

(2012) 02 GAU CK 0057

Gauhati High Court

Case No: Writ Petition (C) No's. 2727 to 2729, 2731 and 2732 of 2010

Mizanor Rahman

APPELLANT

Vs

State of Assam and others

RESPONDENT

Date of Decision: Feb. 7, 2012

Acts Referred:

- Constitution of India, 1950 - Article 14, 16

Citation: (2012) 2 GLD 390

Hon'ble Judges: Adarsh Kumar Goel, C.J; Hrishikesh Roy, J; Arun Chandra Upadhyay, J

Bench: Full Bench

Advocate: A.K. Sikdar, Mr. M. Ahmed, Mr. N. Hoque and Mr. M.H. Talukdar, for the Appellant; M.R. Pathak, SC, Education, for the Respondent

Judgement

Hrishikesh Roy, J.

Heard Mr. A.K. Sikdar, the learned counsel for the petitioner and Mr. M.R. Pathak, the Standing Counsel, Education.

ISSUE

The petitioners are Lecturers of colleges appointed without sanctioned post. On the strength of the Assam Government Memorandum dated 17.7.2004, they seek adjustment in the subsequently available regular vacancies. The issue is whether benefits under this Memorandum will be available to those appointed after 17.7.2004, because of the prohibition on appointment (without sanctioned post being available), imposed through the subsequent Government Memorandum of 12th October, 2004.

CONFLICT

2. According to the judgment in Mukunda Kalita Vs. State of Assam and Others, regularization of college teachers under the first Memorandum dated 17.7.2004 is permissible only for those appointed prior to 17.7.2004. But in the case of Md.

Safiqul Islam Vs. State of Assam and Others, , the benefit of regularization was granted by the Court to a Lecturer who was appointed on 3.2.2004 before the first Memorandum but who joined in service subsequently on 19.7.2004. The Division Bench held that the legal obligation created by the first Memorandum dated 17.7.2004 will apply to the petitioner Safiqul Islam.

3. Since conflicting views have been recorded on the applicability of the regularization benefits to post 17.7.2004 appointees, the issue is being considered by a larger bench, on these referred cases.

BACKDROP

4. In 1952, the Assam Government brought 52 colleges under the deficit grants-in-aid system and thereafter the State stopped sanctioning new posts of Lecturers in the State's colleges. Consequently the Lecturers serving against non-sanctioned posts were unable to have their service regularized and aggrieved Lecturers then approached the High Court. In those writ petitions, direction was issued to consider sanctioning of posts, for accommodation of Lecturers working without sanctioned posts.

5.1 Pursuant to the Court's order, since the Government was not in a position to sanction any new post, a Cabinet Memorandum was prepared on 25.3.2004, to deal with the issue. In this Memorandum, the Government noted that about 395 college teachers were serving (from 5 to 14 years) against non-sanctioned posts in different Degree Colleges of Assam since 1989. These Lecturers were serving on inadequate pay, ranging from Rs. 300/- to Rs. 1500/- provided by the respective college authorities. Such appointments were made on need basis as per UGC guideline and the Lecturers in non-sanctioned posts perform the same duty as regular lecturers. Because the Government hadn't sanctioned new posts in deficit colleges since 1952, the colleges had to appoint persons against non-sanctioned posts and bear their salary burden.

5.2 The Directorate of Higher Education had prepared a list of 325 teachers working without sanctioned post and a decision was taken by the Government, to sort out the issue on the basis of actual requirement.

5.3 Thereafter proposal was mooted in the Cabinet Memorandum for redressal of the grievances of the serving lecturers grievances, in the following manner :

(a) Vacant posts lying in different Grants-in-aid colleges of Assam should be allotted in order of seniority to non-sanctioned teachers in the same college provided that the non-sanctioned teachers were appointed by respective Governing Body after observing due procedures i.e. advertisement, selection and having UGS norms required and if the need for such a post is justified by enrolment etc.

(b) In case of any future vacancies of sanctioned posts, college teachers Working against non-sanctioned post appointed as per procedure stated at (a) above are to

be adjusted in preference to fresh teachers.

(c) To accommodate the non-sanctioned teachers in the college where there is no vacant sanctioned post, the Director of Higher Education may be authorized to withdraw vacant posts from one deficit college where enrolment or other norms does not justify the total number of sanctioned posts in that college and allot to another college where there are non-sanctioned posts justified as per UGC and other norms.

(d) The teachers working under non-sanctioned posts who will be adjusted against vacant sanctioned posts will be required to qualify in NET/SLET within 2 (two) years if they do not possess the same already otherwise their services would be discontinued and till then they will be entitled to basic pay only from the date of approval by Directorate of Higher Education, Assam.

5.4 A list of about 322 vacant posts in different deficit colleges was prepared and to this Cabinet Memorandum, the Finance Department gave their concurrence as under :

Education Department U/O

Your endorsement above,

In respect of the proposed issues to be placed before the Cabinet, Finance Department has no specific comments to make but suggest that the details of posts within names of the colleges may be incorporated in the Cabinet Memorandum in the form of an annexure. A copy of the order/sanction issued on the basis of the Cabinet decision may be marked to Finance (EC.III) Department.

Finance Department further observe that the present problem has cropped up due to engagement of teaching staff by the Managing Committees of the colleges without posts. It is happening in all categories of institutions in the Education Department. In such cases very often, legal complication arises affecting State Exchequer. To avoid it, Education Department must formulate rules prohibiting such engagement.

Sd/-

Deputy Secretary,

Finance (EC.III)

Department

5.5 As can be seen from the above, ban on appointment without sanction post was recommended by the Finance Department.

6. In pursuant to the approval of the Cabinet on 9.6.2004, the first Memorandum dated 17.7.2004 was issued for adjusting the service of about 300 college lecturers against non-sanctioned posts. This was a one time decision to adjust the services of only serving lecturers against the then available 322 regular vacancies. About 4

months later on 12.10.2004, prohibition on engagement of Lecturers without any sanctioned post was imposed by the Government, to give effect to the recommendation of the Finance Department.

DISCUSSION

7. Taking note of the fact that a special measure for regularization was formulated to take care of about 300 serving Lecturers and imposition of immediate prohibition on appointment of Lecturers without any sanctioned posts by the 2nd Memorandum, the Division Bench in Mukunda Kalita (supra) held that the benefit of regularization through the first Memorandum of 17.7.2004 is available only to those appointed before 17.7.2004. But in the case of Safiqul Islam (supra), for a Lecturer, who joined service on 19.7.2004 after being appointed on 3.2.2004, the Division Bench rejected the contention that such appointee will not be covered by the first Memorandum dated 17.7.2004 by considering that, the petitioner therein has rendered 5 years of service in a non-sanctioned post.

8. In order to examine the scope of applicability of the regularization benefits under the first Memorandum, it would be appropriate to take into account the purpose for which the memorandum was issued. Accordingly we have examined the backdrop of the first Memorandum dated 17.7.2004 and notice that the same was intended to take care of the specific grievances of about 300 Lecturers serving then, against non-sanctioned posts. The intended regularization benefits when examined in the context of the Cabinet Memorandum of 25.3.2004 and the concurrence of the Finance Department clearly suggest that, the steps taken through the first Memorandum was meant to address the problem of an identified group of Lecturers. Considering the purpose of the first Memorandum, we feel that the same wasn't intended to be a perennial source of regularizing services of Lecturers. The benefit available under the Memorandum in our view, can't be claimed by all irregularly appointed college teachers, since it was intended to address the grievances of only a identified group of college teachers.

9. In so far as the decision in Safiqul Islam (supra) is concerned, the Court took note of the fact that the petitioner therein was appointed on 3.2.2004 but coincidentally he joined service on 19.7.2004 - 2 days after the first Memorandum was issued on 17.7.2004. This special aspect in the case might have persuaded the Division Bench to give the benefit of the first Memorandum to the petitioner in that case.

10. Furthermore we can't be unmindful of the fact that power to sanction post and appoint/regularize person in regular vacancies vest with the State. The process of adjustment/regularization entail financial implication and submission of Mr. M.R. Pathak that because of resource crunch, fresh post of Lecturers couldn't be sanctioned since 1952 in the Deficit Colleges, has to be weighed to reach a reasonable conclusion. Considering the fact that the one time measure was intended to address the grievances of a specific group of Lecturers, it shouldn't

entitle those outside the targeted group appointed after 17.7.2004, to claim the benefit of adjustment in vacant sanctioned posts of Lecturers. Such process will be contrary to the regular mode of recruitment provided by the applicable Rules. Furthermore recourse to the special process intended to deal with a specific purpose, can't be permitted to defeat the rights under Articles 14 and 16 of the job aspirants in the open market.

11. We therefore are of the opinion that those Lecturers, whose cases were not under consideration at the time when the Cabinet decision was taken on 19.6.2004, can't claim the benefit of the first Memorandum dated 17.7.2004 since the procedure of regularization envisaged by this memorandum, was intended to take care of only about 300 identified college Lecturers and not those, who were subsequently appointed after 17.7.2004. We accordingly concur with the view given in Mukunda Kalita (*supra*), where it has been held that the benefit conferred by the first Memorandum is available to only those Lecturers appointed before 17.7.2004.