

GAHC010009842018



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Review.Pet./47/2018

THE STATE OF ASSAM
- REP. BY THE COMMISSIONER and SECY. TO THE GOVT. OF ASSAM,
EDUCATION (ELEMENTARY) DEPTT., DISPUR, ASSAM

2: THE DIRECTOR OF ELEMENTARY EDUCATION
ASSAM
KAHILIPARA
GUWAHATI -1

VERSUS

RAMESH DIHINGIA AND 7 ORS
S/O LT. JUGA DIHINGIA, R/O VILL. GHILAGURI, PS/DIST. DHEMAJI. ASSAM
PIN. 787057

2:SRI PUTU BORGOHAIN
W/O PRAFULLYA DIHINGIA
R/O CHAPORI P.S. AND DIST. DHEMAJI
ASSAM PIN 787057

3:PHULMAI GOGOI
W/O LOHIT GOGOI
R/O VILL. JUKTALI
PS/DIST. DHEMAJI ASSAM PIN 787057

4:NABIN DIHINGIA
S/O LATE GANGADHAR DIHINGIA
R/O VILL. BONGALMARI
PO. MATIKHULA
DIST. DHEMAJI
ASSAM PIN 787057

5:JINUPRABHA KACHARI
W/O PUNYESWAR DUTTA

R/O VILL. NAGAKHELIA
PO. DHEMAJI
DIST. DHEMAJI
ASSAM PIN 787057

6:NABIN BURAGOHIAN
S/O KANAK BURAGOHAIN
R/O VILL. CHAPORI
PS/DIST. DHEMAJI ASSAM PIN 787057

7:MANIK GOHAIN
S/O NAREN GOHAIN
R/O VILL. GOALGAON
PS/DIST. DHEMAJI ASSAM PIN 787057

8:ROHIT BORGOHAIN
S/O JOYRAM BORGOHAIN
R/O VILL. CHAPORIGAON
PS/DIST. DHEMAJI ASSAM PIN. 78705

Advocate for the Petitioner : MR. D SAIKIA

Advocate for the Respondent :

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the petitioners	: Mr. N.J. Khataniar, Standing Counsel.
For the respondents	: None.
Date of hearing	: 08.05.2023.
Date of judgment	: 08.05.2023.

JUDGMENT AND ORDER

Heard Mr. N.J. Khataniar, learned standing counsel for the Elementary Education Department, representing the two review petitioners.

2. As per the office notes and order dated 10.01.2023, passed in the proceedings before the Lawazima Court, the review petitioners have not taken steps by registered post with A/D and *dasti* mode for service of notice on

the respondent nos. 1, 2, 3 and 8 despite directions given vide order dated 29.05.2019 and 07.12.2022 in the proceedings before the Lawazima Court.

3. The respondents herein are the writ petitioners in W.P.(C) 4529/2010, by which the respondents had prayed, amongst others, for setting aside the impugned order dated 19.04.2010, and two impugned orders dated 01.07.2010, and for a direction upon the authorities for payment of salary to the petitioners from the month of September, 2003. By order dated 13.08.2010, this Court had allowed the writ petition by directing as follows:-

“Heard Mr. P.J. Saikia, learned counsel appearing on behalf of the petitioners and Mr. M.K. Mishra, learned standing counsel appearing on behalf of respondents.

On 11.8.2010, this court directed the learned standing counsel to go through the earlier cases relied upon by the petitioner(s) in order to find out as to whether this case is covered by the decision of the earlier cases which are stated to have dealt with the subject matter of this case.

Mr. Mishra, learned standing counsel appearing on behalf of the respondents submits that he has gone through the cases which are relied upon by the petitioner and it is found that the case of the petitioners is covered by the earlier judgment passed by the Court.

The petitioners eight in number, belong to category of teachers who were terminated from service on 18.05.1992 and whose termination has been set aside by this court in a number of cases.

The prayer made in this writ petition is to allow the petitioners to draw her salary with effect from September, 2003 onwards. Similar nature of cases came up for consideration before the Hon’ble Division Bench in WP’ No. 349/2009 and in that case, the Hon’ble Division Bench directed the respondents to release the salary of the petitioners, which have been withheld from October, 2007, following the orders passed in WP(c) Nos. 3149/2008, 6032/2007 and 1293/2008. The case of the petitioners is squarely covered by the aforesaid order dated 9.4.2010, passed in WP’ No. 349/2009 and other connected cases and as such, the State respondents is, therefore, directed to release the salary of the petitioners which have been withheld with effect of September, 2007 and, thereafter, pay their salary regularly.

*With the above observations and directions, this writ petition is disposed of.
No costs.”*

4. The learned standing counsel for the petitioners has submitted that the writ petition had come up for motion on 13.08.2010 and although there is no order-sheet in the writ proceeding that the matter was listed on 11.08.2010, this Court had recorded that on 11.08.2010, the learned standing counsel was given an opportunity to go through earlier cases relied upon by the petitioners, and accordingly, the writ petition was allowed at the motion stage without issuing notice on the respondents. The learned standing counsel for the petitioners has referred to the various statements made in this review petition and has submitted that the case of the respondents was that (i) pursuant to advertisement issued in the year 1986, the petitioners were appointed as Assistant Teachers (ATs for short) in vacant posts of Lower Primary Schools in Dhemaji District vide separate orders issued by the Deputy Inspector of Schools on 19.12.1989. They were paid their salaries in the year 1994 after a long gap. However, they had come to know that their services were terminated vide order dated 18.05.1992 and that they were entitled to their salaries only upto 1992. Resultantly, the writ petitioners (i.e. respondents herein) had challenged their termination orders by filing Civil Rule Nos. 1989/1995, and 546/1995. The said writ petitions were allowed by orders dated 22.05.1995 and 19.07.1995 respectively, by quashing the termination orders and the State authorities were directed to pay the salary of the respondents herein and it was also directed that if the service of any other similarly situated persons has been regularized, then to regularize the service of the respondents herein after enquiry. It is submitted that the further case of the petitioners in the writ petition was that their services were regularized, but again in the month of September, 2003, their salaries were abruptly stopped. The petitioners again approached this Court by filing W.P.(C) Nos. 2872/2007, 2871/2007 and 2857/2007 and the said

writ petitions were disposed of by order dated 15.06.2007 in terms of directions contained in the decision of this Court in the case of *Sudhendu Mohan Talukdar & Ors. v. The State of Assam & Anr., 2006 (2) GLT 216*, by directing the respondents herein to submit their representations before the Committee constituted by this Court, which would deal with the issue as per direction given by this Court.

5. Thus, it was submitted that without the report of the Committee, the impugned order ought not to have been passed. It is submitted that as per enquiry conducted by the Government, the respondents were not appointed in sanctioned posts and that the respondents were appointed in non-existent and/or non-sanctioned posts and as the appointment was illegal/irregular, there was no scope for adjusting the service of the respondents against non-plan posts since they were appointed illegally.

6. It has been submitted that there were a lot of anomalies in the appointment of the respondents, which amounted to illegality. It has been submitted that pursuant to the judgment and order dated 02.03.2010, passed by the Division Bench of this Court in W.P.(C) 1048/2004 – *Manoj Kumar Sarma v. State of Assam & Ors.*, the State authorities had undertaken an exercise to screen the ATs who were appointed in Lower Primary and Upper Primary Schools during the year 1989 to 2001 and large scale illegal appointments were detected. It has been submitted that 5 (five) Screening Committees were constituted under the following zones, viz., Upper Assam Division, Lower Assam Division, North Assam Division, Hills and Barak Valley Division, and BTC Area. It was submitted that the screening exercise had involved examining 4040 teachers purportedly appointed under Operation Black Board (OBB) Scheme

during 1998-99 and 7066 teachers appointed under the same OBB Scheme during the year 2001, and that schemes were formulated to regularise deserving cases and to terminate non-deserving cases. After scrutiny of the report by the Screening Committees, the Divisional Screening Committees had categorized the teachers in following categories, viz., (i) recommended and working till date – 136 nos. of teachers; (ii) recommended but discontinued the service- 250 nos. of teachers; (iii) not recommended but working till date - 8706 nos. of teachers; (iv) not recommended and discontinued the service – 2664 nos. of teachers; i.e. total 11,756 teachers. It is emphatically submitted that as per the finding recorded by the Screening Committee, the names of the respondents are reflected in the list of 8706 illegally appointed teachers. It has been submitted by the learned standing counsel for the petitioners that he is in a position to show from the screening report that the names of the respondents are either not captured in the DISE Code, or not regularly captured in the DISE Code.

7. It has also been submitted that the respondents were not appointed in accordance with the procedure prescribed in the Assam Elementary Education (Provincialisation of Service) Rules, 1977. Accordingly, it has been submitted that there are a catena of decisions by this Court as well as by the Supreme Court that the illegal appointees do not have any enforceable right either for regularisation of service or for claim to salary.

8. In order to explain the delay in approaching the Court for review of the order dated 13.08.2010, passed in W.P.(C) 4529/2010, it has been submitted that the review petitioners had waited for the outcome of the screening exercise and as it has been found that the respondents were also illegally appointed ATs, the petitioners had filed this review petition. It has been

submitted that being illegally appointed teachers, the State cannot be burdened to pay salary to such illegally appointed teachers. It has been submitted that as the Screening Committee has found that the respondents are illegal appointees, the Government is not in a position to pay salary to the respondents.

9. Considered the materials available on record and considered the submissions made by the learned standing counsel for the petitioners and the learned counsel for the respondents. The point-wise discussions are as mentioned below.

Whether or not the order dated 13.08.2010 in W.P.(C) 4529/2010 and/or appointment of the respondents was vitiated by fraud:

10. At the outset it may be mentioned that in this review petition, it is not the pleaded ground for review that the judgment dated 13.08.2010 in W.P.(C) 4829/2010 was vitiated by fraud. It is also not the pleaded ground for review that the appointment of the respondents was vitiated by fraud. Existence of element of "fraud" is not even a pleaded ground for review.

11. Thus, in total absence of pleadings in this review petition to the effect that the order dated 13.08.2010 in W.P.(C) 4529/2010 and/or appointment of the respondents was vitiated by fraud. The point is answered accordingly.

Can events subsequent to the passing of the impugned judgment by examining of appointments made during 1991-2001 constitute a good ground for review:

12. It was submitted by the learned counsel for the petitioners that the screening exercise undertaken pursuant to the order dated 13.07.2009, passed by the Division Bench of this Court in W.P.(C) 1048/2004 and Cabinet

decision dated 26.02.2011, had involved examining 4040 teachers purportedly appointed under Operation Black Board (OBB) Scheme during 1998-99 and 7066 teachers appointed under the same OBB Scheme during the year 2001, and that schemes were formulated to regularise deserving cases and to terminate non-deserving cases. After scrutiny of the report by the Screening Committees, the Divisional Screening Committees had categorized the teachers in following categories, viz., (i) recommended and working till date – 136 nos. of teachers; (ii) recommended but discontinued the service- 250 nos. of teachers; (iii) not recommended but working till date - 8706 nos. of teachers; (iv) not recommended and discontinued the service – 2664 nos. of teachers; i.e. total 11,756 teachers. It has been emphatically submitted by the learned standing counsel for the petitioners that as per the finding recorded by the Screening Committee, the names of the respondents are reflected in the list of 8706 illegally appointed teachers.

13. In para 18 of this review petition, a specific statement has been made to the effect that the name of respondent no.1- Ramesh Dihingia was captured in the DISE Code for the year 2002-03, 2003-04, 2004-05, 2009-10 and 2010-11. The name of respondent no. 4- Nabin Dihingia was captured in the DISE code for the year 2002-03, 2004-05 and the name of respondent no. 5- Jinuprabha Kachari was captured in DISE Code for the year 2005-06 and 2006-07 and that the names of the respondents do not appear in DISE Code for other years. Hence, it was submitted that the respondents cannot be said to be working till date.

14. It may be mentioned that for reasons best known to the petitioners, the purported list of teachers whose cases have been enquired by

the Screening Committees was not produced even in this review petition. Nonetheless, as indicated herein before, re-verification was ordered vide notification dated 03.11.2016. Therefore, the re-verification report, if any, would prevail over the purported communication dated 24.02.2015.

15. It may be relevant to mention herein that in the proceeding of *The State of Assam & Anr. v. Sikha Das Gupta (Roy) & Ors., Rev. Pet. No. 60/2018, decided by this Court on 28.04.2003*, which was a review petition filed by the Elementary Education Department in a similar case where direction in the writ proceeding was to make payment of salary to the teachers who had rendered their service, the case of the Elementary Education Department was that after the Screening Committees had submitted their report to the Government, pursuant to Govt. notification no. PMA.281/2013/58 dated 04.06.2014, the same was compiled by the Elementary Education Department. However, in view of complaints received, the Commissioner and Secretary to the Government of Assam, Elementary Education Department (petitioner no.1) had ordered re-verification vide notification no. PMA.281/2013/ 134 dated 03.11.2016. In the proceeding of Review Pet. No. 60/2018, the petitioners herein had relied on the order under Memo No. EDN (LC)27/2016/150/Pt-II/38 dated 13.07.2018, issued by the Commissioner and Secretary to the Government of Assam, Elementary Education Department (petitioner no.1) regarding decision of the Government to issue individual notices to 8740 illegally appointed teachers and 766 including 752 terminated teachers to show cause as to why they should not be removed from service. However, the petitioners herein had not brought on record any finding given by the authorities regarding illegal appointments, if any, made.

16. Thus, it is noted that the review petitioners, who had filed this review petition has taken a somewhat stand different than one taken in the proceeding of Review Pet. No. 60/2018 and had not taken a similar stand.

17. Although it is made to appear that the screening committee reports and re-verification reports were available with the petitioners. However, there is no explanation in this review petition as to why those materials have been withheld by the petitioners.

18. The Screening Committee Reports, if any, would take a back-seat in light of re-verification conducted by the Elementary Education Department. Moreover, as there are record available in the proceeding of Review Pet. No. 60/2018 that individual show cause notices was issued to terminate the service of illegally appointed teachers, the finding of the authorities on show cause proceeding, if any, would prevail over the Screening Committee Reports and Re-verification Reports.

19. Thus, the so called subsequent events, which had followed the order dated 13.08.2010, passed by this Court in W.P.(C) 4529/2010, cannot be held to be of "sterling quality" which could persuade this Court to exercise review jurisdiction. Facts relating to issuance of individual show cause notice, if any, to similarly situated alleged illegally appointed teachers has been withheld in this case.

20. Be that as it may, the review jurisdiction can be exercised within the scope and ambit of the provisions of Section 114 CPC read with the provisions of Order XLVII, Rule 1 CPC.

21. The provision of Section 114 CPC is quoted below:-

114. Review.- *Subject as aforesaid, any person considering himself aggrieved—*
(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
(b) by a decree or order from which no appeal is allowed by this Court, or
(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

22. The provision of Order XLVII, Rule 1 is also quoted below:-

1. Application for review of judgment- *(1) Any person considering himself aggrieved—*

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.

23. In the said context, it may be mentioned that the petitioners have not been able to show that subsequent events that had happened long after passing of the judgment of this Court can be a ground for review.

24. The petitioners have failed to show how a mere statement by the

petitioners that subsequent to the passing of the order dated 13.08.2010 in W.P. (C) 4529/2010, on re-verification, the respondents were found to be illegally appointed can constitute a ground to exercise of review jurisdiction by this Court when the authorities had decided to issue show cause notice to some other purported illegally appointed teachers. There is also no pleading as to whether proceeding arising out of show cause notices issued by the petitioners was brought to its logical conclusion.

25. Therefore, the petitioners have not been able to demonstrate that this is a case wherein the order dated 13.08.2010 of this Court in W.P.(C) 4529/2010 was vitiated by any error apparent on the face of record, or that there was discovery of any new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the petitioners or could not be produced by them at the time when the judgment and order was made. Hence, the Court is constrained to hold that none of the legal pre-requisites for exercising review jurisdiction exists in this case.

26. It is trite law that review judgment operates retrospectively. In the case of *M.A. Murthy v. State of Karnataka, (2003) 7 SCC 517*, the Supreme Court of India was considering whether the review judgment would have retrospective or prospective effect and in the said context, it was held that as the review judgment has the effect of overruling the previous judgment, it was held that review judgment operates as the law from inception and is operative retrospectively. Para 8 thereof is extracted below:-

8. *The learned counsel for the appellant submitted that the approach of the High Court is erroneous as the law declared by this Court is presumed to be the law at all times. Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective of its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception.*

The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in L.C. Golak Nath v. State of Punjab, AIR 1967 SC 1643. In Managing Director, ECIL v. B. Karunakar, (1993) 4 SCC 727, the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding the law declared by it earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. [See Ashok Kumar Gupta v. State of U.P., (1997) 5 SCC 201 and Baburam v. C.C. Jacob, (1999) 3 SCC 362]. It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs. That being the position, the High Court was in error by holding that the judgment which operated on the date of selection was operative and not the review judgment in Ashok Kumar Sharma case No. II, (1997) 4 SCC 18. All the more so when the subsequent judgment is by way of review of the first judgment in which case there are no judgments at all and the subsequent judgment rendered on review petitions is the one and only judgment rendered, effectively and for all purposes, the earlier decision having been erased by countenancing the review applications. The impugned judgments of the High Court are, therefore, set aside.

27. In view of the ratio laid down in the hereinbefore referred case of *M.A. Murthy (supra)*, it is not envisaged that in exercise of review jurisdiction, the Court would consider materials which have come into existence after the judgment dated 13.08.2010 was passed and use it to modify/ alter/ vary the said order dated 13.08.2010. This is not a case where any accidental or clerical omission or error has crept in the order dated 13.08.2010. This is also not a case where despite due diligence any material relevant to the enquiry could not

be produced by the petitioners at the time when W.P.(C) 4529/2010 was being heard. Thus, in the considered opinion of the Court, none of the ground nos. (a) to (g) mentioned in para 23 of this review petition constitutes good grounds for this Court to exercise jurisdiction of review in respect of the order dated 13.08.2010 passed by this Court in W.P.(C) 4529/2010.

28. Therefore, this is not a case where power to review ought to be exercised by the Court in respect of the judgment and order dated 13.08.2010 passed by this Court in W.P.(C) 4529/2010.

Maintainability of this review petition:

29. In the opinion of the Court, this review petition would fail on the ground of non-joinder of necessary parties. In the proceedings of W.P.(C) 4529/2010 5 (five) respondents were impleaded, viz., (1) The State of Assam through the Commissioner and Secretary to the Govt. of Assam, Education Deptt., (2) The Joint Secretary to the Govt. of Assam, Education Deptt., (3) The Director of Elementary Education, Assam, (4) The Joint Director of Elementary Education, Assam, and (5) The Deputy Inspector of Schools, Dhemaji. However, this instant review has been filed by the two out of five respondents in W.P.(C) 4529/2010, namely, (1) The State of Assam through the Commissioner and Secretary to the Govt. of Assam, Education Deptt., and (2) The Director of Elementary Education, Assam. However, the other three respondents, namely, (a) The Joint Secretary to the Govt. of Assam, Education Deptt., (b) The Joint Director of Elementary Education, Assam, and (c) The Deputy Inspector of Schools, Dhemaji were neither arrayed as the review petitioners, nor were they arrayed as proforma respondents. The said three parties were proper and necessary parties in the review petition. As the said authorities have accepted

the order dated 13.08.2010, passed in W.P.(C) 4529/2010, it would not be appropriate to review the impugned order.

30. In this review petition, the delay and laches on part of the petitioners in approaching this Court is not explained at all. The petitioners had accepted the order dated 13.08.2010, passed in W.P.(C) 4529/2010 for about 7 years 5 months and the petitioners had filed this review petition on 18.01.2018. Thus, this appears to be a fit case to invoke the legal maxim of *vigilantibus non dormientibus jura subveniunt*, meaning that the law will assist only those who are vigilant about their rights and not those who sleep over them. This maxim is also referred to by the Supreme Court of India in the case of *Sagufa Ahmed v. Upper Assam Plywood Products Pvt. Ltd., (2020) 222 Comp Case 559: (2021) 2 SCC 317*, which was decided by a 3-Judge Bench.

31. Although this review petition was filed after about 7 years 5 months, the petitioners have also failed to take steps for service of notice on the respondent nos. 1, 2, 3 and 8 despite directions given vide order dated 29.05.2019 and 07.12.2022 in the proceedings before the Lawazima Court. In this manner, about 5 years 4 months has gone by. Therefore, for non-taking of steps for service of notice on the respondents nos. 1, 2, 3 and 8, this review petition is liable to be dismissed for non-prosecution.

32. Therefore, in view of the discussions above this review petition fails on three points of maintainability as well as on merit. Accordingly, this review petition stands dismissed. The petitioners are left to bear their own cost.

33. At this stage, the learned standing counsel for the petitioners has submitted that as per instructions received by him, during the pendency of

this review petition, the respondent nos. 1 to 4 and 6 to 8 have been accommodated as "Tutors", based on their qualification, with certain terms, which have been accepted by the said respondents. However, the case of respondent no. 5 could not be considered because on the date of consideration, the said respondent had crossed the date of superannuation. The said submission has been recorded without commenting on the merit of such submission.

JUDGE

Comparing Assistant