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(2010) 1 GLR 818 : (2009) 5 GLT 387

Gauhati High Court (Shillong Bench)

Case No: WA No. 42 (SH) of 2006

Md. Nurul Islam	APPELLANT
Vs	
State of Meghalaya and Others	RESPONDENT

Date of Decision: Aug. 20, 2009

Citation: (2010) 1 GLR 818 : (2009) 5 GLT 387

Hon'ble Judges: B.K. Sharma, J; Anima Hazarika, J

Bench: Division Bench

Advocate: D.P. Chaliha and B.K. Deb Roy, for the Appellant; S.P. Mahanta, for the Respondent

Judgement

B.K. Sharma, J.
This appeal is directed against the judgment and order dated 5.7.2006 passed in the writ petition being WP(C) No. 232 (SH)/2004. The writ petition was filed by the present appellant with the following prayer:

In the premises aforesaid it is most respectfully prayed that your lordship would be graciously pleased to issue Rule, call for the records and after hearing the parties be pleased to issue a writ in the nature of mandamus directing the respondents to provide the salary/emoluments of the staff of the Inspector of Schools to the petitioner as he has the status of Government Head Master.

2. The writ petition was filed on 17.8.2004 and five months thereafter the petitioner retired from service on attaining the age of superannuation on 31.1.2005. Now the claim of the petitioner/appellant is for pensionary benefits treating his service as Government service.

3. The aforesaid prayer of the writ petitioner having been rejected by the learned Single Judge accepting the plea of the respondents, he has preferred this appeal assailing the legality and validity of such rejection.

4. The petitioner while was working as assistant teacher of the school called Bhaitbari Deficit Upper Primary Madrassa, he was temporarily upgraded to the post of headmaster vice one Late Surat Zaman, headmaster expired. For a ready reference the order of up gradation dated 21.9.1999 (Annexure-1 to the writ petition) is quoted below:

GOVERNMENT OF MEGHALAYA
OFFICE OF THE INSPECTOR OF SCHOOLS
WEST GARO HILLS ::: TURA

Subject: Upgradation of Asstt. Teacher to the post of Head Master in the Bhaitbari Deficit Upper Primary Madrassa School.

Ref: No. DISD/DUPS/B/99/20052 dated 17.9.1999 from the Deputy Inspector of Schools, Dadenggre.

ORDER

Dated, Tura, the 21st September, 1999

No. SWG/MC-2/99/32014## Shri Nurul Islam, the Seniormost Asstt. Teacher is hereby temporarily upgraded to the post of Head Master of Bhaitbari Deficit Upper Primary Madrassa School vice Shri Surat Zaman, Head Master expired, with immediate effect until further order.

Sd/-
Inspector of Schools,
West & South Garo Hills,
Tura

Memo No. SWG/MC-2/99/32015-19 dated, Tura, the 21st September, 1999.

Copy forwarded for information and necessary action to:

1. The Director, Mass & Elementary Education, Meghalaya, Shillong.

2. The Additional Director of Higher and Technical Education, Tura,

3. The Deputy Inspector of Schools, Dadenggiri.

4. The Secretary of Bhaitbari Ad hoc Managing Committee.

5. The person concerned.

Sd/-illegible
Inspector of Schools,
West & South Garo Hills,

Tura

5. After the aforesaid temporary Upgradation of the petitioner as headmaster, he continued to discharge his duties and functions as such. By Annexure 2 order dated 4.9.2003 his service was confirmed w.e.f. 8.8.1971. It would be pertinent to mention here that both the orders i.e., the order of temporary upgradation as well as the order of confirmation had been issued by the Inspector of Schools, West and South Garo Hills, Tura. Needless to say that the office of the Inspector of Schools is under the Government of Meghalaya.

6. By Annexure-3 order dated 6.11.2000 issued by the Deputy Inspector of Schools, Dadenggiri, West Garo Hills, the petitioner was authorised to draw and disburse the recurring/non-recurring grants-in-aid of the school on behalf of the Deputy Inspector of Schools, w.e.f. 3.1.2000. In the said order the petitioner was described as the Headmaster of the aforesaid school.

7. When the petitioner made representation for charging the salary of Headmaster of the school in which he had worked, against the Head of Accounts for payment of Government staff salary under the Deputy Inspector of Schools, the Inspector of Schools, West Garo Hills, Tura by his Annexure 4 letter dated 14.1.2004 informed the petitioner that although his services had been upgraded to the post of Headmaster after the expiry of the earlier incumbent Late Surat Zaman, the petitioner would not be entitled to claim salary, etc., from the Government. However, it was informed that for salary the school could submit the budget for the increase of deficit grants as per rule in future.

8. By Annexure-5 letter dated 22.4.1998, issued by the Director of Elementary and Mass Education, Meghalaya and addressed to all the Inspector of Schools on the subject of new appointment to outside cadre posts of teachers, it was intimated that the existence of outside cadre teachers was highly irregular. It was conveyed that the posts in question were originally created by the Government of Assam vide its letter dated 27.4.1955 and that after forty-three years of creation of the said posts, all the persons holding that outside cadre posts must have retired. It was further conveyed that whenever an incumbent retires or is transferred to a regular sanctioned post the original post held by him stands abolished. Further by the said letter it was advised that there should not be any new appointment and in case of violation of Government guidelines, the person concerned would be held responsible.

9. It was after the aforesaid letter dated 22.4.1998, the petitioner was temporarily upgraded to the post of Headmaster by the aforesaid Annexure-1 order dated 21.9.1999. The order clearly reveals that the petitioner was upgraded to the post of Headmaster which fell vacant on expiry of the earlier incumbent, namely, Surat Zaman. It was never indicated in the order that the petitioner holding the post of Assistant Teacher was upgraded along with the post and not against the post which fell vacant due to expiry of said Late Surat Zaman. It was also not indicated that the post to which the petitioner was

upgraded was ex-cadre post. It is also not discernible as to whether any officer has been held responsible for such upgradation of the petitioner which the respondents wanted to convey that the same was in violation of the aforesaid Annexure-5 letter dated 22.4.1998.

10. In the counter affidavit filed by the respondents, it was contended that the petitioner being holder of an ex-cadre post a personal to him cannot get the benefit which was provided to the earlier incumbent Late Surat Zaman. In paragraph 8 of the counter affidavit it was stated that the Headmaster and staff of Deficit Government M.E. Schools are entitled to Government pay scale but their salary cannot be drawn from the Head of Accounts meant for the Government staff.

11. The learned Single Judge has accepted the contention raised in the counter affidavit and has held that although the petitioner was admittedly upgraded to the post of Headmaster, he was never absorbed in the post and in such circumstances, he could not legitimately claim the salary and other entitlement of the post. The further conclusion arrived at by the learned Single Judge is that the service condition of the petitioner including his pay and entitlements would necessarily have to be governed by the Rules governing deficit schools, he being employee of a deficit school.

12. We have heard Mr. D.P. Chaliha, Learned Senior Counsel assisted by Mr. B.K. Deb Roy, Learned Counsel for the appellant/writ petitioner as well as Mr. S.P. Mahanta, learned Additional Advocate General, Meghalaya.

13. While Mr. Chaliha, Learned Senior Counsel for the appellant submits that the petitioner cannot be victimised on the ground never spelt out in the order of appointment and any communication subsequent thereto, Mr. Mahanta learned Additional Advocate General, Meghalaya submits that the petitioner being a teacher of a deficit school, he will be governed by the terms and conditions of the service prevalent in such type of school. He further submits that the petitioner was temporarily upgraded to the post of Headmaster and as such he cannot claim the benefit which the earlier incumbent Late Surat Zaman had enjoyed. He further submits that in fact the post was advertised but could never be filled up due to some internal reason. Thus, according to Mr. Mahanta, the petitioner having never been absorbed in the post of Headmaster, he cannot legitimately claim the benefits like that of said Surat Zaman.

14. We have given our anxious consideration to the submissions made by the Learned Counsel for the parties. We have also carefully examined the materials on record. As we have already observed that in the order of appointment dated 21.9.1999, there was no indication that the petitioner was upgraded to the post of Headmaster along with substantive post of Assistant Teacher, rather he was upgraded to the post of Headmaster which fell vacant on expiry of said Late Surat Zaman. In the order of confirmation dated 4.9.2003 also the petitioner was shown as Headmaster of the school. However, such confirmation being w.e.f. 8.8.1971 perhaps it cannot be said that he was confirmed as the Headmaster of the school. The confirmation having been effected from 8.8.1971 the

same necessarily means that such confirmation was in the post of Assistant Teacher. Nonetheless, the confirmation order duly took note of the fact that the petitioner was discharging his duties and functions as Headmaster of the school.

15. As regards the Annexure-4 reply to the petitioner rejecting his claim for salary, etc., under the particular Government Head, the grounds assigned therein were never communicated to the petitioner earlier. He continued to discharge his duties and functions as Headmaster of the school on the basis of the above quoted Annexure-1 order dated 21.9.1999. As regards the Annexure-5 letter dated 22.4.1998 conveying the decision that no appointments should be made against the particular posts and that in case of violation of the Government guidelines the concerned officer should be held responsible, suffice it to say that it is not discernible as to whether the said letter would hold the field or not. Even if the said letter has same being in the instant case, the respondents themselves having ignored the same while upgrading the petitioner as Headmaster, it will not be fair to fall back on the said letter at a later stage. The petitioner was upgraded to the post of Headmaster without any reference to the said letter dated 22.4.1998 and he continued to be the Headmaster of the school till the age of superannuation, i.e., 31.1.2005. By Annexure-6 letter dated 9.12.1999, the interview scheduled to be held for the post of Headmaster was done away, with the stipulation that the upgradation of the petitioner. Seniormost Assistant Teacher of the school would stand. Such stipulation necessarily meant that the petitioner"s position as Headmaster got solidified.

16. It was only in the counter affidavit the stand taken by the respondent was that the petitioner was holding the ex-cadre post and the same was personal to him. It was further contended that on expiry of said Late Surat Zaman, the post being held by him got abolished. Contrary to such stand in the counter affidavit what the Annexure-1 order reveals is that the petitioner was temporarily upgraded against the post earlier held by Late Surat Zaman which fell vacant on his expiry.

17. The Apex Court in the case of Secretary-cum-Chief Engineer, Chandigarh Vs. Hari Om Sharma and Others, dealing with the service conditions of the incumbent held that imposition of unconscionable condition is invalid. In that case, while promoting the respondent on a stop-gap arrangement an undertaking was obtained from him that he would not claim salary of the higher post or any other benefit. Such undertaking was held to be illegal. It was also observed that the Government being a model employer could not be permitted to rely on such undertaking. It was further observed that although the respondent therein: was promoted by way of stop-gap arrangement he could have been deprived of the pay and allowances admissible to the post. In the instant case no such condition was imposed towards upgrading the petitioner as Headmaster.

18. In Union of India v. Wing Commander T. Parthasarathy 2001 1 SCC 158, the Apex Court dealing with the legal right in the context of service jurisprudence observed that a substantive legal right cannot be denied to a person merely on the basis of some policy decision of Government or any certificate acknowledging a particular position which has

no legal sanctity.

19. From the materials on record, what we find is that the denial of the claimed service benefits to the petitioner at par with said Late Surat Zaman is on the plea of the respondents in the counter affidavit that petitioner was not promoted to the post earlier being held by said Late Surat Zaman and that such promotion was personal to him and also that he was holding an ex-cadre post. Apart from such stand in the affidavit there is no other material, from which such plea of the respondents finds support. As noticed above, Annexure-5 letter dated 22.4.1998 was on the particular context and notion and from the said letter it cannot be said that the case of the petitioner is covered and governed by the decision conveyed in the said letter, rather the Annexure-1 order dated 21.9.1999 suggests otherwise.

20. The prayer made in the writ petition has been noted above. In the meantime, the petitioner has retired from service on attaining as the age of superannuation w.e.f. 31.1.2005. The moot question that arises for consideration in the writ petition is as to whether the salary, etc., of the petitioner should have been charged under the particular Government Head as was claimed by the petitioner. To the specific query made, the Learned Counsel for the appellant submits that an appropriate direction is required to be issued to treat the petitioner at par with Late Surat Zaman. As per Annexure-4 letter dated 14.1.2004 Late Surat Zaman was appointed as Headmaster of the school against the post sanctioned vide Government letter dated 27.4.1955 and he was appointed vide order dated 16.3.1970.

21. As to under what circumstances and with what terms and conditions Late Surat Zaman was appointed as Headmaster is not discernible. Only thing we can say is that the petitioner was not appointed and or promoted against any ex-cadre post nor he was upgraded along with the post of Assistant Teacher. He was clearly appointed in the post earlier being held by Late Surat Zaman. As to what would be the consequence thereof is for the respondents to decide.

22. In view of the above, this writ appeal is disposed of directing the respondents to consider the case of the appellant, writ petitioner treating his promotion to the post of Headmaster being the one against the post earlier held by Late Surat Zaman and not treating the same to be a promotion against an ex-cadre post or a promotion along with the post personal to the appellant. Facilitating such dispassionate consideration and also in view of the facts and circumstances stated above, the impugned judgment and order dated 5.7.2006 passed by the learned Single Judge in WP(C) No. 232(SH)/2004 is interfered with and stands set aside and quashed.

23. Entire exercise shall be carried out by the respondent-authorities in terms of this judgment order as expeditiously as possible preferably within three months. The respondent-authorities shall pass a speaking order and shall communicate the same to the petitioner.

24. With the above direction, this writ appeal stands disposed of, without, however, any order as to costs.