

GAHC010026202015



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

Case No. : WP(C)/7222/2015

RATUL CHANDRA DAS
S/O. SRI JAGENDA NATH DAS, R/O. GANAKKUCHI, P.O. and DIST. BARPETA,
ASSAM.

VERSUS

THE STATE OF ASSAM AND 3 ORS
REP. BY THE COMM. and SECY. TO THE GOVT. OF ASSAM, SECONDARY
EDUCATION ASSAM, DISPUR, GHY.-781006.

2:THE DIRECTOR

SECONDARY EDUCATION
ASSAM
KAHILIPARA
GHY.-781019.

3:THE INSPECTOR OF SCHOOLS

BARPETA
PIN-781301.

4:THE PRINCIPAL

BARPETA VIDYA PITH HIGHER SECONDARY SCHOOL
BARPETA. PIN-781301

Advocate for the Petitioner : MR H HOQUE

Advocate for the Respondent : SC, SECONDARY EDUCATION

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

O R D E R

04.05.2023

Heard Mr. A.K. Medhi, learned counsel for the petitioner. Also heard Mr. R. Mazumdar, learned standing counsel for the Secondary Education Department representing respondent nos.1 to 3. None appears on call for the respondent no.4, although notice was duly served.

2. The petitioner is working as Laboratory Bearer in Barpeta Vidyapith H.S. School. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has prayed for (i) setting aside the impugned order dated 06.02.2015, passed by the Director of Secondary Education, Assam (respondent no.2), thereby refusing to upgrade the service of the petitioner from the post of Laboratory Bearer to Assistant Teacher in the said school; and (ii) for directing the respondent authorities to initiate the process for selecting and appointing him to the post of Assistant Teacher in the said school.

Case of the petitioner and submissions on his behalf:

3. The learned counsel for the petitioner has extensively referred to the pleadings in the writ petition and documents appended thereto, and it has been submitted that the petitioner is otherwise eligible for being upgraded to the post of Assistant Teacher of his school. By referring to the case of

Subhash Ch. Das v. The State of Assam & Ors., Civil Appeal No. 10121/2011, decided on 24.11.2011, it is submitted in the said case, the facts are similar. The appellant therein made a claim for being appointed to the post of Assistant Teacher, which was refused. The Supreme Court of India took note of rejection of claim by the authorities as well as this Court and it was negated that under the Assam Secondary Education (Provincialized) Service Rules, 1982, the appointment to the post of Assistant Teacher has to be made on the basis of direct recruitment only. Accordingly, the respondent authorities were directed to consider the case of the appellant in the said case for being appointed to the post of Assistant Teacher, subject to his clearing the selection test by the District Selection Board in terms of circular dated 17.04.1993.

4. It is submitted that the judgment of the Supreme Court of India had been complied with and the Inspector of Schools, Barpeta District Circle, by his order dated 05.06.2013, had upgraded the post of the appellant therein, namely, Subhash Ch. Das, BA, Laboratory Bearer, Barpeta Vidyapith H.S. School in the vacant post of Assistant Teacher of the same school. Accordingly, it is submitted that as the petitioner is from the same school and is similarly situated, the denial of upgrading the post of the petitioner from Laboratory Bearer to Assistant Teacher was not sustainable. By referring to the case of *State of Uttar Pradesh & Ors. v. Arvind Kumar Srivastava & Ors., (2015) 1 SCC 347*, it is submitted that if one of the similarly situated person gets a relief by the Court, all other identically situated persons need to be treated alike by extending the same benefit, otherwise it would amount to discrimination and would be violative of Article 14 of the Constitution of India. The relevant paragraph 23.1, on which reliance is placed, is quoted below:

“The legal principles which emerge from the reading of the aforesaid judgments,

cited both by the appellants as well as the respondents, can be summed up as under:

(1) Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently."

5. It is submitted that certain provisions of the Assam Secondary Education (Provincialized) Service Rules, 2003 (hereinafter referred to as the "2003 Rules" for short) were amended by Assam Secondary Education (Provincialised) Service (Amendment) Rules, 2012, which came into effect from 10.07.2012. In the said context, it is further submitted that the change of criteria brought about by the said amendment w.e.f. 10.07.2012, would not affect the petitioner as the post of Assistant Teacher had become vacant on 28.02.2011, on superannuation of one Haripad Barman.

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

6. Per contra, the learned standing counsel for the Secondary Education Department has referred to various provisions of the provision of the 2003 Rules, including Rules 2(n), 2(p), 3, 8, 10, Schedule-I and Schedule-II thereof. It is submitted that on a conjoint reading of the said provisions would show that two classes of Teachers are envisaged under the said 2003 Rules, i.e. (i) Graduate Teacher, and Post Graduate Teachers.

7. It is submitted that the case of *Subhash Ch. Das (supra)* was decided on 24.11.2011. However, w.e.f. 10.07.2012, various provisions of the

2003 Rules had been amended, which altered the legal position which was prevailing when the said case was decided. In the said context, it has been submitted that under the proviso to Rule (3), as amended, a bar was created for fresh recruitment to the cadres of Junior Teacher, Junior Classical Teacher, Junior Hindi Teacher, Senior Classical Teacher and it was provided that all such existing posts would stand upgraded as "Graduate Teacher" or Hindi Teacher having Bachelor degree from any recognized University or Classical Teacher (Sanskrit/Arabic/Assamese Language Teacher) as the case may be from the dates such post becomes vacant, either as a result of recruitment of existing incumbent or otherwise. Accordingly, it is submitted that the decision rendered by the Supreme Court of India in the case of *Subhash Ch. Das (supra)* would be qua the appellant therein and would not have a general application. It is submitted that under the amended Rule 8 and 10 of the 2003 Rules, read with relevant entries in Schedule-I and II of the said 2003 Rules lays down that the post of Graduate Teacher is to be filled up by direct recruitment only and that the candidate must satisfy the academic and other professional qualifications required, which also includes clearing TET examination.

Discussions and decision:

8. It may be mentioned at the outset that the 2003 Rules was amended by Assam Secondary Education (Provincialised) Service (Amendment) Rules, 2012, which came into effect from 10.07.2012. This writ petition was filed on 23.11.2015. During the pendency of this writ petition, the said 2003 Rules was repealed by enacting The Assam Secondary Education (Provincialized Schools) Service Rules, 2018 (hereinafter referred to as the "2018 Rules"), which was published in the Assam Gazette Extraordinary on 10.10.2019, which

is also the appointed date when the said 2018 Rules had come into force.

9. The relevant Rules 2(i), 2(p), 3, 8, 10, Schedule-II (2) of the 2018 Rules are quoted below:-

2. (i) "Graduate Teacher" means and includes the category of Assistant Teacher, Classical teacher of Higher Secondary or Senior Secondary (erstwhile Junior College) or High Madrassa or a High School including amalgamated Higher Secondary and Senior Secondary and High Schools for whose appointment the minimum qualification is Graduate in Arts/Science/Commerce from recognized University including Demonstrators of a provincialised Higher Secondary School or a Senior Secondary School;

* * *

(p) "Post Graduate Teacher" means the category of Post Graduate Teachers in the Subject of Arts/Science/ Commerce stream, vocational stream including the Commercial Computer Application of a Higher Secondary School, Senior Secondary School for whose appointment the minimum qualification is Post-Graduate Degree in Arts/Science/Commerce or in vocational subject from recognized University for imparting education minimum from class IX to XII and such other classes as may be assigned by the Principal of the School;

* * *

3. Classes and Cadres.- (1) The Service in provincialised School shall consist of the teaching and non-teaching staff as in Schedule-III. The teaching staff shall consist of the following classes and cadres, each one of those constituting a distinct and separate cadre as on the commencement of these rules, namely:-

(a) Class-I (Senior):- It includes the cadre of-

(i) Principal;

(a) Class-II:- It includes the cadres of-

(i) Vice Principal;

(ii) Post Graduate Teacher;

(iii) Headmaster/Superintendent;

(b) Class-III:- It includes the cadres of-

(i) Assistant Headmaster/ Assistant Superintendent;

(ii) (a) Graduate Teacher;

(b) Hindi Teacher having Bachelor Degree from any recognized University;

(c) Classical Teacher (Sanskrit/Arabic/Language Teacher) having Bachelor Degree from any recognized University; (d) Assamese Language Teacher;

(iii) Demonstrator;

(iv) Music Teacher;

(v) Under Graduate Teacher/Junior Classical Teacher/ Junior Hindi Teacher;

(vi) Craft Teacher.

(2) The non-teaching staff in provincialised School shall consist of the following classes and cadres on the date of commencement of these rules, namely:-

(a) Class-III:- It includes the cadres of-

(i) Senior Assistant;

(ii) Junior Assistant ;

(iii) Library Assistant;

(b) Class-IV:- It includes the cadres of-

(i) Laboratory Bearer;

(ii) Peon/Chowkidar.

(3) The service may also include:-

(i) Any post equivalent to a post in any of the cadre mentioned in sub-rule (1) and (ii) Any cadre or post declared by the Government to be cadre of the service.

(ii) Each cadre in sub-rule (2) of rule 3 shall form an independent cadre and members of any cadre shall have no claim for appointment at any cadre except in accordance with provision of these rules.

(ii) The service may also include post equivalent to post of any cadre mentioned in sub-rule (2) of rule 3 and any post that may be declared by the Government from time to time as cadre post of the service.

* * *

8. Recruitment to the post of Graduate Teacher, Post Graduate Teacher selection procedure thereof: (1) The Recruitment to the post in the cadre of Graduate Teachers, Post Graduate Teacher including Subject Teacher in Vocational Subjects

in provincialised High School/High Madrasa, Higher Secondary Schools and Senior Secondary School shall be made by direct recruitment in the manner prescribed under sub-rule (2).

(2)(i) Before the end of the year the Member-Secretary of the District Selection Committee constituted under Rule 16(2), shall ascertain the vacancy position of the posts in the cadre of Graduate Teacher, Post Graduate Teacher including Subject Teacher in Vocational Subjects in provincialised High School, High Madrasa, Higher Secondary Schools Senior Secondary School with sanction number, allotment and retention order of those posts and invite applications through an advertisement to be published in two local newspapers.

(ii) The Member-Secretary shall prepare a list of eligible candidates and submit to the District Selection Committee after scrutiny of the applications. The District Selection Committee shall verify documents in respect of academic qualification and marks sheet of the respective examination and calculate the marks secured by a candidate in respect of the respective examination in the manner as specified in Schedule-II and on the basis of total marks secured by a candidate in respect of the academic marks secured in the respective examinations under Schedule-1, prepare a select list in respect of as many candidates equal to the number of vacancies.

(iii) The select list so prepared by the District Selection Committee shall be submitted to the Director who shall after necessary verification as may be required, approve the select list and publish the same in the official notice Board or in such other places as the Director may consider fit and proper.

(iv) After approval and publication of the select list the Appointing Authority shall appoint the candidates in order of preference in the select list by observing all formalities.

(v) No appointment in any manner shall be made by any authority except in accordance with the procedure prescribed above.

(vi) The validity of the select list shall not exceed beyond one year from the date of its approval by the Director.

* * *

10. Academic and professional qualification: (1) The academic and professional qualification for direct recruitment shall be as in Schedule-III.

(2) In addition to such academic and professional qualifications mentioned in Schedule-III, for direct recruitment to the posts, candidates shall have to appear and pass in the Teachers Eligibility Test (TET) in the concerned cadre, conducted by the Government scoring a minimum of 60% marks in case of Unreserved

category candidates and minimum of 55% marks in case of Scheduled Castes/Scheduled Tribes/Other Backward Classes and Persons with disabilities candidates:

Provided further that any experienced teacher who has appeared but could not secure the minimum qualifying 60 marks in the TET, shall be awarded at least 60 marks in respect of their experience if he or she has already completed 15 years of teaching experience. Any marks secured by such experienced teacher over and above 60 qualifying marks in TET shall be counted additionally in respect of TET for such teacher for the purpose of selection for the post of Post Graduate Teacher and Graduate Teacher as the case may be.

(3) The teachers engaged on contractual basis in a provincialised Higher Secondary/High School under the scheme "strengthening of secondary education shall be given preference for recruitment to the post of Graduate teachers by awarding total 50 bonus marks for their services as contractual teachers, Le 25 marks for one year and another 25 marks for completion of two years of service as contractual teacher, subject to consideration for a maximum period of two years.

(4) The teachers working continuously on Fixed pay basis (other than contractual teachers) in a provincialised Higher Secondary School or High School/Madrassa shall be given preference for recruitment to the post of Graduate teachers by awarding 50 bonus marks for their service as Fixed Pay teachers provided they have requisite academic and professional qualification.

(5) In addition to the academic and professional qualification per sub-rule (1), the candidate must satisfy the following criteria:-

(i) In case of Assamese Medium School, the candidate must have passed HSLC or equivalent Examination with Assamese language as one of the subjects or having Diploma in Assamese language issued by the Axom Sahitya Sabha or read up to HSLC level in Assamese medium School;

(ii) In case of Bengali Medium School, the candidate must have passed HSLC or equivalent Examination with Bengali language as one of the subjects or having Diploma in Bengali language issued by the Barak Upatyaka Bangya Sahitya Sanscriti Sammelan or read up to HSLC level in Bengali medium School;

(iii) In case of Hindi Medium School, the candidate must have passed HSLC or equivalent Examination with Hindi language as one of the subjects or read up to HSLC level in Hindi medium School;

(iv) In case of Bodo Medium School, the candidate must have passed HSLC or equivalent Examination with Bodo language as one of the subjects or read up to HSLC level in Bodo medium School;

(v) In case of English Medium School, the candidate must have passed HSLC or equivalent Examination with Alternative English as one of the subjects or read from Class XI onwards in English medium School:

Provided that for recruitment of teacher for teaching MIL subject, the candidate who passed FISLC examination with particular MIL subject shall be considered.

* * *

Schedule-II

(2) Criteria for Selection of Graduate Teacher:

(i) 100 marks on percentage of marks in BA/B.Com/ B.Sc. Examination; (in case of Major/Hons. the marks obtained in Major/Hons shall be taken into consideration);

(ii) 100 marks on percentage of marks in HS Final Examination;

(iii) 100 marks on percentage of B.T./B.Ed. Examination;

(iv) 100 marks on percentage of marks in TET Examination or 60 marks for 15 years of experience as an Under- graduate/Junior Teacher in a provincialised High/Higher Secondary school having requisite academic and professional qualification. Any experienced teacher who has appeared but could not secure the minimum qualifying 60 marks in the TET, shall be awarded at least 60 marks in respect of their experience if he or she has already completed 15 years of teaching experience. Any marks secured by such experienced teacher over and above 60 qualifying marks in TET shall be counted additionally in respect of TET for such teacher;

(v) Explanation: For the purpose of calculation of marks under the categories mentioned in clauses (1)(ii), (iii) and (iv) above, it may be clarified that if a candidate secures; for example 60% marks in the particular examination he/she secure 60 marks out of 100 marks allotted in the concerned examination; (vi) 50 marks @25 marks for one year of teaching experience as contractual teacher and another 25 marks for two years, subject to consideration for a maximum period of two years;

(vii) 50 marks teaching experience for the teachers working continuously on Fixed pay basis (other than contractual teachers) in a provincialised Higher Secondary School or High School/Madrassa for their service as Fixed Pay teachers provided they have requisite academic and professional qualification;

(viii) 10 marks for NCC Certificate (10 marks for 'C' Certificate and 5 marks for 'B' Certificate);

(ix) 10 marks for participation in recognized sports at National level representing Assam;

(x) 10 marks for achievements in fine Arts and Cultural Activities representing the State officially at National level.”

10. The petitioner, on the basis of College Certificate dated 22.01.2017 (Annexure-5), claims that he has passed B.A. Examination in the year 2006. The petitioner also claims that the post of Assistant Teacher (Arts) became vacant on 28.02.2011. It is projected that advertisement for filling up the post of Graduate Arts Teacher in the Barpeta Vidyapith H.S. School was published in newspaper on 22.06.2013. Thus, 22.06.2013 is the date on which the process for filling up the post of Graduate Teacher in Arts was initiated. On the said date, the provision of Rule 3 and 8 of the 2003 Rules, as amended w.e.f. 10.07.2012, were as follows:-

“3. Classes and Cadres- (1) The service in provincialized School shall consist of the teaching and non-teaching staff. The teaching staff shall consist of following classes and cadres, each one of those constituting a distinct and separate cadre as on the commencement of these rules, namely:- of-

(a) Class II (Senior): It includes the cadres

(i) Principal;

(ii) Vice-Principal;

(iii) Post-Graduate Teacher;

(iv) Headmaster/Superintendent;

(b) Class II (Junior): It includes the cadres of-

(i) Assistant Headmaster/ Assistant Superintendent;

(ii) (a) Graduate Teacher, (b) Hindi teacher having Bachelor Degree from any recognized University, (c) Classical teacher (Sanskrit/Arabic/ Language teacher) having Bachelor Degree from any recognized University;

(iii) Demonstrator;

- (iv) Senior Classical Teacher without Bachelor Degree;*
- (v) Music Teacher;*
- (vi) Junior Teacher/Junior Classical Teacher/ Junior Hindi Teacher;*
- (vii) Craft Teacher;*

Provided that there shall be no fresh recruitment to the cadres of Junior Teacher, Junior Classical Teacher, Junior Hindi Teacher, Senior Classical Teacher, and all such existing posts shall stand upgraded as Graduate Teacher or Hindi Teacher having Bachelor Degree from any recognized University or Classical Teacher (Sanskrit/ Arabic/ Assamese Language Teacher, as the case may be) from the date such posts become vacant either as a result of retirement of existing incumbent or otherwise;

(2) The non-teacher staff in provincialised School shall consist of the following classes and cadres on the date of commencement of these rules, namely:-

(a) Class-III:- It includes the cadres of-

- (i) Senior Assistant;*
- (ii) Junior Assistant;*

(b) Class-IV - It includes the cadres of-

- (i) Laboratory Bearer;*
- (ii) Grade-IV.]*

* * *

8. Recruitment to the post of Graduate Teachers of the provincialised High/Higher Secondary and Multipurpose School and selection procedure.- (1) The Recruitment to the post of Graduate Teachers in provincialised High/Higher Secondary and Multipurpose Schools shall be made by direct recruitment in the manner hereinafter provided:-

(2) The Member Secretary of the School Selection Committee shall ascertain the vacancy position of the posts of Graduate Teacher in the School with sanction number, allotment and retention order of those posts from the concerned Inspector of Schools and invite applications through an advertisement to be published in two local newspapers.

(3) The Member Secretary of the School Selection Committee shall prepare a list of eligible candidates and submit to the Selection Committee after scrutiny of the applications.

The School Selection Committee shall hold interview and prepare a penal of School-

wise Select List consisting of four candidates for each vacancy on the basis of marks secured by each candidate in the manner provided in the Schedule-I.

(4) The School Selection Committee for selection of Principal, Post Graduate Teacher/Graduate Teacher and Non-teaching Staff of School shall be as follows:-

Chairman: The President of Managing Committee;

Member: (i) The Vice-Principal/ a Post Graduate Teacher in case of Higher Secondary School or Assistant Headmaster/Senior most Graduate Teacher in case of High School;

(ii) One parent to be nominated by the Managing Committee;

Member Secretary: The Principal/Headmaster of the School.

In addition to above, there shall be a Subject Expert in case of selection of Post Graduate Teacher and Graduate Teacher, wherever necessary;

5) There shall be a District Approval Committee at the District level for recommendation of a panel of List of candidates for the post of Post Graduate Teachers and Graduate Teachers as follows or his

(i) Deputy Commissioner of the concerned district nominee, not below the rank of an Additional Commissioner Chairman;

(ii) Inspector of Schools Member-Secretary;

(iii) One retired Principal/Headmaster or an officer under Education Service to be nominated by Deputy Commissioner

-Member.

(6) The teachers engaged on contractual basis in a provincialised Higher Secondary/High School under the scheme e "Strengthening of Secondary Education" shall be given preference for recruitment to the post of Graduate Teachers by awarding total 50 bonus marks for their services as contractual teachers i.e. 25 marks for one year and another 25 marks for completion of two years of service as contractual teacher, subject to consideration for a maximum period of two years.

(7) The panel of Select List prepared by the School Selection Committee shall be forwarded through the concerned Inspector of Schools to the District Approval Committee under rule 8(5) for approval.

(8) After receipt of the panel under sub-rule (7), the District Approval Committee shall prepare a Select List equal to the number of vacant posts on the basis of the

marks secured by each candidate calculated in the manner as provided in Schedule-1.

(9) The Select List so prepared by the District Approval Committee shall be submitted to the Director who shall approve the Select List submitted by the District Approval Committee and publish the list in the official notice Board or in such other places as the Director may consider fit and proper.

(10) After approval and publication of the Select List under sub-rule (9) the Director, shall appoint the candidates in order of preference in the Select List by observing all formalities.

(11) No appointment in any manner shall be made by any authority except in accordance with the procedure prescribed above.

(12) The validity of the Select List shall not exceed beyond one year from the date of its publication by the Director."

11. The provision of proviso to Rule 3 of 2003 Rules makes it clear that w.e.f. 10.07.2012, there would be no fresh recruitment to the Cadre of Junior Teacher, Junior Classical Teacher, Junior Hindi Teacher, Senior Classical Teacher, and that all such existing posts would stand upgraded as "Graduate Teacher" from the dates such posts became vacant, either as a result of retirement of existing incumbent or otherwise. Rule 8 of the 2003 Rules made it clear that the only mode to make recruitment to the post of Graduate Teacher was by way of direct recruitment only. Therefore, on the date for which the post of Graduate Teacher (Arts) in the said school was advertised, the petitioner, who was a Laboratory Bearer, had no vested right to be considered for promotion and/or upgradation to the post of Graduate Teacher.

12. Under such facts, the Court is of the considered opinion that under the provision of Rule 3 and 8 of the 2003 Rules, as amended w.e.f. 10.07.2012, as mentioned herein before, the decision of the Supreme Court of India in the case of *Subhash Ch. Das (supra)*, cannot be applied. On amendment of provisions of Rule 3 and 8 of the 2003 Rules w.e.f. 10.07.2012,

the cited case of *Arvind Kumar Srivastava (supra)*, is also not found to help the petitioner under the altered circumstances.

13. Nonetheless, as mentioned herein before, w.e.f. 10.10.2019, the 2018 Rules has come into force and under the provision of Rule 35 thereof, the 2003 Rules has been repealed. Thus, the provisions of Rule 8 of the 2018 Rules, the post of Graduate Teacher can only be filled up by direct recruitment.

14. It is a trite law that ordinarily, the effect of amendment by substitution would be that the earlier provisions would be repealed, and amended provisions would be enacted in place of the earlier provisions from the date of inception of that enactment. In this case, there is absence of any pleading that the provision of Rule 3 and 8 of the erstwhile 2003 Rules (as amended) would not have the effect of taking away the vested right, if any, of the petitioner. Nonetheless, even assuming that the petitioner had any vested right to be considered for appointment to the post of Graduate Teacher under 2003 Rules, such a right cannot be presumed to exist after the 2018 Rules have come into force w.e.f. 10.10.2019, as because under the provisions of Rule 3 and 8 of the 2018 Rules, the post of Graduate Teacher could be filled up only by way of direct recruitment.

15. Therefore, in light of the discussions above, this writ petition fails and the same is dismissed. No costs.

JUDGE

Comparing Assistant