegal, unjust or improper in the facts and

circumstances of the present case necessitating interference under the writ jurisdiction of this Court, exercising power of judicial review.

15. In view of the aforesaid discussions and decisions, there is no merit in this writ petition. Accordingly, the same is dismissed.

The interim order passed earlier, stands vacated.

No order as to costs.