

(2008) 12 GAU CK 0016

Gauhati High Court

Case No: WP (C) Nos. 4386 of 2003, 6324 of 2001 and 2897 of 2007

Prafulla Kr.Kalita

APPELLANT

Vs

State of Assam & Ors.

RESPONDENT

Date of Decision: Dec. 3, 2008

Citation: (2008) 5 GLR 367 : (2008) 2 GLT 701

Hon'ble Judges: B.K.Sharma, J

Bench: Single Bench

Advocate: A.Saikia, B.Swargiary, I.A.Talukdar, M.R.Pathak, N.N.Karmakar, U.K.Goswami,
Advocates appearing for Parties

Judgement

B. K. Sharma, J.

Heard Mr. LA. Talukdar, learned counsel for the petitioner in the first two writ petitions as well as Mr. N.N. Karmakar, learned counsel for the petitioner in the third writ petition. I have also heard Mr. M.R. Pathak, learned Standing Counsel, Education Department. Since the issue raised in the writ petitions is one and the same, the writ petitions have been heard analogously and are being disposed of by this common judgment and order.

2. In the 1st writ petition, the challenge made is against the order dated 6.7.2001 (AnnexureD) and the order dated 6.5.2003 (AnnexureE). By the 1st order, the upgradation of the petitioner as Assistant Teacher from that of the substantial Grade of Lower Division Assistant (LDA) was withdrawn and by the 2nd order, the post in which the petitioner was upgraded, was filled up by the respondent No. 6 by way of adjustment of his service as Assistant Teacher. Be it stated here that the respondent No. 6 was a dropped teacher as his service was not provincialised at the time of provincialisation of the school in which he had been working.

3. The second writ petition was filed by the same very petitioner making a challenge to the aforesaid order dated 6.7.2001 by which the earlier order dated 19.3.2001 by which he was upgraded as Assistant Teacher from that of LDA was withdrawn. Thus,

basically the challenge made in both the writ petition is the cancellation of the earlier order by which the petitioner was upgraded as Assistant Teacher from that of LDA.

4. In the third writ petition, the petitioner, who is GradeIV employee (Laboratory Bearer) has prayed for a direction to the respondent to appoint him as Assistant Teacher in terms of the letter dated 28.6.1993 (Annexure4). For a ready reference, theAnnexure4 letter dated 28.6.1993 is quoted below:

"GOVT OF ASSAM

OFFICE OF THE DIRECTOR OF

SECONDARY EDUCATION, ASSAM

KAHILIPARA,GUWAHATI19.

No. GBEST/ASSO/3/86/Pt/12 Dated Kahilipara, the 28th June, 1993

From: Sri S. Chakraborty, Joint Director of Secondary Education, Assam, Kahilipara, Ghy19.

To: Appointment of Asstt. Teacher in High and H.S. School from the existing staff of GradeIII and IV having requisite qualification.

Ref: This office letter No. GB/EST/ASSO/3/86/270 dt. 17.4.93 Sir,

With reference to the subject cited above, I am directed to clarify that the grade III and IV employees having requisite qualification for appointment as Asstt. Teacher may be appointed on ad hoc basis without selection. Subsequently, their candidature should be placed before the District Level Selection Board for selection and regularization of their services.

Action taken in this regard may kindly be intimated to the undersigned.

Yours faithfully

SoVSri S.K. Chakraborty

Joint Director of Secondary Education

Kahilipara, Ghy19"

5. From the above narration of fact, it is seen that when the petitioner in the first two writ petitions is aggrieved by the cancellation of his appointment/upgradation as Assistant Teacher from that of LDA, in the 3rd (third) writ petition, the prayer made is for appointment as Assistant Teacher from that of Laboratory Bearer.

6. The petitioner in the first two writ petitions while was serving as LDA was upgraded by order dated 19.3.2001. It is the case of the petitioner that upon his appointment as such, he assumed charge of the post of Assistant Teacher. While he

was continuing as such, the impugned order dated 6.7.2001 (AnnexureD) was issued withdrawing the earlier order of upgradation.

7. The whole basis of the claim of the petitioners for such upgradation is the Annexure4 letter dated 28.6.1993, which has been quoted above. On perusal of the said letter, it is seen that such upgradation/appointment was permissible only on adhoc basis. The letter itself provides that such cases should be placed before the District Level Selection Board for selection and regularization.

8. As per the affidavit in opposition filed by the respondents, the aforesaid letter dated 28.6.1993 was withdrawn by letter dated 17.1.1997 (AnnexureR/2 to the counter affidavit). Thus, according to the respondents, since the earlier order has been withdrawn, there is no question of appointment and/or upgradation of the Laboratory Bearer and LDA to that of Assistant Teacher. Upon a reference to the recruitment rules, it is also the case of the respondents that since the recruitment rules do not provide for any upgradation and that the Assistant Teacher can be appointed only by way of direct recruitment, the very basis, on which the petitioner was upgraded was wrong. According to the respondents, realizing the mistake committed by the authority which had upgraded the petitioner from LDA to that of Assistant Teacher, the order was withdrawn.

9. Mr. Talukdar, learned counsel for the petitioner in the first two writ petitions submits that since the action towards upgradation of the petitioner was taken on the basis of the above quoted letter of 1993, the order to that effect passed by the competent authority could not have been withdrawn and that too without affording reasonable opportunity of being heard. In this connection, he has placed reliance on the decision of this Court in WP(C) No. 2613/2003 (Purabi Kalita Vs.State of Assam & Ors.). The judgment was delivered on 24.3.2004.

10. Mr. Karmakar, learned counsel for the petitioner in the 3rd writ petition on the other hand submits that the letter dated 28.6.1993 was issued in consultation with the Service Association for the benefit of the employees, who were otherwise qualified for appointment as Assistant Teacher. According to him, the AnnexureR/2 letter dated 17.1.1997 is an afterthought just to frustrate the legitimate claim of the eligible employees for being appointed as Assistant Teacher. He further submits that the AnnexureR/2 letter dated 17.1.1997 having been issued without any consultation with the Service Association, same cannot override the earlier letter dated 28.6.1993. Upon a reference to certain orders of upgradation passed in 1999, he further submits that the respondents themselves having not applied the AnnexureR/2 letter dated 17.1.1997, same cannot be made applicable only in case of the petitioner.

11. I have given my anxious consideration to the submissions made by the learned counsel for the parties and the materials available on record. As stated above, the very letter dated 28.6.1993 on which the learned counsel for the petitioners has

placed reliance speaks of appointment as Assistant Teacher on adhoc basis. Thus what was provided in the letter dated 28.6.1993 was the temporary arrangement till regular selection. The letter itself provides that the adhoc appointees would require to compete in regular selection upon placing the matter before the District Level Selection Board. Apart from the fact that the letter dated 28.6.1993 has been withdrawn and thus was not applicable in 2001, when the petitioner in the 1st two writ petition was shown upgraded to the post of Assistant Teacher, there is also no dispute that the petitioner was so appointed dehors the recruitment rules. It is an admitted position that his such upgradation was not preceded by any selection. It is in these circumstances, the authority realizing the fallacy in upgrading the petitioner, cancelled the order by which he was upgraded.

12. The decision on which Mr. Talukdar, learned counsel for the petitioner in the first two writ petitions has placed reliance is not applicable to the fact and circumstances involved in the present case. In that particular case, the petitioner was appointed as Assistant Teacher and her matter was placed before the Selection Board. Although, her appointment as such was cancelled, but she was allowed to continue as Assistant Teacher and the authority extracted her service as such. It is in such circumstances, it was provided that till the case of the petitioner in that case was considered in accordance with the rules, she should be allowed to continue as Assistant Teacher. At the same time, it was provided that such continuation would not preclude the respondents to deal with the matter in accordance with law and in due compliance of the principles of natural justice.

13. Unlike the said case, in the present case, the petitioner was upgraded not on adhoc basis, but on regular basis, admittedly dehors the recruitment rules. Within three months thereafter the order of appointment was withdrawn. The petitioner stood reverted to his former post of LDA with the passing of the impugned order dated 6.7.2001. After expiry of more than 6 years, now there is no question of allowing the petitioner to continue as Assistant Teacher pursuant to the illegal order of upgradation. Needless to say that the principle of natural justice is not a straight]acket formula. Even if opportunity of being heard is provided, if the same results in the same situation in which the petitioner finds himself, there is no question of following the same only for the sake of issuance of notice to the petitioner. Each case will have to be decided on its own merit. Needless to say that the ratio of a case has to be understood in the background of the fact situation of the case.

14. Now I deal with the submissions made by Mr. Karmakar, learned counsel for the petitioner in the 3rd writ petition. The letter dated 28.6.1993 having been withdrawn by Annexure R/2 letter dated 17.1.2007, there is no question to take action as per the said letter dated 28.6.1993. Even if the respondents have upgraded some teachers in 1999 ignoring the letter dated 17.1.1997, same cannot cloth the petitioner with any right. If the respondents have acted illegally in the matter by way of providing upgradation, even after issuance of the letter dated 17.1.1997, this Court cannot be

party to such illegalities so as to give a direction to the respondents to violate the letter dated 17.1.1997. Further the petitioner will have to make out his own case and not on the basis of the illegalities committed, even if any, by the respondents. Two wrongs cannot make a thing right.

15. As regards the submissions made by Mr. Karniakar, learned counsel for the petitioner in the 3rd writ petition that the Annex ureR/2 letter dated 17.1.1997 is an afterthought, it is not understood as to on what basis such a submission has been made. There is no challenge to the letter dated 17.1.1997. Further, merely because the copy of the letter was not endorsed to the Service Association, same by itself will not obliterate the contents of the letter dated 17.1.1997.

16. As per the recruitment rules, even the serving employees, eligible and qualified, are entitled for direct recruitment. If the petitioners are eligible for appointment as Assistant Teacher, as per the provisions of the recruitment rule holding the field, it will be open for them to offer their candidatures for such direct recruitment. It will also open for them to make prayer before the respondents for relaxation, in case any hardship operates against them in respect of age bar etc. If the respondents decide to fill up the posts by issuing advertisement, the petitioners may also be allowed to apply in response to such advertisement.

17. Writ petitions are dismissed subject to the aforesaid observations. There shall be no order as to costs.