

(2010) 09 GAU CK 0066

Gauhati High Court

Case No: Writ Appeal No. 278 of 2010

Aminul Haque

APPELLANT

Vs

Assam State Election
Commissioner and Others

RESPONDENT

Date of Decision: Sept. 14, 2010

Acts Referred:

- Assam Panchayat Act, 1994 - Section 111
- Constitution of India, 1950 - Article 102, 102(1)

Citation: (2011) 3 GLR 414

Hon'ble Judges: Madan B. Lokur, C.J; Utpalendu Bikas Saha, J

Bench: Division Bench

Advocate: N. Dutta, Ms. B. Bhuyan and Mr. B. Talukdar, for the Appellant; M.U. Mahmud, J.C. Borah, V.M. Thomas and B.C. Das, for the Respondent

Judgement

Madan B. Lokur, C.J.

The question for consideration is whether respondent No. 4 (Md. Raihan Choudhury) held a "service of profit" within the expression as used in section 111(e) of the Assam Panchayat Act, 1994 when he filed his nomination paper on 20th December, 2007 for election as a member of the Zilla Parishad. In our opinion, the answer must be in the affirmative. The consequence is that it was rightly held by the Returning Officer that he was disqualified from contesting that election.

2. For easy reference, section 111(e) of the Assam Panchayat Act, 1994 ("the Act") is reproduced below and it reads as follows : --

111. Disqualifications. - No Person shall be elected or co-opted and remain as President, Vice-President or Member of Zilla Parishad, Anchalik Panchayat and Gaon Panchayat, if he or she -

(a)

(b)

(c)

(d)

(e) hold any service of profit under Government or any educational institution recognized and received grant from the Government, or holds remunerated office under Zilla Parishad, Anchalik Panchayat and Gaon Panchayat or holds any contract under any of the aforesaid bodies or under the Government;

The facts:

3. Choudhury was appointed as an Assistant Teacher sometime in 1993 by the Managing Committee of the Uttar Rawmari AHEME School under the Operation Black Board Scheme. Earlier, on or about 19.11.1991 the school was provincialised under the provisions of the Assam Elementary Education (Provincialisation) Act, 1974.

4. On 6.5.1999 the services of Choudhury were regularized as an Assistant Teacher with effect from 24.4.1998 along with several others.

5. On 27.9.1999 the Secretary in the Education Department, Government of Assam directed the Director of Elementary Education to cancel the regularization order. In pursuance of the directions so given, the Director of Elementary Education cancelled the order regularizing the services of Choudhury and others by an order dated 25.11.1999.

6. Feeling aggrieved, Choudhury and others filed WP(C) No. 6246/99 challenging the order canceling their regularization in service. Although it is not very clear, it, however, appears that the learned Single Judge dealing with the writ petition passed an interim order staying the operation of the impugned cancellation order dated 25.11.1999.

7. By an order dated 21.7.2004 a learned Single Judge dismissed the writ petition by holding that the initial appointment of Choudhury and others was not in accordance with law and, therefore, their services could not have been regularized. Under the circumstances, the challenge to the order canceling the regularization could not be sustained.

8. Against this order passed by the learned Single Judge in WP(C) No.6246/99, Choudhury and others preferred a writ appeal being WA No.343/04. When the writ appeal came up for consideration on 29.11.2004 the following order was passed whereby, as an interim measure, it was directed that if the appellants are in service they shall be allowed to continue in service until further orders :-

Heard Mr. A.K. Bhattacharyya, learned senior counsel on interim prayer.

It is submitted that the appellants were appointed by the competent authority after regularization in accordance with law and their regularization have been cancelled without any notice. Mr. Bhattacharyya submits that there is violation of the principles of natural justice in the impugned Government action and, therefore, status quo as on today, i.e., continuity in service of the appellants may be maintained. In support of this submission the certificates issued by the Headmasters of the concerned Schools have been produced which shall form part of record.

Mr. V.M. Thomas, learned State counsel submits that he has no objection in maintaining status quo as on today in so far the appellants are concerned.

In view of this, as an interim measure it is directed that if the appellants are in service they shall be allowed to continue until further orders.

In the meantime, Mr. Thomas, learned State counsel shall obtain necessary instructions and place the Government's stand in the matter.

This interim direction is peculiar to the facts and circumstances of this particular case only.

By virtue of this interim order (or so it is said) Choudhury continued in service as an Assistant Teacher in Uttar Rawmari AHEME School.

9. At this stage, it is important to note that about two years earlier, while the writ petition filed by Choudhury and others was pending consideration before the learned Single Judge, the Secretary in the Education Department of the Government of Assam issued a letter dated 25.11.2002 directing the Director of Elementary Education not to give effect to the order of cancellation dated 27.9.1999 and to refrain from ousting the writ petitioners. The letter dated 25.11.2002 was issued (apparently) in the context of the interim relief granted to Choudhury and others in the writ petitions challenging the cancellation of the order regularizing their services. The letter dated 25.11.2002 reads as follows : -

With reference to the letter cited above on the subject, I am directed to say that pursuance to the Hon"ble High Court's interim order dated 8.12.1999 and 15.12.1999 passed in WP(C) No.6167/99, WP(C) No.6157/99, WHO No.6168/99, WP(C) No.6156/99 WP(C) No.66152/99, WP(C) No.6153/99 and WP(C) No.6246/99 respectively you are requested not to give effect to the order of cancellation issued by Government vide letter No.A(1)E 562/99/60-A dated 27.9.1999 and not to oust the petitioners.

Further, in pursuance to the Hon"ble High Court direction dated 9.5.2002 passed in WP(C) No.6157/99 in the matter of Shri Rabindra Kr. Bhuyan you are requested not to terminate the petitioners from service pending regularization of their services along, with release of monthly salary w.e.f. the respective date of joining till the finalization of the cases.

Action taken in this regard may kindly be intimated to this Department.

10. It appears that as a follow up to the above letter, the Director of Elementary Education wrote a letter dated 12.12.2002 to the District Elementary Education Officer not to give effect to the order of cancellation of regularization. Acting upon both the letters dated 25.11.2002 and 12.12.2002 the District Elementary Education Officer issued an order dated 30.12.2002 withdrawing the cancellation order dated 25.11.1999 in respect of the aggrieved teachers including Choudhury. The order dated 30.12.1999 reads as follows :

OFFICE OF THE DISTRICT ELEMENTARY EDUCATION OFFICER, NAGAON, ASSAM

ORDER

In pursuance of the Government Letter No.A(I)E.562/99/160, dated 25.11.2002 and Director of Elementary Education, Assam's letter No.ES(P)155/2001/105 dated 12.12.2002 the cancellation order vide this office letter No. A-14/Grieven/99/12854-60 dated 25.11.1999 is hereby withdrawn from the date of cancellation.

Sl. No.	Name of the schools	Name of the teacher
1.	Uttar Rowmari A.H.A.M.E.M.	1. Anowar Sadat 2. Raihan Uddin Choudhury

Sd/- Shri D. Das,
District Elementary Education
Officer, Nagaon, Assam

Memo No.EPS/10/98/Pt-I/15861-67 dated 30.12.2002

Copy to : -

(1) The Secretary, Government of Assam. Education Department, Dispur, Guwahati-5 for information for his letter No. A(I)E.562/99/160 dated 25.11.2002.

(2) The Director of Elementary Education, Assam, Kahilipara, Guwahati-19 for information for his letter No. EE(P)155/2001/105, dated 12.12.2002.

(3) The Deputy Inspector of Schools, Nagaon/Hojai and Kaliabor for information.

(4) The Treasury Officer, Nagaon/Hojai and Kaliabor for information.

(51 The Block Ele. Edn. Officer, Batadraba for information and necessary action.

(6) The Head Master, Uttar Rowmari A.H.E.M.E.M. for information and necessary action.

(7) Person concerned.

So/-

District Elementary Education
Officer, Nagaon, Assam.

11. We would have thought that under these circumstances, nothing farther survives in the writ petition filed by Choudhury and others being WP(C) No.6246/99 in which they had challenged the cancellation of the regularization order but it is alleged that the withdrawal order dated 30.12.2002 was not served upon Choudhury nor was he aware of its contents. But be that as it may, Choudhury continued to work as an Assistant Teacher in Uttar Rawmari AHEME School either under the protection of the interim order granted in the writ appeal filed by him or by virtue of the order dated 30.12.1999.

12. Sometime in late 1997, elections were announced for Member, No. 8, Tuktuki Zilla Parishad constituency under Nagaon Zilla Parishad for the third phase of Panchayat elections. The election was to be held on 9.1.2008 and nomination papers could be filed by 20.12.2007.

13. Choudhury was one of the candidates for the elections as also the appellant before us, that is, Aminul Haque. In fact, these were the only two candidates for the election.

14. Choudhury filed his nomination papers on 20.12.2007 and Haque filed his objections to Choudhury's nomination papers on the ground, inter alia, that he (Choudhury) held a service of profit in an educational institution recognized and receiving grants from the Government and as such he was disqualified from contesting the election in terms of section 111(e) of the Act.

15. On 24.12.2007 the Returning Officer considered the objections filed by Haque and rejected the nomination papers of Choudhury. It was concluded that Choudhury held a service of profit and was, therefore, disqualified for contesting the elections. The result of this was that Haque was the only eligible candidate and he was declared elected as Member of the Zilla Parishad.

16. Choudhury thereafter filed Election Case No. 1/08 challenging the rejection of his nomination papers and he also challenged the election of Haque. The Panchayat Election Tribunal, Nagaon, constituted under the provisions of the Act, passed a judgment and order dated 20.8.2009 allowing the election petition filed by Choudhury and further directing that fresh elections be held within one month and Choudhury be allowed to contest the election on the basis of the nomination papers

already filed by him.

17. Aggrieved by the judgment and order dated 20.8.2009 passed by the Election Tribunal, Haque preferred WP(C) No.3791/09 which was heard and considered by a learned Single Judge. By the order under appeal dated 21.7.2010, it was held that Choudhury did not hold a service of profit so as to disqualify him from contesting the elections. In other words the judgment and order of the Election Tribunal was upheld by the learned Single Judge by his order dated 21.7.2010.

18. Feeling aggrieved, Haque filed the present writ appeal challenging the order passed by the learned Single Judge and reiterating his contention that Choudhury held a service of profit on the date he filed his nomination papers, thereby disqualifying him from contesting the elections.

Submissions:

19. We have heard learned counsel for the parties and perused the records and in view of the urgency expressed, namely, that fresh elections are scheduled for 23.9.2010 we have given priority of hearing to this case.

20. The admitted position is that the expression "service of profit" used in section 111(e) of the Act has the same meaning as the expression "office of profit" occurring in article 102 of the Constitution and in fact there is no difference between these two expressions. Therefore, for the sake of convenience we propose to use the expression "office of profit" rather than "service of profit."

21. Certain facts are not in dispute and they are : that at all material times, Choudhury was working as an Assistant Teacher in the Uttar Rawmari AHEME School; that the school was provincialised in 1991 and Choudhury joined the school as a teacher in 1993 and; that the appointment of Choudhury was made by the Managing Committee of the school. According to Choudhury his appointment having been made by the Managing Committee, it was contractual in nature.

22. Whether the appointment of Choudhury by the Managing Committee of the school was irregular or illegal, as held by the learned Single Judge in WP(C) No.6246/99, or on a contractual basis as contended before us, is not at all an issue. Indeed it cannot be an issue before us for the simple reason that according to Choudhury he was regularized in service and when that regularization order was cancelled on 25.11.1999 he even challenged the cancellation. All along, therefore, the contention of Choudhury has been that he is a regular teacher in Uttar Rawmari AHEME School and not a contractual employee. He cannot now turn around and take a stand completely contrary to what he has been agitating for long. We have, therefore, no option but to proceed on the basis that Choudhury's employment was not contractual in nature.

23. It is submitted by learned counsel for Choudhury that there are two other important facts which should not be lost sight of and they are : First, that the order

regularizing the services of Choudhury was cancelled by another order dated 25.11.1999 of the Director of Elementary Education. The cancellation order was upheld by the learned Single Judge in WP(C) No. 6246/99 and the order passed by the learned Single Judge was not stayed in the writ appeal filed by Choudhury. As such, the contention is that Choudhury was not a regular teacher in Uttar Rawmari AHEME School at the relevant time, and that he reverted to his status as a contractual teacher. Second, that Choudhury did not accept any remuneration from the Uttar Rawmari AHEME School; rather, he was working there as a teacher only in a voluntary capacity. As such, Choudhury's contention is that he did not hold an office of profit disqualifying from contesting the election u/s 111(e) of the Act.

24. It is also submitted by learned counsel for Choudhury that his client had in fact submitted his resignation letter to the Headmaster of the school on 20.12.2007, the date on which the nomination papers were filed. Therefore, even if it is held that Choudhury was holding an office of profit, it was only till 19.12.2007 - he ceased to hold an office of profit on 20.12.2007 when he submitted his resignation to the Headmaster of the school who in turn accepted his resignation.

25. We are not impressed by any of the submissions made on behalf of Choudhury.

Findings:

26. The crucial issue is the status of Choudhury on 20.12.2007. It is a matter of record that his services were regularized by an order dated 6.5.1999. Even though the order of regularization may have been cancelled on 25.11.1999 by the Director of Elementary Education, the fact of the matter is that the Secretary of the Education Department of the Government of Assam ordered the Director of Elementary Education by a letter dated 25.11.2002 not to give effect to the cancellation order. Although this appears to have been in the context of the interim relief granted to Choudhury in the writ petition filed by him, the fact remains that the District Elementary Education Officer passed an order on 30.12.2002 withdrawing the order dated 25.11.1999. That Choudhury was unaware of the order dated 30.12.2002 (as he says) is of no consequence. The fact of the matter is that insofar as the State of Assam is concerned, and for all practical purposes, Choudhury continued to remain a regular teacher with the Uttar Rawmari AHEME School. Under the circumstances, he clearly fell within the category of disqualified candidates.

27. It is not possible to accept the contention of Choudhury that he was unaware of the order dated 30.12.2002. A copy of the order dated 30.12.2002 was marked to the Headmaster of Uttar Rawmari AHEME School and to the person concerned, that is Choudhury. It is, therefore, extremely unlikely that he was unaware of the order dated 30.12.2002 withdrawing the cancellation order dated 25.11.1999.

28. Even if it is assumed that the withdrawal order dated 30.12.2002 was of no effect (for whatever reason) the fact is that Choudhury continued as an Assistant Teacher with the Uttar Rawmari AHEME School by virtue of the interim protection in the writ

appeal filed by him. It was contended by his learned counsel that the order of cancellation of regularization was not stayed by the Division Bench considering the writ appeal. As such, Choudhury reverted back to his status as a contractual teacher with the Uttar Rawmari AHEME School. In view of his status as a contractual teacher, it is submitted that Choudhury could not be described as someone holding an office of profit in the school.

29. As we have already noted above, we have no option but to proceed on the basis that Choudhury's appointment in the Uttar Rawmari AHEME School was not on a contractual basis. That apart, it does appear that the order dated 27.9.1999 cancelling the regularization of the services of Choudhury was stayed in the writ petition filed by him. It appears that it is for this reason that the Secretary in the Education Department of the Government of Assam issued a letter dated 25.11.2002 directing the Director of Elementary Education not to give effect to the order of cancellation dated 27.9.1999 and to refrain from ousting the writ petitioners. Subsequently, the cancellation was withdrawn on 30.12.2002 resulting in revival of the status of Choudhury as a regular teacher in the Uttar Rawmari AHEME School.

30. That apart, the services of Choudhury continued with the school (even otherwise) by virtue of the interim protection given by the Division Bench in the writ appeal filed by Choudhury. It is true that the order of cancellation was not specifically stayed by the Division Bench, but the effect of the interim protection given has the same consequence. In fact, the argument of learned counsel for Choudhury to the contrary is rather strange, if we may say so. The argument is that even though the learned Single Judge held Choudhury's appointment to be illegal, the interim protection given by the Division Bench did not revive his status as a regular teacher but it only revived his status as a contractual teacher. We are unable to understand the rationale for the limited interpretation given by learned counsel to the interim protection afforded by the Division Bench. The only intention appears to be to somehow or the other get out of the prohibitory net cast by section 111(e) of the Act by claiming to be a contractual teacher.

31. Unfortunately, even this does not help Choudhury. The reason is the wide language used in section 111(e) of the Act. It includes a "contract" under an educational institution recognized and receiving a grant from the Government (such as the Uttar Rawmari AHEME School). The word "contract" is broad enough to take within its compass a contract of service, such as the one claimed by Choudhury. Therefore, every which way the issue is looked at, Choudhury undoubtedly held a "service of profit" or "office of profit" so as to fall afoul of section 111(e) of the Act.

32. The contention of learned counsel for Choudhury that his client did not accept any remuneration from the school and that he was working as a teacher purely in a voluntary capacity is stated only to be rejected. It has been held in [Jaya Bachchan Vs. Union of India \(UOI\) and Others](#), that what is relevant is not whether a person holding an office of profit actually receives any pecuniary gain but whether the

office is capable of yielding a profit or pecuniary gain. If such an entitlement exists, then the person is said to be holding an office of profit. This is what the Supreme Court had to say in paragraph 6 of the Report:

The term "holds an office of profit" though not defined, has been the subject-matter of interpretation, in several decisions of this court. An office of profit is an office which is capable of yielding a profit or pecuniary gain. Holding an office under the Central or State Government, to which some pay, salary, emolument, remuneration or non-compensatory allowance is attached, is "holding an office of profit". The question whether a person holds an office of profit is required to be interpreted in a realistic manner.....For deciding the question as to whether one is holding an office of profit or not, what is relevant is whether the office is capable of yielding a profit or pecuniary gain and not whether the person actually obtained a monetary gain. If the "pecuniary gain" is "receivable" in connection with the office then it becomes an office of profit, irrespective of whether such pecuniary gain is actually received or not. If the office carries with it, or entitles the holder to, any pecuniary gain other than reimbursement of out of pocket/actual expenses, then the office will be an office of profit for the purpose of article 102(1)(a). This position of law stands settled for over half a century commencing from the decisions of [Ravanna Subanna Vs. G.S. Kaggeerappa](#), [Shivamurthy Swami v. Agadi Sanganna Andnappa](#), (1971) 3 SCC 870, [Satrucharla Chandrasekhar Raju Vs. Vyricherla Pradeep Kumar Dev and another](#), and [Shibu Soren Vs. Dayanand Sahay and Others](#).

33. On the facts of this case, it is clear that Choudhury was entitled to receive salary as an Assistant Teacher in the Uttar Rawmari AHEME School, at least by virtue of the interim order granted by the Division Bench of this court. That he chose not to accept the salary, for reasons best known to him, does not mean that he did not hold an office of profit as discussed by the Supreme Court. Therefore, the contention of learned counsel in this regard must be rejected.

34. It was then contended that Choudhury had submitted his resignation letter to the Headmaster of the school on 20.12.2007 and that the Headmaster had "accepted" it. We only need to look at the deposition of the Headmaster of the school, namely, Md. Nurul Islam in this regard. He clearly states in his deposition that the school was provincialised on 19.11.1991 and Choudhury was appointed by the Managing Committee of the school in 1993. He says that Choudhury did submit his resignation letter on 20.12.2007 and that the resignation letter was forwarded to the competent authority that is, the Block Elementary Education Officer. The Headmaster does say that he "accepted" the resignation letter, but he also goes on to say that he forwarded it to the Block Elementary Education Officer. What this means, if read in its correct perspective, is that there was a physical taking of the document by the Headmaster for the purpose of forwarding it to the Block Elementary Education Officer. The statement of the Headmaster, as a whole, does not mean that he was authorized or was the competent authority to accept the

terms of the resignation letter. In fact this interpretation is established from his cross-examination where the Headmaster says that the Block Elementary Education Officer is the competent authority to accept the resignation letter of the teacher and that is why he had forwarded Choudhury's resignation letter to him on 24.12.2007. The Headmaster further says that he does not know whether the Block Elementary Education Officer accepted the resignation or not.

35. What is important from this deposition is that the Headmaster of the Uttar Rawmari AHEME School was not the competent authority to accept Choudhury's resignation letter; that Choudhury's resignation letter came into the hands of the competent authority, that is the Block Elementary Education Officer only on 24.12.2007 which is after the date of submission of the nomination papers by Choudhury. In other words, when Choudhury submitted his nomination papers on 20.12.2007, his resignation had not yet been accepted by the competent authority, that is the Block Elementary Education Officer.

36. We may make a mention of a certificate dated 19.12.2007 which was Ext-8 before the Election Tribunal. The certificate mentions that Choudhury is an Assistant Teacher in Uttar Rawmari AHEME School and his post was regularized with effect from 24.4.1998. The certificate further mentions that as per the report submitted by the Headmaster, the arrears of salary due to him had been submitted to the District Elementary Education Officer on 25.3.2007 and that he (Choudhury) has been serving as Assistant Teacher in the school from the date of regularization till date. This document (Ext-8) clearly shows that even the competent authority, that is the Block Elementary Education Officer was of the view that Choudhury was a regular teacher in Uttar Rawmari AHEME School even on 19.12.2007. This certificate was apparently given on the basis of the order dated 30.12.2002 wherein the order canceling the regularization of the services of Choudhury was withdrawn, or in any event on the basis of the interim protection given by the Division Bench of this court.

37. Therefore, in our opinion, there is no escape from the conclusion that Choudhury was a regular teacher in Uttar Rawmari AHEME School on 20.12.2007 when he filed his nomination papers and his protestations to the contrary are really of no avail. As such, he held a service of profit or an office of profit within the meaning of that expression in section 111(e) of the Act.

38. [Sultan Sadik Vs. Sanjay Raj Subba and Others](#), to learned counsel for Choudhury sought to rely upon contend that there did not exist any master and servant relationship between Choudhury and the school since he did not get any salary from the school nor he was aware of the withdrawal order canceling the regularization of his services. In our opinion this decision does not at all assist the case of Choudhury. In Sultan Sadik the termination order was accepted by the appellant therein unlike in the present case where Choudhury has not accepted any adverse order passed against him. Moreover, as held in *Jaya Bachchan* whether Choudhury receives salary

or not is of no consequence - what is of consequence is whether he is entitled to receive salary. On this there is no doubt and, therefore, the first aspect of the decision rendered in Sultan Sadik, relied upon by learned counsel for Choudhury is of no assistance. Insofar as the second aspect is concerned, it is not possible to accept the contention of learned counsel for Choudhury that his client was unaware of the order dated 30.12.2002 for the reasons already mentioned earlier. Even otherwise, there is nothing on record to suggest that Choudhury was not aware of this document.

Conclusion:

39. Under the circumstances, we have no doubt that the writ appeal is required to be allowed and we do so accordingly. The decision of the learned Single Judge in WP(C) No. 3791 of 2009 as well as of the Election Tribunal in Election Case No. 1 of 2008 are set aside.

40. There will be no order as to costs.