

**(2007) 04 GAU CK 0026**

**Gauhati High Court**

**Case No:** None

Sujit Paul

APPELLANT

Vs

State of Assam and Others

RESPONDENT

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**Date of Decision:** April 9, 2007

**Citation:** (2007) 2 GLT 329

**Hon'ble Judges:** Biplab Kumar Sharma, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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### **Judgement**

B.K. Sharma, J.

The petitioner, an Assistant Teacher of Harakishore High School, Hailakandi is aggrieved by the order dated 29.8.2006 passed by the Commissioner and Secretary to the Government of Assam in the Education Department by which it has been held that the Respondent No. 4 is senior to the petitioner and consequently, she will hold the charge of Headmistress in the school till regular appointment to the post is made.

2. The petitioner was first appointed as an Assistant Teacher in another school called J.C.H.S. School, Hailakandi and he was so appointed on 17.2.1992. After about 4 years, he was transferred to the present school by order dated 30.1.1996 and as per the condition imposed in the order, the petitioner would be the junior-most teacher of the school. The condition imposed was that upon his transfer to the present school, he would not claim seniority over the other staff of the school. For the transfer, no T.A. & D.A. was also admissible to the petitioner. Going by the condition imposed in the order of transfer, it is apparent that the transfer of the petitioner was as per his own request and he accepted the bottom seniority in the school.

3. In Paragraph 2 of the writ petition, the petitioner while stating about the aforesaid transfer order dated 30.1.1996, has contended that the condition imposed was illegal and arbitrary and he had submitted written objection to the Inspector of

Schools, Hailakandi for omitting the condition and he was assured of doing the needful. However, till this very date, the condition is still there and according to the petitioner, in spite of assurance of the Inspector of Schools, no positive action has been taken in the matter.

4. On 30.1.2004, the Headmaster of the school retired from service on attaining the age of superannuation and by order dated 27.12.2004, the Respondent No. 4 was allowed to hold the current charge of Headmaster of the school under FR 49 (C) in addition to his normal duties. He was also allowed to exercise the financial power for drawal and disbursement of salary to the teaching and non-teaching staff. However, by a corrigendum issued on 3.1.2005, the Respondent No. 4 was entrusted with academic affairs of the school while the Inspector of Schools, Hailakandi was to take over charge as D.D.O. of the school.

5. The petitioner, claiming seniority over the Respondent No. 4, approached this Court by filing the writ petition being W.R (C) No. 492/2005 and the writ petition was disposed of by order dated 3.3.2006 providing that the Commissioner and Secretary to the Government of Assam in the Education Department would resolve the dispute relating to seniority taking into account all the relevant factors and materials and after hearing the petitioner. Upon such determination of seniority, the senior most teacher was to be given the charge of Headmaster. It was also provided that if the petitioner was aggrieved by the decision to be arrived at, it would be open for him to approach this Court. It is pursuant to this order the impugned order dated 29.8.2006 has been passed making a grievance against which the petitioner has once again invoked the writ jurisdiction of this Court.

6. The relevant materials for the purpose of determining the seniority between the petitioner and the Respondent No. 4, are available in the impugned order itself. While the petitioner joined as Assistant Teacher on 26.2.1992, the Respondent No. 4 had joined as such on 9.3.1992. While the petitioner started receiving his pay in the graduate scale with effect from 26.2.1992, the Respondent No. 4 received the same with effect from 9.3.1992. Thus, going by the date of joining the post of Assistant Teacher and receiving salary in the graduate scale of pay, the petitioner appears to be senior to the Respondent No. 4. However, because of the condition imposed in the aforesaid order of transfer dated 30.1.1996, the effective date of seniority in the school for the petitioner has been counted with effect from 30.1.1996. Taking into account the date of joining the new school by the petitioner, he is naturally junior to the Respondent No. 4 who has been serving in the school with effect from 9.3.1992. It will have to be born in mind that the present seniority dispute by and between the petitioner and the Respondent No. 4 is only relating to the school for the purpose of holding the current duty charge of Headmaster.

7. The Respondent No. 4 has filed her affidavit-in-opposition denying the claim of the petitioner. According to the respondent, the petitioner having been transferred as per his own request, he cannot claim seniority over other Assistant Teachers in

the school. The petitioner has also filed an affidavit-in-reply to the affidavit-in-opposition filed by the Respondent No. 4. In the reply affidavit, the petitioner has insisted for determination of seniority on the basis of the dates of joining the service which is 17.2.1992 and 7.3.1992 respectively. The transfer order dated 30.1.1996 has been described as ambiguous impugned order, but in the writ petition, there is no challenge to the condition imposed in the order dated 30.1.1996. A challenge has been put collaterally in respect of the condition imposed while challenging the order dated 29.8.2006. According to the petitioner, his case is covered by the decision of this Court dated 18.8.2006 passed in the writ petition being W.P. (C) No. 2332/2004 (Sri Jiten Thakuria v. State of Assam and Ors).

8. The Respondent No. 4 has filed further affidavit reiterating the stand taken in the affidavit-in-opposition. It has been contended that in the earlier writ petition being W.P. (C) No. 492/2005 filed by the petitioner, a challenge was made to the condition imposed in the transfer order dated 30.1.1996, but the same did not find favour of this Court and the only order passed was to determine the seniority by and between the parties taking into account all the relevant factors which necessarily meant that the condition imposed in the transfer order dated 30.1.1996 was also be taken into consideration. As regards the claim of the petitioner for cadre-wise seniority and not school-wise seniority, the Respondent No. 4 has contended that the seniority dispute by and between the petitioner and the Respondent No. 4 being basically relating to the school, there is no question of any cadre-wise seniority.

9. I have heard Mr. A.B. Choudhury, learned Sr. counsel assisted by Mr. A.M. Borbhuyan, learned Counsel for the petitioner as well as Mr. B. Sinha, learned Counsel for the Respondent No. 4. I have also heard Mr. M.K. Choudhury, learned Sr. Standing Counsel assisted by Mr. M. Dutta, learned Standing Counsel, Education Department.

10. There is no dispute that both the petitioner and the Respondent No. 4 were appointed on ad hoc basis. The petitioner has annexed the copy of the order of appointment dated 17.12.1992. In the order of appointment, the petitioner has been described as outsider and the condition was imposed that the order would be valid till selection of candidates by the selection board or until further orders whichever is earlier. The same was the case of the Respondent No. 4. It is on the basis of such ad hoc appointments dehors the rules, the petitioner has claimed seniority from the initial date of appointment. In the reply affidavit, the petitioner has annexed the copy of the order dated 16.6.2002 by which the services of the incumbents named therein were confirmed with immediate effect. In the column -" date of joining" - the date of appointment of the petitioner and the Respondent No. 4 has been indicated as 26.2.1992 and 9.3.1992 respectively. Learned Standing Counsel, Education Department has produced the copy of the order dated 31.3.2001 by which the services of the incumbents named therein including the petitioner and the Respondent No. 4 were regularized with retrospective effect. In the order, while the

Respondent No. 4 has been placed at S1. No. 1, the petitioner has been placed at S1. No. 3. Likewise, in the order of confirmation also, the Respondent No. 4 has been placed at S1. No. 6, above the petitioner at S1. No. 8.

11. In the normal circumstances, the question will arise as to whether the ad hoc period of service can be counted towards seniority. There is no dispute that both the petitioner and the Respondent No. 4 were appointed on ad hoc basis dehors the rule and if that be so, they are not entitled to count seniority from their initial date of joining the service. Admittedly, their services have been regularized by order dated 31.3.2001, but such regularization has been given effect to retrospectively. It can very well be argued that the retrospective regularization of service cannot give rise to retrospective seniority as well. Seniority and other service conditions, such as, increments, pensionary benefits etc. are altogether on a different footings. While retrospective regularization of service may necessarily mean conferring of benefits of past service for the purpose of increments, pensionary benefits etc., such retrospective regularization may not lead to retrospective seniority as well, inasmuch as the regularization of service, for the purpose of seniority, normally takes effect prospectively i.e., from the order of regularization.

Above aspect of the matter need not detain us as the same is not the issue raised by either party. The seniority between the petitioner and the Respondent No. 4 in the school has been determined on the basis of the respective date of joining the school which is 30.1.1996 and 9.3.1992 respectively, In the order of transfer, by which the petitioner was transferred to the present school, there is specific clause that the petitioner cannot claim seniority over the other staff of the school. Thus, the petitioner was aware that upon his transfer to the new school, he would rank junior to all the Assistant Teachers in the particular cadre.

The issue relating to determination of seniority has arisen because of the fact that the post of Headmaster has in the meantime fallen vacant. It is the Respondent No. 4, who has been allowed to hold the charge of the school in the academic side. In the earlier writ petition filed by the petitioner i.e., W.R (C) No. 492/2005, a copy of which has been annexed to the affidavit filed by the Respondent No. 4, the prayer made amongst others, was to modify the transfer order dated 30.1.1996 so far as the same relates to the condition of accepting bottom seniority over the other staff of the school. The writ petition was disposed of directing the Commissioner and Secretary to determine the seniority of the incumbents involved in the school taking into account all the relevant considerations and thereafter, to allow the senior most incumbent to hold the charge of Headmaster. Now, the impugned order has been passed on the basis of the admitted and prevalent fact situation regarding the date of joining in the school by the petitioner and the Respondent No. 4, which is 30.1.1996 and 9.3.1992 respectively. The seniority of the petitioner and the Respondent No. 4 has been determined in respect of the school only for the purpose of deciding as to who would be the incumbent to hold the charge of

Headmaster of the school.

12. Learned Counsel for the petitioner has emphasized on cadre seniority and it is in this context, has referred to the judgment of this Court in the aforementioned writ petition i.e., W.P. (C) No. 2332/2004. Unlike the present case, in the said case, in the order of transfer, no condition was imposed that the incumbent would not claim seniority over other teaching staff of the school. The inference of losing seniority was drawn in view of the fact that in the order of transfer, it was indicated that the incumbent would not be entitled to D.A. & T.A. That was not a case of accepting the transfer with the undertaking of forgoing past service for seniority. It was observed in the judgment that mere making a request for transfer may not lead to forgoing of past service for seniority unless the same is made condition precedent for transfer and indicated in the order of transfer.

13. In the instant case, the issue is not of determining the cadre seniority, but school seniority. The records produced by the learned Standing Counsel, Education Department have revealed that the request of the petitioner for his transfer was recommended by the Minister of State, Panchayat and Rural Development and it was on that basis, the transfer of the petitioner to the present school came into being. In the order, it was clearly indicated that the petitioner would not claim for seniority over the other staff of the school. The petitioner accepted such condition of transfer without any reservation. Although in Paragraph 2 of the writ petition, the petitioner has stated that the condition imposed was arbitrary and he made a grievance against the same, but no materials have been placed as to how such grievance was raised and at what point of time ?

14. The petitioner has relied upon annexure-"D" representation dated 31.12.2004 and the letter of the same date addressed to the Director of Secondary Education, Assam by the Inspector of Schools, Hailakandi making a request therein to consider the case of the petitioner for holding the charge of Headmaster of the school. The representation dated 31.12.2004 was made to the Director of Secondary Education, Assam with the prayer for allowing the petitioner to hold the charge of Headmaster and in the representation a passing reference was made to the condition imposed in the transfer order dated 30.1.1996.

15. From the above materials on record, what has transpired is that the petitioner all along accepted the condition imposed in the order of transfer dated 30.1.1996 till such time the Respondent No. 4 was allowed to hold the charge of the school by order dated 27.12.2004. The settled position of seniority between the petitioner and the Respondent No. 4 in the school upon acceptance of the condition imposed by the transfer order dated 30.1.1996 was sought to be diluted by the petitioner when the Respondent No. 4 was given the charge of Headmaster by the aforesaid order dated 27.12.2004. The Inspector of Schools, Hailakandi also readily obliged the petitioner by making the recommendation in his favour unmindful of the condition imposed in the order of transfer dated 30.1.1996.

16. The condition imposed in the order dated 30.1.1996 was put to challenge by the petitioner in the earlier writ petition, which was disposed of by order dated 3.3.2006 only providing determination of seniority by the Commissioner and Secretary taking into account all the relevant factors, which necessarily meant that he would also take into consideration the condition imposed in the transfer order dated 30.1.1996. The challenge made to the condition having not been entertained by this Court, shall have to be deemed to be rejected. Even otherwise also, the claim made in the writ petition filed after 9 years of the order dated 30.1.1996 was highly belated. As noticed above, in the instant writ petition, there is no challenge to the condition imposed in the order of transfer dated 30.1.1996.

17. As discussed above, the dispute relating to seniority is only in respect of the school for the purpose of holding the charge of Headmaster. Upon determination of school-seniority, the Respondent No. 4 has been entrusted with the charge of Headmaster. I do not find any infirmity in the impugned order dated 29.8.2006. However, I hasten to add that in case of regular selection for the post of Headmaster, the authorities may also consider the case of the petitioner, if his cadre-seniority permits the same.

18. Writ petition is dismissed leaving the parties to bear their own costs.