

GAHC010025852016



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

Case No. : WP(C)/5779/2016

DR. JYOTIRUPA SARMA
W/O. SRI HITEN SHARMA, R/O. HOUSE NO. 41 NEAR SHIV MANDIR, PUB
SARANIA ROAD, BYLANE NO.9, RAJGARH ROAD, GHY.-781003, ASSAM.

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP. BY THE SECY. TO THE GOVT. OF ASSAM, HIGHER EDUCATION
DEPTT., DISPUR, GHY.-781006.

2:THE ADDL. CHIEF SECRETARY TO THE GOVT. OF ASSAM
DEPT. OF HIGHER EDUCATION
DISPUR
GUWAHATI -781006.

3:THE DIRECTOR OF HIGHER EDUCATION
ASSAM
KAHILIPARA
GUWAHATI -781019.

4:THE PRINCIPAL
ARYA VIDYAPEETH COLLEGE
SARABHATI
GUWAHATI -781008.

5:GOVERNING BODY
ARYA VIDYAPEETH COLLEGE
SARABATHI
GUWAHATI -781008

Advocate for the Petitioner : MR.M MAHANTA

Advocate for the Respondent : MSN KALITAR- 4and5

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
O R D E R

12.05.2023

Heard Mr. K.N. Choudhury, learned senior counsel, assisted by Mr. N. Mahanta, learned counsel for the petitioner. Also heard Mr. K. Gogoi, learned standing counsel for the Higher Education Department.

Case of the petitioner, reliefs sought for and submissions made on her behalf:

2. The petitioner had offered her candidature for the post of Lecturer in Department of Anthropology in Arya Vidyapeeth College carrying UGC pay scale pursuant to an advertisement dated 06.06.1998. The Selection Committee placed the name of the petitioner as first nominee. However, the Governing Body of the said college recommended the name of the second nominee for the said post. Therefore, the petitioner had approached this Court by filing W.P.(C) 3385/1999. This Court by order dated 15.03.2001, directed the authorities to adhere to the recommendations made by the Selection Committee. Pursuant to the said order, the Director of Higher Education had instructed the Principal of Arya Vidyapeeth College for compliance of the order of this Court. However, after the Governing Body of the said college was re-constituted, the newly re-constituted Governing Body in its first meeting held on 27.05.2003, resolved to honour the order of this Court and the recommendation dated 04.12.1998 of the Selection Committee was approved. However, the Director of Higher Education, Assam (respondent no. 3) by letter dated

12.08.2003 and 17.11.2005, expressed its reluctance to approve the appointment of the petitioner. In the meanwhile, the petitioner had approached this Court again by filing Cont. Case (C) 513/2003. During the pendency of the said contempt petition, the respondent no. 3 complied with the order of this Court and the contempt proceeding was closed by order dated 23.01.2006.

3. In the said context, the learned senior counsel for the petitioner had submitted that perhaps because the petitioner came in the way of appointment of the second nominee, the Director of Higher Education did not dispose of the request for approving the appointment of the petitioner as Lecturer in Department of Anthropology in Arya Vidyapeeth College.

4. It is submitted that although belatedly the appointment letter was issued on 15.06.2006, but contrary to the terms of advertisement, her appointment was made conditional, and made subject to clearing NET/SLET within 2 (two) years from the date of approval and till then, the petitioner would remain on probation and would receive fixed pay of Rs.8,000/- per month and was liable to be discharged without notice if she failed to clear NET/SLET within time. It has been submitted that the petitioner had cleared NET in the year 2013 and got the Ph.D. Degree in the year 01.04.2016, the date when the same had received Vice Chancellor's approval. It is submitted that the requirement of clearing NET/SLET, amongst others, for lecturers came vide Assam Government guidelines issued vide notification dated 20.02.2003, which could not have been retrospectively imposed upon the petitioner, who had applied pursuant to advertisement dated 06.06.1998 and that because of illegality committed by the

then Governing Body of Arya Vidyapeeth College in recommending the name of the second nominee by ignoring the name of the petitioner, being the first nominee, that the petitioner had to approach this Court and therefore, new conditions could not have been imposed upon the petitioner, which would amount to punishing her and treating her differently than others whose appointments were made pursuant to the advertisements which were made during such period, where no such condition of requirement to clear NET/SLET was imposed.

5. By referring to the statements made in the affidavit-in-reply filed by the petitioner and documents appended thereto, it has been submitted that as per RTI information disclosed to the petitioner, all the persons who were selected on the basis of advertisement dated 06.06.1998 were after 24.12.1998, but except the petitioner, other similarly placed persons were not only appointed as Lecturer after completion of their probation, but were also promoted to the post of Assistant Professor and were given the benefit of UGC pay-scale, as enhanced from time to time and were given seniority from the date of initial appointment. In this regard, it was submitted that pursuant to the order dated 10.01.2019, the Director of Higher Education, Assam (respondent no.3) had filed an additional affidavit on 29.01.2019, where a statement prepared by the Principal of Arya Vidyapeeth College was annexed, which disclosed that appointment of several Lecturers were approved without clearing NET/SLET.

6. In course of hearing on 08.05.2023, the learned senior counsel for the petitioner had filed written submissions on behalf of the petitioner. By referring to the same, it has been submitted that only after institution of a writ

petition and thereafter, a contempt petition before this Court, with as much delay as the then Director of Higher Education (respondent no. 3) could, ultimately granted approval dated 21.01.2006 for appointment of the petitioner, which paved way for the petitioner to join her post on 01.02.2006.

7. It was reiterated that the UGC norms prevailing on the date of the advertisement did not prescribe the requirement of clearing NET/SLET and therefore, imposition of such a condition was illegal and untenable in law.

8. By citing the case of (i) *Madan Mohan Sharma & Anr. v. State of Rajasthan & Ors.*, (2008) 3 SCC 724 (para-11), and (ii) *State of Rajasthan v. R. Dayal & Ors.*, (1997) 10 SCC 419 (para-8), it has been submitted that Rules which were prevailing at the time of advertisement would prevail and changes in eligibility conditions which were brought during the pendency of the advertisement would not affect the eligibility conditions. The paragraphs on which reliance was placed are quoted below:-

Madan Mohan Sharma (supra):

11. *We have heard learned counsel for the parties and perused the records. Mr. M.R. Calla, learned senior counsel appearing for the appellants has strenuously urged that during the pendency of the selection process, the eligibility criteria was changed and the date for submission of the application in pursuance to the advertisement was extended and Rule 266 of the Rules of 1996 came into being on 30-12-1996 whereby it was provided that Higher Secondary Examination shall be the criteria for preparing the merit list. As such, as per the service rules, the selection should have been made on the basis of Higher Secondary Examination marks and not on the basis of Secondary Examination marks. We regret this cannot be accepted. Once the advertisement had been issued on the basis of the circular obtaining at that particular time, the effect would be that the selection process should continue on the basis of the criteria which was laid down and it*

cannot be on the basis of the criteria which has been made subsequently.

R. Dayal (supra):

8. *Therefore, it is not in dispute and cannot be disputed that while selecting officers, minimum requisite qualifications and experience for promotion specified in the relevant column, should be taken into consideration against vacancies existing as on 1st April of the year of selection. But since the Rules came to be amended and the amendment became effective with immediate effect and clause (11-B) of Rule 24-A indicates that options have been given to the government or the appointing Authority, as the case may be, to revise the select list as existing as per the law as on the date of the appointment or as may be directed by a competent court, selection is required to be made by the concerned DPC. An appointment made, after selection as per the procedure, to the vacancies existing prior to the amendment, is valid. But the question is whether selection would be made, in the case of appointment to the vacancies which admittedly arose after the amendment of the Rules came into force, according to the amended Rules or in terms of Rule 9 read with Rules 23 and 24-A, as mentioned hereinbefore. This court has considered the similar question in para 9 of the judgment above-cited. This court has specifically laid that the vacancies which occurred prior to the amendment of the Rules would be governed by the original Rules and not by the amended Rules. Accordingly, this court had held that the posts which fell vacant prior to the amendment of the Rules would be governed by the original Rules and not the amended Rules. As a necessary corollary, the vacancies that arose subsequent to the amendment of the Rules are required to be filled in accordance with the law existing as on the date when the vacancies arose. Undoubtedly, the selection came to be made prior to the amendment of the Rules in accordance with law then existing since the anticipated vacancies also must have been taken into consideration in the light of Rule 9 of the Rules. But after the amended Rules came into force, necessarily the amended Rules would be required to be applied for and given effect to. But, unfortunately, that has not been done in the present case. The two courses are open to the government or the appointing authority, viz., either to make temporary promotions for the ensuing financial year until the DPC meets or in exercise of the power under Rule 24-A(11-B), they can revise the panel already prepared in accordance with the Rules and make appointments in accordance therewith.*

9. Accordingly, the learned senior counsel for the petitioner has submitted that by filing this writ petition under Article 226 of the Constitution of India, the petitioner has prayed for (a) quashing the condition imposed in the

impugned appointment letter dated 15.06.2006 to clear NET/SLET within 2 (two) years and until such time the petitioner would remain on probation; (b) directing the respondent authorities to regularise the service of the petitioner from the date of joining/appointment along with salary increment as per law along with all consequential benefit; (c) granting seniority, promotion and all consequential service benefit from the date of joining/ appointment; and (d) directing the respondent authorities to grant the petitioner legitimate increment of salary as per law for clearing NET/SLET and Ph.D.

Submissions made on behalf of the respondent nos. 1 to 3:

10. The learned standing counsel for the respondent nos. 1 to 3 has submitted that as per his instructions, the respondents would not contest the prayer (d) to the writ petition. However, in respect of other reliefs, it is submitted that the petitioner would not be entitled to any relief because of the fact that the Government of Assam in the Higher Education Department had issued an OM No. B(2)H.408/99/41 dated 13.01.2000, by which in pursuance to the recommendations made by the UGC in their notification dated 24.12.1999, the State Government had adopted the "Measures recommended by the UGC for the Maintenance of Standards 1998 in Universities and Colleges", *inter alia*, providing under Clause 1(e) thereof that lecturer must have good academic record with at least 55% of the marks or an equivalent grade at the Master's Degree level, or any equivalent degree from any foreign University, besides clearing of the National Eligibility Test (NET). It has been submitted that the said requirement was reiterated from time to time and therefore, it would not be factually correct to accept that the requirement of NET/SLET was introduced

only from 20.02.2003, as has been projected by the petitioner. It is submitted that the Higher Education Department of the State vide OM dated 13.01.2000, followed by another OM 22.06.2004, has made the requirement compulsory that a lecturer must clear NET/SLET, which would entitle only such qualified lecturer to UGC Scale of Pay and thus, if in some cases, the legal requirement has been violated by some authority, such illegality cannot be allowed to be perpetuated.

11. It has been submitted that the Ministry of Human Resources Development, Department of Education, Govt. of India vide notification no. F-1-21/87 U.I. dated 17.06.1987 had made it mandatory that minimum qualifications required for appointment to the post of Lecturers, amongst others, will be those prescribed by the UGC, which also prescribed that the candidate should have qualified in a comprehensive test to be specifically conducted for the purpose. This was followed by 9.0 UGC Regulations, 1991 regarding Minimum Qualifications for Appointment of Teachers in Universities and Colleges vide notification No. F.1-11/87(CPP) dated 19.09.1991, reiterating the requirement that the qualifications required for appointment to the post of Lecturers will be those prescribed by the UGC. Thus, it was submitted that the State could prescribe a higher bench-mark for appointment to the post of Lecturer, but could not waive the requirement of following UGC norms.

12. Thus, it is submitted that as the appointment letter dated 15.06.2006 contained the condition that she would have to clear NET/SLET, the challenge made to the said condition by filing this writ petition in the year 2016, after 10 years would be liable to be rejected on the ground of delay and laches.

13. In support of his submissions, the learned standing counsel for the Higher Education Department has cited the following cases, viz., (i) *M.P. Palanisamy & Ors. v. A. Krishnan*, (2009) 6 SCC 428, (ii) *Surendra Kumar & Ors. v. Greater Noida Industrial Development Authority & Ors.*, (2015) 14 SCC 382, and (iii) *Somesh Thapliyal & Anr v. Vice Chancellor, H.N.B. Garhwal University & Anr.*, (2021) 10 SCC 116.

Reasons and decision:

14. From the submissions made on behalf of the petitioner and the Higher Education Department, it appears that the following points arise for decision in this case, viz., (i) Whether the conditions of NET/SLET/ Ph.D. was prevailing before the advertisement dated 06.06.1998 was issued? (ii) whether the petitioner would be entitled to UGC pay scale on and from the date when she had cleared NET/SLET and earned her Ph.D. Degree? (iii) whether based on the fact that some others who were appointed under same advertisement were given UGC pay scale without having cleared NET/ SLET/Ph.D., the petitioner would be liable for the same benefit by applying rule of parity? (iv) whether by accepting her appointment order dated 21.01.2006 and approval order dated 15.06.2006 without any demur, the petitioner is estopped from assailing the conditions contained therein? (v) whether the belated challenge by the petitioner would be maintainable?

Point no. (i) and (ii):

15. The point no. (i) and (ii) are taken up together. The learned standing counsel for the Higher Education Department has produced a copy of the UGC notification no. F.1-11/87(CPP) dated 19.09.1991. The said notification had been issued in exercise of power conferred by Clause (e) of Sub-Section (1) of Section 26 read with Section 14 of the University Grants Commission Act, 1956. The said notification had superseded previous notifications dated 13.06.1983, 19.02.1985 and 26.11.1985. In Schedule-1 thereto, the following qualification is prescribed in respect of the post of Lecturer:

“SCHEDULE-1

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*

*

(3) A

Lecturer

(a) Arts, Sciences, Social Sciences, Commerce, Education, Physical Education, Foreign Language and Law.

Good academic record with atleast 55% marks or an equivalent grade at Master's degree level in the relevant subject from an Indian University or an equivalent degree from a foreign university.

Candidates besides fulfilling the above qualifications should have cleared the eligibility test for lecturers conducted by UGC, CSIR or similar test accredited by the UGC."

16. In the notification dated 19.09.1991, Clause-2 contains a non-obstante provision to the effect that no person shall be appointed to a teaching post in university or in any institutions including constituent or affiliated colleges recognized under clause (f) of section 2 of the UGC Act, 1956. Moreover, under Clause 11 of the notification No. F-1-21/87 U.I dated 17.06.1987, issued by the Govt. of India, Ministry of Human Resources Development, Department of

Education also prescribes to the effect that only those candidates who, besides fulfilling the minimum academic qualifications prescribed for the post of lecturer, have qualified in a comprehensive test, to be specially conducted for the purpose, will be eligible for appointment of lecturers. Therefore, in light of the contents of the said two notifications, the Court is unable to accept that the petitioner would be entitled to wish away the qualification requiring clearing of the "eligibility test for lecturer". There is no dispute that NET/SLET is such eligibility test prescribed to be cleared for appointment to the post of lecturer. Similar conditions requiring NET/SLET is reiterated, amongst others, in the subsequent UGC Regulation on Revision of Pay Scales, Minimum Qualification for Appointment of Teachers in Universities, Colleges and Other Measures for the Maintenance of Standards, 1998.

17. From the contents of the OM dated 13.01.2000, it appears that the Government of Assam, Education (Higher) Department had adopted the UGC Regulation, 1998. On a conjoint reading of Clause 1(e) of the OM dated 13.01.2000 and Clause 4.4.1 of the UGC Regulation, 1998, it appears that the Government of Assam had prescribed the following qualification for a lecture, viz., *"Lecturer:- Good academic record with at least 55% of the marks or an equivalent grade at the Master's Degree Level, or any equivalent degree from any foreign University, besides clearing of the National Eligibility Test (NET)."* The provision requiring that to be appointed to the post of lecturer, a candidate must have cleared NET is found to be pre-existing prior to the date when the petitioner was appointed as lecturer.

18. The learned standing counsel for the Higher Education Council had submitted that as per the OMs dated 02.06.2004, 26.07.2004, and 10.07.2015, there is a requirement to clear NET/ SLET/ Ph.D. as a pre-condition for being granted annual increment.

19. The learned senior counsel for the petitioner had submitted that the petitioner had cleared UGC- NET held on 30.06.2013, and the date of qualifying NET was 21.10.2013. It was also submitted that the petitioner has also qualified for award of Ph.D. by Gauhati University on 01.04.2016.

20. The UGC Regulations, 1998 requiring minimum qualification is in the greater interest of the students for which the said Regulation must be allowed to prevail over the desire of the petitioner to claim pay increment and/or higher pay scale while she lacked the requisite qualification.

21. In this regard, we find support from the decision of the Supreme Court of India in the case of *P. Suseela & Ors. v. University Grants Commission & Ors.*, (2015) 8 SCC 129, where the UGC had granted exemption to persons holding Ph.D. Degree from the requirement to clear NET/SLET. Such exemption was negated by the Central Government by holding that the decision of the Government was binding on the UGC.

22. Apart from UGC guidelines, the Government of Assam, though the Education (Higher) Department had provided conditions vide OM dated

13.01.2000, 22.06.2004, 26.07.2004, 10.07.2015, requiring that for appointment of lecturer, the candidate must have cleared NET/ SLET/Ph.D. as a pre-condition for being granted annual increment.

23. In light of the discussions above, the point of determination no. (i) is answered in the affirmative by holding that the conditions of clearing NET/SLET/ Ph.D. was prevailing before the advertisement dated 06.06.1998 was issued. The point of determination no. (ii) must also be answered in the affirmative by holding that on and from the date when the petitioner had cleared NET/ SLET and/or earned her Ph.D. Degree, as the case may be, the petitioner would be entitled to UGC pay scale and arrear pay due to the petitioner is required to be calculated/ computed from such date.

The point of determination no. (iii):

24. In this case, the petitioner, by accepting the appointment letter dated 15.06.2006, had joined Arya Vidyapeeth College as lecturer. Therefore, having accepted the said appointment, the petitioner is deemed to have accepted whatever terms and conditions that were attached to it.

25. The learned senior counsel for the petitioner has strenuously urged that the College authorities and/or the authorities in the Higher Education Department had started to give annual increment to the petitioner and/or granted UGC Scale of Pay to other similarly situated persons despite not clearing NET/SLET/ or acquiring Ph.D. Degree. Be that as it may, merely because the

Government granted financial benefit to some similarly situated persons and did not initiate any action against the interest of such beneficiaries, yet it cannot be said that the respondent authorities had waived the requirement of the petitioner to clear NET/SLET/Ph.D. to be given increment in pay or a higher pay scale. The UGC notifications, notifications by the Department of Education, Assam Government OMs dated 13.01.2000, 22.06.2004, 26.07.2004, 10.07.2015 are reiteration of the decision of the appropriate authority/ Government that lecturers in Colleges should have cleared NET/ SLET/Ph.D. so as to enable the lecturers including existing lecturers in the State to earn annual increment and higher pay scale.

26. In the considered opinion of the Court, under such circumstances, the principle of estoppel would have no application against the UGC Regulation, 1998, which has statutory force and consequence of failure to comply with the Regulation is prescribed under Section 14 of the University Grants Commission Act, 1956.

27. The Court is also of the considered opinion that in light of the prescription issued by the UGC and the Govt. of Assam, as morefully indicated herein before, even if some other Lecturers, who were appointed under same advertisement were given UGC pay scale without having cleared NET/ SLET/Ph.D., the petitioner would not be entitled for the same benefit by applying rule of parity because in cases of such nature, the principle that doctrine of negative equality cannot be invoked, would come in the way for the Court to grant relief to the petitioner.

28. The prescription of law is that a lecturer, in order to be appointed and become entitled to UGC pay-scale, would be required to clear NET/SLET/Ph.D. Therefore, if any person has been appointed as lecturer without such qualification, such an appointment cannot be said to be in accordance with law. It is well settled that writ ought not to be issued to nullify the provision of law or to allow illegality to prevail. Writ ought not to be issued which would amount to direct the authorities to commit illegality. Therefore, if a writ as prayed for issued in this case, it would amount to committing a wrong. In this regard, a 3-Judge Bench of the Supreme Court of India in the case of *R. Muthukumar & Ors. v. The Chairman and Managing Director Tangedco & Ors.*, reported in (2022) 0 Supreme(SC) 135, has put its seal of approval on the well settled legal proposition that one wrong committed in one case cannot be allowed to be repeated in another case as there is no concept of negative equality. Therefore, the appointment made to any other person without clearing NET/SLET/PH.D. would be of no help to the case of the petitioner.

29. Therefore, the point of determination no. (iii) is answered in the negative by holding that even if some others were appointed under same advertisement, and were given UGC pay scale without having cleared NET/SLET/Ph.D., the petitioner would still not be liable for the same benefit by applying rule of parity.

Point of determination no. (iv):

30. The Court finds force in the submissions made by the learned

standing counsel for the Higher Education Department (respondent nos. 1 to 3) that as the petitioner had accepted the appointment letter dated 15.06.2006, the petitioner is deemed to have accepted whatever terms and conditions that were attached to it. Therefore, it is not open to the petitioner to wish away the requirement of having cleared NET/SLET/Ph.D. In this regard, we find support from the case of *Surendra Kumar (supra)*. Paragraphs 14 and 15 thereof are quoted below:-

14. *The appellants were initially engaged on contractual basis and they were not appointed against any sanctioned post before they were substantially appointed on the said post on 6-08-2010. Even though advertisement dated 20-11-2002 indicated that there were vacancies, the policy of regularization of contractual employees was approved by the State Government only on 5-03-2008. The appellants were appointed on the post of Assistant Manager (Civil) only pursuant to the policy decision of the respondents for regularisation of contractual employees and thus, the appellants cannot seek for regularization with retrospective effect from 20-11-2002, that is when the advertisement was issued, because at that time regularisation policy was not in vogue. By policy of regularisation, it was intended to give the benefit only from the date of appointment. The Court cannot read anything into the policy decision which is plain and unambiguous. Having accepted the appointment orders dated 6-08-2010 and also joined the post, the appellants cannot turn round and claim regularisation with retrospective effect.*

15. *The judgment of the High Court quashing the appointment of the appellants vide appointment order dated 06.08.2010 is set aside. However the appellants' plea for regularization with retrospective effect is declined.*

31. Therefore, the point of determination no. (iv) is answered by holding that having accepted her appointment order dated 21.01.2006 and approval order dated 15.06.2006 without any demur, the petitioner, by application of principle of estoppel, the petitioner is estopped from assailing the conditions contained therein.

Point of determination no. (v):

32. The Court is conscious of the fact that although with some delay, the petitioner was appointed as lecturer by order dated 21.01.2006 and the petitioner had joined in the said post w.e.f. 01.02.2006. However, the condition contained in the said appointment letter has been assailed by filing this writ petition on 19.09.2016, which is ten years a little too late. Moreover, having accepted the appointment letter and having worked for 10 years with the conditions attached to the same, it must be deemed that the petitioner had acquiescence to it and thus, following the ratio laid down in the case of *Surendra Kumar (supra)*, cited by the learned standing counsel for the Higher Education Department, the Court is constrained to hold that the belated challenge by the petitioner would not be maintainable. The point of determination no. (v) is answered accordingly.

33. Therefore, in light of the discussions above, this writ petition is partly allowed by only granting relief to the petitioner in terms of prayer (d) made in the writ petition. In respect to the other prayers made in the writ petition, the Court does not find the petitioner to be entitled to the relief and therefore, other prayer nos. (a), (b) and (c) are refused.

34. The petitioner shall produce a certified copy of this order before the Director of Higher Education, Assam. On receipt of the same, the Director of Higher Education, Assam shall take appropriate steps within 4 (four) weeks so as to send his report/proposal before the competent authorities to act in consonance with this order and send by way of an e-mail to the petitioner at his

e-mail address to be provided for by the petitioner. The Director of Higher Education, Assam (respondent no.3) shall do all that is needful to provide financial benefit to the petitioner, increment in salary from the date of completing Ph.D. and clearing NET, within an outer period of 4 (four) months from the date of receipt of certified copy of this order.

35. The parties are left to bear their own cost.

JUDGE

Comparing Assistant