

GAHC010012132022



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

Case No. : WP(C)/586/2022

SANJIB DAS
S/O- SURESH DAS, R/O- VILL.- CHAMTILLA, P.O. CHAMTILLA, DIST.-
KARIMGANJ, ASSAM, PIN- 788736.

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF
ASSAM, EDUCATION (ELEMENTARY) DEPARTMENT, DISPUR, GUWAHATI-
6.

2:THE DIRECTOR
ELEMENTARY EDUCATION
ASSAM
KAHILIPARA
GUWAHATI-19.

3:THE DISTRICT ELEMENTARY EDUCATION OFFICER
KARIMGANJ
P.O. AND DIST.- KARIMGANJ
ASSAM

4:THE BLOCK ELEMENTARY EDUCATION OFFICER
RAMKRISHNA NAGAR EDUCATION BLOCK
RAMKRISHNA NAGAR
P.O. RAMKRISHNA NAGAR
DIST.- KARIMGANJ
ASSAM

5:DIWAKAR RAI
S/O- LATE BIKASH RANJAN RAI
VILL.- LALCHERRA
P.O. FANAIRBOND
DIST.- KARIMGANJ

ASSAM
PIN- 788737

Advocate for the Petitioner : DR. B AHMED
Advocate for the Respondent : SC, ELEM. EDU

BEFORE
HON'BLE MR. JUSTICE MANASH RANJAN PATHAK
ORDER

20-02-2023

Heard Mr. K. Uddin, learned counsel for the petitioner and Mr. N. J. Khataniar, learned Standing counsel, Department of School (Elementary) Education, Assam for the respondent Nos. 1 to 4. Also heard Mr. A. K. Baruah, learned counsel for the respondent No. 5.

2. The petitioner is an Assamese Language Teacher in Fanairbond Adarsha M.E. School in the Ramkrishna Nagar Education Block of District-Karimganj, a provincialised upper primary school of the State and the respondent No. 5 is a Hindi Teacher of the same school.

3. After the retirement of the regular Headmaster of said Fanairbond Adarsha M.E.School on 31.12.2022 on attaining the age of superannuation at 60 years, the District Elementary Education Officer, (DEEO) Karimganj by his communication under Memo No. K-DEO/92020-21/P-2/6079-82 dated 16.12.2021 directed the said regular Headmaster of school to hand over the charge of the Headmaster to the respondent No. 5 holding him to be the senior most teacher of said school.

4. Being aggrieved with such decision of the DEEO, Karimganj dated 16.12.2021, noted above, the petitioner filed this writ petition on 20.01.2022 praying amongst others for direction to the respondent authorities to set aside the letter dated 16.12.2021 of the DEEO, Karimganj so far it relates to the direction of the said authority to hand over the charge of Headmaster of said school to the respondent No. 5 (Annexure-5 to this petition) and to quash the said letter dated 16.12.2021 finding that the respondent No. 5 is the senior most teacher of said school and to allow the petitioner to hold the charge of In-charge Headmaster of said school who is its second senior most teacher.

5. The respondent No. 2 Director of Elementary Education (DEE), Assam as well as the private respondent No. 5 filed their respective affidavits in the matter. The petitioner has also filed an additional affidavit in the matter.

6. The claim of the petitioner is that the DEEO, Karimganj vide order under Memo No. 9318-22 dated 08.01.1996 allowed him to act as an Assamese Language Teacher in said school in the Pay Scale of Rs. 1185/- to 2395/- per month plus other allowances as admissible under rules for a period of 4 (four) months w.e.f. the date of his joining as one Sri Birendra Sinha, Assamese Language Teacher of the school was adjusted to the post of Assistant Teacher in said school and pursuant to the same, the petitioner joined his service on 10.01.1996 itself and since then he is serving in that school.

7. The petitioner placed before the Court a copy of the order under Memo No. K-DEO/99-2000/2958-71 dated 11.06.1999 issued by the DEEO, Karimganj, pursuant to the letter of the DEE, Assam vide No. ELM-52/97/29 dated 31.03.1999 whereby regularised the service of the petitioner from the date of his joining in the concerned school on the ground that his was extended by the office of the DEEO, Karimganj from time to time (Annexure-2 to this petition).

8. The petitioner submitted that the DEEO, Karimganj by order under Memo No. KDEO/98-99/7566-71 dated 30.10.1998 appointed the respondent No. 5 adjusting him to the post of Hindi Teacher of said school fell vacant due to expiry of one Byasmuni Tewari in the Pay Scale of Rs. 1185/- to 2395/- or as per the Government Scale sanctioned from time to time plus other allowances as admissible under the Government Rules with immediate effect (Annexure-3 to this petition).

9. The petitioner also submitted that though by order dated 11.06.1999 issued by the DEEO, Karimganj pursuant to the letter of the DEE, Assam dated 31.03.1999 regularised his service as an Assamese Language Teacher in said school and such regularization was from the date of his joining in said school i.e. w.e.f., 10.01.1996, he is senior to the respondent No. 5 since his service has been regularized w.e.f. 10.01.1996 and that the respondent No. 5 was appointed only on 30.10.1998.

10. The petitioner filed an application before the DEEO, Karimganj on 27.12.2021 for redressal of his grievances with regard to said communication dated 16.12.2021 of the DEEO, Karimganj whereby the said authority allowed the respondent No. 5 to be the Headmaster in-charge of the said school holding him to be the senior most above the petitioner which according to the petitioner is yet to be disposed of.

11. The petitioner along with this writ petition has also annexed an order of the Commissioner & Secretary to the Government of Assam in the Education Department dated 06.03.2003 whereby the Deputy Inspector of Schools/the District Elementary Education Officers/the Inspector of Schools were warned and directed not to approve any appointment made by the Managing Committee of

provincialised schools. Further, the State Government directed those authorities to inspect all the schools under their jurisdiction and to disallow any such person found working as honorary teachers on appointment made by the Managing Committee of such provincialised schools observing that the same should be done forthwith and the action should be taken accordingly and should be reported by the concerned District officials to the respective Directors.

12. In the affidavit filed by the DEE, Assam in the matter on 18.04.2022, admitted the fact that the petitioner was appointed as an Assamese Language Teacher by the DEEO, Karimganj vide letter dated 08.01.1996 and his service along with four others were regularized vide order dated 11.06.1999 w.e.f. the date of joining in their respective schools.

13. In its said affidavit, it is clarified that the respondent No. 5 was originally appointed by the Headmaster of said Fanairbond Adarsha M.E. School as a Hindi Teacher on the basis of the resolution adopted by its School Managing Committee on 25.08.1990 and he joined the said school on 01.09.1990. Thereafter, in pursuance of the Court's order dated 25.05.1996 passed in Civil Rule No. 2144/1995, the service of the respondent No. 5 was adjusted with immediate effect to the post of Hindi Teacher in said school vide order dated 30.10.1998 issued by the DEEO, Karimganj. However, excepting the same, the DEE, Assam in its affidavit did not determine the seniority of the petitioner vis-a-vis the respondent No. 5.

14. The respondent No. 5 also filed an affidavit in the matter on 06.08.2022 and stated that he joined the said school on 01.09.1990, whereas the petitioner joined the said school on 10.01.1996, therefore, he is much senior than the petitioner. He also stated that the seniority of a member of the service in a cadre who joins in a school otherwise than by the direct recruitment shall be determined as per the date of joining in the school in the concerned cadre.

15. In his said affidavit, the respondent No. 5 further stated that because of increase of enrollment of the students in said school, its Managing Committee on 25.08.1990 resolved to appoint him as a Hindi Teacher in said school, pursuant to which the appointment order was issued to him by the School authorities and on the basis of which, he joined the said school on 01.09.1990 and since then, discharging his duties in said school.

16. In said Civil Rule No. 2144/1995, the Court on 24.05.1996 directed the DEEO, Karimganj to consider the case of the petitioner therein i.e. the respondent No. 5 herein and to pass an appropriate order considering the existing government policy in that stage and thereafter, on 30.10.1998, the

DEEO, Karimganj after considering all, adjusted his service against the vacant sanctioned post of Hindi Teacher in Fanairbond Adarsha M.E. School on the basis of which the respondent No. 5 joined in regular service on 01.11.1998.

17. Placing the provisions of Rule 24 (3) of the Assam Secondary Education (Provincialised Schools) Service Rules, 2018, the respondent No. 5 submitted that the inter-se seniority of a member of the service in a cadre who joins in a school otherwise than by direct recruitment shall be determined on the basis of the date of joining and since both the petitioner and the respondent No. 5 did not joined the said school on the basis of direct recruitment, their seniority is required to be counted from the date of their joining, therefore, the respondent No. 5 who joined the said school on 01.09.1990 is senior to the petitioner who joined the said school on 10.01.1996.

18. Since the regular Headmaster Birendra Sinha on attaining his age of superannuation at 60 years retired from service on 31.12.2021, there was requirement to hand over the charge of Headmaster to the senior most teacher of said school and as the petitioner was unwilling to take the charge of Headmaster of said school, the respondent authorities had no option and offered the charge of Headmaster to the respondent No. 5.

19. Relying on the decision of this Court passed in the case of *Bilu Borah Saikia Vs. the State of Assam and others* decided on 09.01.2018 and the decision of the Hon'ble Apex Court passed in the case of *Pawan Pratap Singh and others Vs. Reevan Singh and others* decided on 10.02.2011 reported in (2011) 3 SCC 267, the respondent No. 5 submitted before the Court that the seniority cannot be granted from the back date and if it is done, it must be on objective consideration and on valid classification and must be traceable to the Statutory Rules.

20. It is urged by him that the seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been born in the cadre and by doing so, it may adversely affect the employees who have been appointed validly in the meantime.

21. Placing the decision of the Hon'ble Apex Court passed in the case of the *Direct Recruitment Class-II Engineering Officers Association*, the respondent No. 5 submits that if the service of an incumbent is regularised with retrospective effect, even then, the said incumbent will be entitled to all other service benefits of such regularization from a retrospective date but the said incumbent cannot

be given the benefit of seniority over others on the basis of such retrospective regularization.

22. Placing the Service Book of the petitioner annexed by the petitioner himself in his additional affidavit filed on 09.01.2023, he submitted that his appointment order issued by the DEEO, Karimganj on 08.01.1996 as an Assamese Language Teacher was purely on ad-hoc basis and his service was regularized by the DEEO, Karimganj vide order dated 11.06.1999 since the date of his joining in service w.e.f. 10.01.1996.

23. As the service of the petitioner was purely on ad-hoc basis, as such, according to the respondent No. 5, the petitioner is not entitled to seniority till his service is regularized. The respondent No. 5 urged that the petitioner's seniority can be reckoned only w.e.f. the order dated 11.06.1999 issued by the DEEO, Karimganj regularizing his service.

24. During the deliberation of the matter, the Court earlier directed the respondent authorities in the Elementary Education to place certain information, more particularly, the Gradation List of teaching staff of provincialised ME/MV/MEM of the District-Karimganj for promotion to the post of Headmaster/Headmistress/ Superintendent in such schools prepared by the concerned committee on 14.07.2022.

25. In spite of giving time to the respondent authorities in the Elementary Education Department, it failed to place any such information before the Court till date.

26. The petitioner placed before the Court a copy of the Gradation List of teachers in respect of ME schools for promotion to the post of Headmaster wherein the name of the petitioner figured at Sl. No. 67, showing his educational qualification as B.A.with Assamese, date of joining/entry in regular service as 10.01.1996 having Diploma in Elementary Education, length of service upto 31.12.2020 as 25 years whereas the name of the respondent No. 5 figured at Sl. No. 85 showing his educational qualification as B.A. with Kobid, date of joining/entry in regular service as 01.11.1998 with 22 years of length of service as on 31.12.2020.

27. Petitioner stated that since the District Level Selection Committee prepared the Gradation List of seniority-cum-efficiency for promotion to the post of Headmaster in provincialised M.E. Schools in the district of Karimganj in which his name is figured at Sl. No. 93 and that of the respondent No. 5 figured at Sl. No. 189, further, he is senior to the respondent No. 5 and that pursuant to such Gradation List prepared by the committee concerned, he should be allowed to hold the charge of Headmaster of said school.

28. The Court by order dated 03.01.2023, called for the records of said Civil Rule No. 2144/1995 preferred by the respondent No. 5 herein that was disposed of on 24.05.1996. From the perusal of the same, it is seen that the mother of the respondent No. 5 was a Headmistress of 728 No. Lalacherra Hindi L.P. School under Karimganj District who died-in-harness on 16.04.1984 and that the respondent No. 5 on attaining the age of majority of 18 years on 05.05.1986, submitted an application before the DEEO, Karimganj for his appointment on compassionate ground on the basis of the Office Memorandum No. ABP-357/80/137 dated 09.09.1983 of the State Government in the Personnel (B) Department.

29. As his said application for compassionate appointment was pending before the concerned authority, on his application before the authorities of said Fanairbond Adarsha M.E.School, a provincialised school of the State, its Managing Committee on 25.08.1990 resolved to appoint/adjust the respondent No. 5 as a Hindi Teacher of said school considering the increasing numbers of students in it, accordingly, the Headmistress of said school on 30.10.1998 appointed the respondent No. 5 as honorary teacher, pursuant to which he joined the said school on 01.09.1999 and since then, he is rendering his service in said school.

30. In the meanwhile, as the regular Headmaster of said school expired on 22.12.1994, the respondent No. 5 (petitioner therein) filed said Civil Rule No. 2144/1995 on 30.05.1995 praying amongst others to direct the respondent authorities therein to regularize his service and/or to appoint him regularly as a junior Hindi Teacher with interim prayers to direct the respondent authorities to keep a post of junior Hindi Teacher vacant for him in the said school that fell vacant due to expiry of Byasmuni Tewari, a Hindi Teacher of said school and not to oust him from service and to pay him consolidated sum of Rs. 900/- per month i.e., stipendiary pay.

31. The Court on 31.05.1995 while issuing Rule in said Civil Rule No. 2144/1995 observed that the post of Hindi Teacher in Fanairbond Adarsha M.E. School fell vacant due to death of Byasmuni Tewari, shall not be filled up without prior permission from the Court and that the respondent No. 5 (petitioner therein) shall not be ousted from the post.

32. The Court by order dated 24.05.1996 disposed of said Civil Rule No. 2144/1995 directing the DEEO, Karimganj to consider the case of the petitioner therein for appointing him as a Hindi Teacher if he is otherwise qualified for the said post and to pass an appropriate order considering the existing Government Policy in that regard further directing the said respondent No. 4 therein to complete the process within a period of 6 (six) weeks from the date of receipt of the certified copy of said order.

33. At Para 7 of the said Office Memorandum No. ABP-357/80/137 dated 09.09.1983 of the State Government in the Personnel (B) Department with regard to compassionate appointment annexed by Diwakar Rai, respondent No. 5 in his writ petition, Civil Rule No. 2144/1995, it is clearly observed that *"if several years have passed after the death of Government Servant, it would appear on the face of it that the family has managed to support itself all these years and has some means of subsistence. In such a case, compassionate appointment would not ordinarily be justified. Applications for appointment under this scheme should be carefully examined from the point of view of immediate need for assistance to ensure that only the most deserving get the benefit of the scheme."*

34. The respondent No. 5 in said Civil Rule No. 2144/1995 clearly stated that as his mother, Headmistress of 728 No. Lalacherra L.P. School expired on 16.04.1984, he attained the age of majority of 18 years, applied for his appointment on compassionate ground. However, pursuant to the order of the Court dated 24.05.1996 passed in said Civil Rule No. 2144/1995, the DEEO, Karimganj vide order dated 30.10.1998 adjusted the respondent No. 5 to the post of Hindi Teacher of said Fanairbond Adarsha M.E. School that was lying vacant due to expiry of one Hindi Teacher namely, Byasmuni Tewari on 22.12.1994 in the Pay of Scale of Rs. 1185/- to 2395/- plus other allowances as admissible with immediate effect. As such, the respondent No. 5 born in the cadre of Hindi teacher in provincialised M.E. School in the district of Karimganj w.e.f. 30.10.1998.

35. With regard to the petitioner, the DEEO, Karimganj on 08.01.1996 appointed him as an Assamese Language Teacher initially for a period of four months against a resultant vacancy of one Assamese Language Teacher Birendra Sinha in said Fanairbond Adarsha M.E. School who was adjusted to the post of Assistant Teacher in said school, pursuant to which, he joined the said school on 10.01.1996 as an Assamese Language Teacher.

36. The service of the petitioner as an Assamese Language Teacher in said school was extended by the DEEO, Karimganj on various dates and by order dated 11.06.1999 regularised his service w.e.f. the date of joining the said school i.e., 10.01.1996.

37. By order dated 11.06.1999 issued by the DEEO, Karimganj in pursuance of the letter of the DEE, Assam dated 31.03.1999, service of the petitioner was regularized but the said order is totally silent with regard to the seniority of the petitioner since 10.01.1996 i.e., from the date of his joining as an Assamese Language Teacher in said school.

38. Prior to coming into force of the Right of Children to Free and Compulsory Education (RTE)

Act, 2009 and the Assam Right of Children to Free and Compulsory Education Rules, 2011, the Assam Elementary Education (Provincialisation) Rules, 1977, a Statutory Rules under Article 309 of the Constitution of India regulating the recruitment and the conditions of service of teachers of Elementary Schools provincialised under the Assam Elementary Education (Provincialisation) Act, 1974 as amended from time to time was in force.

39. Said 1977 Rules laid down the process of method of recruitment of teachers in such primary and upper primary provincialised schools of the State and the post of Assistant Teachers in such provincialised primary and upper primary schools were filled up by a process of direct recruitment after the advertisement and selection.

40. From among the selected candidates in order of merit, only from the authenticated select list, it is seen that the petitioner was not appointed as an Assamese Language Teacher by following the said 1977 Rules. Further, though the respondent No. 5 was appointed in terms of the Court order dated 24.05.1996 passed in said Civil Rule No. 2144/1995 but not following the provisions of the scheme of compassionate appointment laid down in the O.M. dated 09.09.1983 inspite of the order dated 24.05.1996 wherein specifically directed the DEEO, Karimganj to consider his case and to pass an appropriate order considering the existing Government Policy in that regard and at the time of such appointment of the respondent No. 5, said OM dated 09.09.1983 was in force about which it is already specified above.

41. With regard to the decision of this Court passed in the case of *Bilu Borah Saikia* (supra) placed by the respondent No. 5 in support of his claim, it is seen that the respondent No. 6 therein was appointed by the School Management Committee on 26.02.1990 as a Hindi Teacher on honorary basis whereas the school in question was a provincialised school and the concerned authorities regularized the service of the said respondent No. 6 with retrospective effect from 16.11.1991 wherein the Court considering the decisions of the Hon'ble Apex Court passed in the cases of *the Direct Recruit Class II Engineering Officers Association* (supra) and *Pawan Pratap Singh* (supra), held that the said respondent No. 6 cannot be given the benefit of seniority over others on the basis of such retrospective regularization.

42. As such, the respondent No. 5 cannot claim his seniority in service being appointed by the Managing Committee of a provincialised M.E. School on honorary basis w.e.f. 01.09.1990.

43. However, the petitioner was appointed on ad-hoc basis in regular Scale of Pay as an Assamese

Language Teacher by the DEEO, Karimganj whose service was extended from time to time and pursuant to the letter dated 31.03.1999 of the DEE, Assam, the DEEO, Karimganj vide order dated 11.06.1999 regularised the service of the petitioner w.e.f. date of his joining in said school as an Assamese Language Teacher on 10.1.1996 and the respondent No. 5 did not challenge the said order of regularization of service of the petitioner at any stage since 11.06.1999.

44. Considering the above, this Court is of the view that the decision passed in the case of *Bilu Borah Saikia* (supra) relied upon by the respondent No. 5, is not applicable in the present case.

45. It is already noted above that the service of the petitioner was appointed on ad-hoc basis as an Assamese Language Teacher against the post that fell vacant due to upgradation of an Assamese Language Teacher to the post of Assistant Teacher without following any such advertisement and selection for the said post and which was only initially for a period of four months that was extended from time to time and subsequently regularized by the DEEO, Karimganj vide order dated 11.06.1999 but the said order did not state regarding seniority of the petitioner who served on adh-hoc basis.

46. Considering the entire aspect of the matter, it is directed that the seniority dispute between the petitioner and the respondent No. 5 shall be settled by the Director of Elementary Education, Assam after hearing the petitioner as well as the respondent No.5 considering the relevant Rules and the records of their appointments.

47. Both the petitioner and the respondent No. 5 shall submit their respective representations before the Director of Elementary Education, Assam forthwith along with the certified copy of this order obtaining necessary acknowledgment from the authority concerned in that regard.

48. After receipt of such representations along with other relevant documents, within the time as specified above, the Director of Elementary Education, Assam shall pass a reasoned order within a period of 60 (sixty) days determining the seniority of the petitioner and the respondent No. 5 intimating them about the outcome of said representations.

49. With the above observation and direction, this writ petition stands disposed of.

JUDGE

Comparing Assistant