

(2014) 04 GAU CK 0019

Gauhati High Court

Case No: W.P. (C) Nos. 4632 of 2006 and 488 of 2013

Esrafil Ali

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: April 29, 2014

Acts Referred:

- Constitution of India, 1950 - Article 226
- Penal Code, 1860 (IPC) - Section 120-B, 147, 148, 149, 379

Citation: (2014) 2 GLT 802

Hon'ble Judges: Tinlianthang Vaiphei, J

Bench: Single Bench

Advocate: A.R. Bhuiyan and M.A.I. Hussain, Advocate for the Appellant; U.K. Goswami, S.C., A. Deka, S.C., H.R.A. Choudhury, Sr. Advocate and F.U. Borbhuiyan, Advocate for the Respondent

Judgement

Tinlianthang Vaiphei, J.

These two writ petitions, being inter-connected, were heard together and are now being disposed of by this common judgment. The reliefs claimed in WP(C) No. 4632/2006 are as follows: (a) for quashing the order dated 5.8.2006 issued by the respondent No. 2 approving the resolution of the Managing Committee of Fingua Anchalik Pre-Senior Madrass ("the Madrassa" for short) degrading the petitioner from the post of Head Mudaris to the post of Assistant Teacher of the Madrassa and of appointing the respondent No. 5 in his place, (b) to allow the petitioner to continue in the post of Headmudaris of the Madrassa. In WP(C) No. 488 of 2013, the reliefs claimed by the petitioner are:--(i) to quash the resolution dated 1.3.2011 terminating him from the post of Headmudaris of Fingua Anchalik Pre-Senior Madrassa ("the Madrassa" for short) adopted by the Managing Committee of the Madrassa and the order dated 24.6.2011 issued by the Director, Madrassa Education, Assam (respondent 2) approving his termination order, (ii) to quash the order dated 17.9.2012 issued by the respondent No. 2 clarifying that the respondent

No. 7 should be considered for provincialization in the post of Headmudaris, (iii) to quash the appointment of the respondent No. 7 as the Headmudaris of the Madrassa, (iv) to set aside the order dated 22.2.2001 recognizing the Madrassa, (v) to direct/command the respondents to reinstate him as the Headmudaris of the Madrassa, (vi) to restrain the respondent No. 2 and 3 from provincializing the service of the respondent No. 7 in the post of Headmudaris, (vii) to restrain the State-respondents from releasing more financial assistance/fixed monthly remuneration in favour of the Madrassa and (viii) directing the respondent No. 5 to complete the investigation of Sarthebari Police Station Case No. 17/06 (GR. No. 326/06 registered in connection with FIR No. 10.3.2006). Undoubtedly, the writ petition suffers from multifariousness/misjoinder of cause of action. The case of the petitioner, in a nutshell, is that he was initially appointed as Intermediate Assistant Teacher of the Madrassa on 16.2.1999 and joined the post on 17.2.1999. The building of the Madrassa was originally located at the land under Miadi Patta No. 34 with four bighas under Patta No. 49, Dag No. 88 with a total area as five bighas recorded in the name of the Madrassa. In the year 2001, the Headmudaris of the Madrassa resigned from the post due to personal difficulties whereupon the petitioner was appointed as the Headmudaris in her place. The appointment order was issued by the Secretary of the Madrassa on 30.6.2001 whereafter he joined the post. Immediately after his appointment, the respondent No. 3 (the District Scrutiny Committee, Barpeta) vide the office order dated 29.5.2003 reconstituted the Managing Committee of the Madrassa by including the name of the petitioner as the Headmudaris-cum-Member Secretary of the Madrassa.

2. It would appear that some complaints were lodged against the petitioner after his appointment which resulted in reconstituting the Managing Committee even before the expiry of its term. The petitioner promptly challenged the reconstitution by approaching this Court in W.P. (C) No. 7943/2004, and this Court by the order dated 20.12.2005 declined to interfere with the order as the term of the petitioner was about to be expired. In the meantime, some vested interest on 9.3.2006 went to the Madrassa and forcibly dismantled the Madrassa building from the original location and shifted the Madrassa to a different location. The FIR lodged by the petitioner on 10.3.2006 with the Officer-in-Charge of Sarthebari Police Station (respondent 5) was subsequently registered as Sarthebari P.S. Case No. 17/06 under Sections 120-B/147/148/149/427/379/506 IPC, but the investigation of the case is yet to be completed till now. The Managing Committee of the Madrassa in the meantime downgraded the petitioner to the post of Intermediate Assistant Teacher and appointed the respondent No. 7 in his place, which was also approved by the Deputy Director, Madrassa Education on 5.8.2006. This again drove the petitioner to file WP(C) No. 4632/2006 before this Court, which by the interim order dated 18.9.2006 stayed the impugned order, if the same had not be given effect to in the interregnum. The writ petition was subsequently dismissed on 8.9.2009 in default of prosecution with the result that the interim order also stood vacated.

3. The writ petition was, however, restored to file on 26.3.2010 in Misc. Case No. 735/2010 for hearing on merit, but the stay order was not revived. Apparently, the Managing Committee of Madrassa, taking advantage of the vacation of the stay order, passed resolution No. 2 dated 1.3.2011 re-affirming the resolution dated 17.9.2006, which had discharged the petitioner from the post of Headmudaris of the Madrassa. The discharge resolution was approved by the respondent No. 2 by his order dated 24.6.2011 by directing the In-charge Headmudaris to submit a proposal for filling up the post held by the petitioner through advertisement. The petitioner thereafter made a representation to the respondent No. 2 on 18.6.2012 to cancel the said order dated 5.8.2006 and allow him to work as Headmudaris by taking over the charge from the respondent No. 7. In the meantime, the respondent No. 2 issued the order dated 6.8.2012 by keeping the said order dated 24.6.2011 in abeyance pending final disposal of WP(C) No. 4532/2006. Consequently, the petitioner approached the respondent No. 2 to release the cheque for financial assistance to him as the Headmudaris of the Madrassa. In the meantime, the respondent No. 2 issued the order dated 17.9.2012 clarifying that the respondent No. 7 should be considered as Headmudaris/Secretary of the Madrassa for the purpose of provincialization, which would be finally disposed of on receipt of the order from this Court. Aggrieved by the aforesaid orders, the petitioner is once again initiating another round of litigation by way of this writ petition for appropriate remedy.

4. The writ petition is opposed by the State-respondents, the Managing Committee of the Mdarassa, the Officer-in-Charge of Sarthaberi P.S. and the Circle Officer, Sarthebari Revenue Circle by filing their separate affidavits-in-opposition. The stance taken by the State-respondents as evident from the affidavit-in-opposition filed by the respondent No. 2 is that the Managing Committee of the Madrassa shifted the Madrassa building to the plot of land adjacent to the original land which was used as play ground. The FIR lodged by the petitioner in connection therewith ended up in a final report submitted by the police. According to the respondent No. 2, the petitioner while working as Headmudaris of the Madrassa misappropriated the grants received from the MLA Local Fund and Sarva Abhijan Mission (SSA) and stopped attending the Madrassa since 2004 despite the direction of the Managing Committee whereupon he was degraded to the status of Assistant Teacher from Headmudaris and was replaced by the respondent No. 7 as in-charge Headmudaris in terms of the resolution dated 25.8.2004 passed by the Managing Committee, which was approved by the Directorate vide the letter dated 5.8.2004. As he remained absent even thereafter without even bothering to reply to the various show cause notices issued to him, the Managing Committee discharged him altogether from service. He subsequently filed WP(C) No. 4632/2006 before this Court, which by the interim order dated 5.8.2006 protected his service, but the writ petition was dismissed on 8.9.2009 in default of prosecution.

5. It is also the case of the answering respondent that though the case was subsequently restored to file, the stay order was not revived. Following the dismissal of the writ petition, the Managing Committee directed the respondent No. 7 to work as the I/c Headmudaris, which was approved by the Directorate on 24.6.2011. Thereafter, the advertisement dated 24.6.2011 was issued for filling up the post of Headmudaris, but the petitioner did not raise any objection regarding the filling up of the post of Headmudaris nor did he challenge the said advertisement. Pursuant to the said advertisement, the respondent No. 7 was selected and appointed as the Headmudaris on 5.7.2011 following due process of selection, which was also approved by the answering respondent on 13.7.2011; the service of the respondent 7 is now rightly considered for provincialization. It is, therefore, contended that the writ petition is not maintainable due to the involvement of disputed question of facts and due to the failure of the petitioner to challenge the advertisement dated 24.6.2011 and the selection dated 5.7.2011 and the consequential approval order dated 13.7.2011.

6. The respondent No. 7, representing himself and the Managing Committee of the Madrassa in his affidavit-in-opposition, endorsed the stance taken by the State-respondents in their affidavit-in-opposition. Raising the very maintainability of the writ petition, he submits that the Madrassa is a Venture school, and the action taken by its Managing Committee is not amenable to the writ jurisdiction of this Court. The petitioner was appointed temporarily for the said post and had voluntarily left it and, as such, he has no locus standi to file writ court. As the claim of the petitioner that he is the Headmudaris is disputed by the respondent No. 7 by making a parallel claim to that post, there is a disputed question of fact which cannot be decided by a writ court. The petitioner is, therefore, guilty of suppression of the material fact that he had not been attending the Madrassa since 11.5.2005 and not rendering any service to the Madrassa for the last nine years. It is pointed out that the petitioner was appointed as Intermediate Assistant Teacher on 16.2.1999 while the respondent No. 7 was appointed as Assistant Teacher against FM post i.e. higher grade on 20.10.1998 thereby making the latter senior to him. He, therefore, contends that there is no merit in this writ petition, which is otherwise not maintainable in the present form and is, therefore, liable to be dismissed. These are the main contention of the respondent No. 7.

7. Before proceeding further, the material facts of the case, which are not disputed by the parties, may be noted. By the order dated 5.8.2006 issued by the respondent No. 2, the resolution dated 25.8.2004 of the Managing Committee of the Madrassa degrading the petitioner from the post of Headmudaris to Intermediate Assistant Teacher and of appointing the respondent No. 7 as the Headmudaris in his place as In-charge Headmudaris was approved. Aggrieved by this, the petitioner approached this Court in WP(C) No. 4632/2006, and this Court by the interim order dated 18.9.2006 stayed the operation of the order dated 5.8.2006, if the same had not been given effect to in the meantime. However, this Court dismissed the writ

petition on 8.9.2009 in default of prosecution. The interim order dated 18.9.2006 was also vacated. The petitioner thereafter filed Misc. Case No. 735/2010 before this Court for condonation of delay in filing the application for restoration of the writ petition which was dismissed on 8.9.2009 in default. This Court by the order dated 26.3.2010 condoned the delay and restored the writ petition to file for hearing on merit. However, the stay order was not restored and has not admittedly been restored till now.

8. The respondent No. 2 thereafter issued the order dated 24.6.2011 approving the resolution dated 1.3.2011 of the Managing Committee of the Madrassa re-affirming the resolution dated 17.9.2006, which discharged the petitioner from the post of Head Mudaris. He also in the same order instructed the I/c Head Mudaris to submit the proposal for filling up the post through advertisement. Interestingly, though the interim order dated 18.9.2006 was never revived by this Court, the respondent No. 2 issued the order dated 6.8.2012 withdrawing the order dated 24.6.2011 discharging the petitioner from the post of Head Mudaris and keeping the same in abeyance till final judgment of WP(C) No. 4632/2006 and Misc. Case No. 735/2010 was given by this Court. Though a number of issues have been raised by the petitioner, which are countered by an equal number of denials/disputes made by the respondent No. 7, I do not think it necessary to adjudicate all these disputes inasmuch as they involve complicated questions of fact, which cannot be decided without adducing oral and documentary evidence by the parties. For example, the question as to whether the petitioner had stopped attending the Madrassa since 25.8.2004 and had not since then been rendering his service to the Madrassa, in the face of denial to that effect by the answering respondents, can be decided only after taking oral and documentary evidence, for which this Court is ill-equipped.

9. That apart, the pleaded case of the respondents is that the respondent No. 7 has been holding the charge of the post of Headmaster all these years. To compound the problems for the petitioner, no whisper of statement is ever made by him in his writ petition that he has actually been discharging the duty of Headmudaris on in-charge basis since 25.8.2004. All that he said is that his discharge from the post was stayed by this Court. Now, this is different from saying that he has been functioning as In-charge Headmudaris all these years. The burden of proof that he has been continuing as in-charge Headmudaris since 25.8.2004 is upon the petitioner: he is unable to produce adequate evidence to prove it. Article 226 of the Constitution can be invoked only to enforce an established right, and cannot be invoked to establish a right. Moreover, the petitioner does not challenge the selection of the respondent No. 7 or his consequential appointment to the post of Headmudaris of the Madrassa on regular basis as approved by the respondent No. 2 by the order dated 13.7.2011. Looking at the matter from all angles, I am, therefore, of the view that this writ petition is not maintainable due to the existence of complicated disputed questions of fact.

10. I am somewhat surprised as to how the order dated 6.8.2012 was issued by the respondent No. 2 when the interim stay was never revived following the dismissal of the main case, namely, WP(C) No. 4632/2006, in default of prosecution. Restoration of the writ petition to file does not automatically revive an interim order unless an express order to that effect is passed by the Court while or after restoring the writ petition. On the other hand, in so far as the impugned order dated 17.9.2012 is concerned, I fail to understand as to how the petitioner can seriously claim that he is aggrieved by such clarification, which, as I understand, only merely stated that the question of provincialization of the service of the respondent No. 7 would be finally disposed of on receipt of the order from this Court as the entire matter was sub-judice. The service of the respondent No. 7 in the post of Headmudaris has not been provincialized and cannot be provincialized as of now due to the pendency of WP(C) No. 4632/2006 and Misc. Case No. 735/2010. If the petitioner is suffering from paranoia, this Court can only express its helplessness. There is thus no cause of action for this action. For what has been stated in the foregoing, the writ petition is not maintainable and is, accordingly, dismissed but by directing the parties to bear their respective costs. The interim order dated 5.2.2013 stands vacated.