

GAHC010130942017



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

Case No. : WP(C)/1609/2019

SASHIMAI GOGOI
W/O JITENDRA NATH GOGOI
R/O NAZIRA
DIST.- SIVASAGAR
ASSAM.

VERSUS

THE STATE OF ASSAM AND 6 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
EDUCATION DEPTT. DISPUR
GUWAHATI- 781006

2:THE ACCOUNTANT GENERAL ASSAM
GUWAHATI BELTOLA – 08

3:THE DIRECTOR OF ELEMENTARY EDUCATION
ASSAM KAHILIPARA
GUWAHATI- 19

4:THE DISTRICT ELEMENTARY EDUCATION OFFICER
SIBSAGAR

5:THE DEPUTY INSPECTOR OF SCHOOLS
NAZIRA
SIVASAGAR 785685

6:THE BLOCK ELEMENTARY EDUCATION OFFICER
NAZIRA/KHELUA

7:THE HEAD MASTER
RAMUGAON L.P. SCHOOL
KHELUA
NAZIRA

Advocate for : MR. A J DAS
Advocate for : SC
EDU appearing for THE STATE OF ASSAM AND 6 ORS.

BEFORE

HON'BLE MR. JUSTICE MANASH RANJAN PATHAK

ORDER

17/08/2023

Heard Mr. G Rengma, learned counsel for the petitioner and Mr. P N Sarma, learned Standing counsel, Department of School (Elementary) Education for the respondent Nos. 1, 3 to 6.

2. No representation on behalf of the respondent No. 2.

3. In the case in hand, the Deputy Inspector of Schools, Nazira by an order dated 18.11.1995 appointed the petitioner as an Assistant Mistress in Ramugaon Lower Primary School under Khelua Education Block of Sivasagar district in the scale of pay of Rs.1185/- to Rs.2395/- and other Government admissible allowances with immediate effect for a period of 90 days against a vacant post vice Sri Prodip Bawri, Assistant Teacher of 822 No. Seaugipam Lower Primary School, who was placed under suspension. Said appointment of the petitioner was extended from time to time by the Deputy Inspector of Schools, Nazira and by another order dated 30.01.1996, the petitioner was appointed as Assistant Mistress in Ramugaon Lower Primary School in the same scale of pay for a period of 90 days vice Sri Nilo Nath Kotokey, retired from Lakhimjan Lower Primary School. The Deputy Inspector of Schools, Nazira by another order dated 22.04.1996 in continuation of the earlier order of appointment of the petitioner dated 30.01.1996 appointed her as an Assistant Mistress at Ramugaon Lower Primary School in the same scale of pay against the vacant post of Sri Nulo Nath Kotokey who retired from Lakhimjan Lower Primary School. Later, the said Deputy Inspector of Schools, Nazira vide order dated 27.09.1999 confirmed the service of the petitioner as Assistant Teacher of Ramugaon Lower Primary School from her date of joining on 30.01.1996. The petitioner obtained her certificate for primary education from IGNOU.

4. The petitioner has filed this writ petition on 06.03.2019 praying amongst others for a direction to the respondent authorities in the Elementary Education Department to release her salaries that was withheld from 01.03.2012 to 31.01.2018, i.e., till the date of her retirement from service.

5. The Commissioner & Secretary to the Govt. of Assam in the Department of School Education has filed a detail affidavit in this matter.

6. The State Government in the Education Department issued an order under No. EPE-25/83/Part dated 26.09.1986 wherein certain reservations against the vacancies of Assistant Teachers in provincialised Primary Schools of the State were specified , i.e., - (i) 50% of the total posts were to be filled up on the basis of merit; (ii) 10% of posts were reserved for the candidates of Swahid families/victims of Foreign National Movement family; (iii) 10% of posts were reserved for the candidates of sons and daughters of retired school teachers; (iv) 10% of posts were reserved for the candidates of experienced lady/widows, (v) 10% of posts were reserved for the candidates working in venture/Adult Education or other temporary posts and (vi) 10% of posts were reserved for the candidates working as teachers for 5 years on honorary posts who are Pre-Primary/Normal trained.

7. The petitioner along with 31 others preferred a writ petition being Civil Rule No. 212/1987 challenging the said order dated 26.09.1986 of the State Government in the Education Department as the posts were reserved only for the Pre-Primary/Normal trained Teachers though they are serving as Teachers, they will not be able to participate in the said selection process.

8. The Court after hearing the parties, by order dated 25.04.1988 disposed of said Civil Rule No. 212/1987 with the observation that the percentage-wise division mentioned in the letter dated 26.09.1986 of the State Government in the Education Department shall be read along with Rule 3(iii) (a) of the Assam Elementary Education (Provincialisation) Rules, 1977, wherein the Court made it clear that while selecting candidates according to the percentage-wise division, preference should be given to the candidates trained in Senior Basic, Normal and Junior Basic Training Courses as required by Rule 3 (iii)(a) of the said 1977 Rules, in all the aforesaid categories of reservation.

9. The Court by the said judgment and order dated 25.04.1988 passed in said Civil Rule No. 212/1987 categorically observed that untrained teachers were not altogether debarred from getting appointment and specified that preference shall be given to trained teachers and not that untrained teachers will not be appointed at all.

10. However, according to the petitioners of said Civil Rule No. 212/1987, the State respondents did not comply with the said direction of the Court passed on 25.04.1988 in said Civil Rule No. 212/1987 and as such, the petitioners of said C.R. No. 212/1987 including the present petitioner along with others preferred a Contempt petition being Civil Original Petition (Contempt) No. 105/1988.

11. The Court by order dated 29.08.1989 in said Civil Original Petition (Contempt) No. 105/1988 clarified that no action shall be taken by the respondents (Elementary Education Department) which would be in violation of the order passed earlier by the Court on 25.04.1988 observing that if the respondents would violate the said order dated 25.04.1988 in any way, they would be dealt with appropriately in said contempt proceeding.

12. Thereafter, the respondents in the Elementary Education Department after due scrutiny took steps to terminate all those teachers whose appointments were not found to be valid pursuant to the order dated 25.04.1988 passed in said Civil Rule No. 212/1987 as well as the order dated 29.08.1989 passed in said Civil Original Petition (Contempt) No. 105/1988, noted above.

13. The petitioner herein along with 4 others preferred a writ petition being WP(C) No. 5222/2008 (*Smti. Piyali Kachari and Others Vs. State of Assam and Others*) stating that their services were adjusted subsequently against regular vacancies and that they are aggrieved as the respondents in the Education Department stopped their salaries w.e.f. August, 2007 apprehending that their salaries were stopped on the ground that they were appointed beyond the existing vacancies.

14. The Court by order dated 23.02.2011 disposed of said WP(C) No. 5222/2008 (*Smti. Piyali Kachari and Others*), noted above, with the following directions that –

“1) As claimed by the petitioners, they would produce before the Director of Elementary Education, Assam certified copies of the orders of the court, if any, pursuant to which they claim to have been appointed to the posts which they assert hare holding since the year 1989 along with other documents, if any, attesting their participation in any selection contemplated by the Rules preceding their appointments.

2) The aforementioned State authority would scrutinize all relevant records including those produced by the petitioners as above and examine the tenability of their claim for salary from the month of August-2007 as claimed verifying inter alia, as to whether they are rendering their services against the posts claimed b y them.

3) If on such verification, the appointments of the petitioners are found to be valid in law and if they are found to be actually in service against the posts claimed by them, the Director of Elementary Education, Assam would pass consequential and appropriate orders in connection with their salary.”

15. Thereafter, the petitioner approached the Director of Elementary Education, Assam with the said order of the Court dated 23.02.2011 passed in said WP(C) No. 5222/2008 preferred by her and 4

others and the Director of Elementary Education, Assam by order dated 27.03.2014 held that the appointment of the petitioner was not valid in law as she was appointed against non-existing post and accordingly, rejected the claim of salary of the petitioner and against the same, the petitioner along with 4 others approached the Court in Cont. Cas(C) No. 66/2014 which was dismissed on 23.04.2014.

16. Against certain orders of the Court, the State Government preferred writ appeal being WA No. 301/2012 and other connected cases wherein the Court by order dated 18.03.2015 observed that the petitioners and all such teachers serving in Dhemaji District who are continuously working as Teachers, and their salaries were paid by virtue of the orders of the Court where the arrears of salary from July, 2007 were not being paid to them. The Court further observed that since the respondents (Teachers of Dhemaji/petitioners) are continuously serving as Teachers, the question whether they are illegally appointed or otherwise it matter-less. The Court also observed that "However, for the services rendered by the private respondents and availed by the State, on the principle of "*quantum meruit*" the salaries have to be paid". In that view of the matter, the Court did not find any ground to interfere with the order of the learned Single Judge and accordingly, dismissed those appeals preferred by the State.

17. Some other teachers preferred a writ petition being WP(C) No. 1764/2008 (*Smt. Dayawati Dutta and 2 Others Vs. State of Assam and 7 Others*) wherein the Court by order dated 26.05.2015 while disposing of said WP(C) No. 1764/2008 observed that – the Division Bench in said WA No. 301/2012 and other connected cases vide judgment and order dated 18.03.2015 have already observed that the respondents are continuously serving as Teachers, the question whether they are illegally appointed or otherwise it matter-less and for the services rendered by the private respondents and availed by the State, on the principle of "*quantum meruit*" the salaries have to be paid, as such, the Court directed the State respondents to take steps for payment of salaries to the petitioners of said WP(C) No. 1764/2008 for the period from August, 2007 till the date of said order i.e., 26.05.2015 within the specified time.

18. The petitioner along with 4 others approached this Court in WP(C) No. 3470/2015 against the order dated 27.03.2014 passed by the Director of Elementary Education, Assam wherein the said authority rejected the claim of the petitioner and others of WP(C) No. 5222/2008 for payment of their salaries.

19. The Court by order dated 17.12.2015 disposed of said WP(C) No. 3470/2015 directing the Director of Elementary Education, Assam to redo the exercise in terms of the order dated 23.02.2011

passed in said WP(C) No. 5222/2008 and to consider the case of the petitioner and also to pass an appropriate order within the specified time.

20. For non-compliance of the order dated 17.12.2015 passed in said WP(C) No. 3470/2015, the petitioner along with 4 others preferred a contempt case being Cont. Case No 370/2016.

21. To regulate the recruitment and conditions of service of teachers of the Elementary Schools provincialised under the Assam Elementary Education (Provincialisation) Act, 1974, the State Government in the Education Department framed the Assam Elementary Education (Provincialisation) Rules, 1977 under the proviso to Article 309 of the Constitution of India. The said 1977 Rules came into force w.e.f. 19.03.1979 which was first amended in the year 1997.

22. At the time of appointment of the petitioner on 18.11.1995, the process for appointment in terms of said 1977 statutory recruitment Rules was prescribed under Rule 3 and Rule 3 (i) of said 1977 Rules stipulated that there shall be a valid advertisement in newspapers from desirous candidates registered with employment exchange prescribing the minimum qualification of matriculation/High School Leaving Certificate Examination or any other examination of equivalent standard being the minimum qualification for the posts of teachers in L.P. Schools or Junior Basic Schools where preference to be given to the candidates trained Senior Basic Normal and Junior Basic Training courses.

23. As per the provisions of said Rule 3 (i) of said 1977 Rules, the number of posts category-wise reservation for Scheduled Castes/Scheduled Tribes and Other Backwards Classes etc. for vacancies of elementary school teachers existing in the year in the Sub-Division was to be notified. Such select list was to be authenticated either by the Director or by the District Elementary Education Officer of the District for middle Schools as directed by the Director and the Deputy Inspector of Schools of Sub-Division.

24. The petitioner in this writ petition categorically stated that the Deputy Inspector of Schools, Nazira appointed her as an Assistant Mistress on 18.11.1995 against a leave vacancy in Ramugaon Lower Primary School under Khelua Education Block of Sivasagar district.

25. It is not the case of the petitioner that after due advertisement and selection, she participated in the Selection process and thereafter, on the basis of her selection following the merit, she was appointed by the Deputy Inspector of Schools, Nazira on 18.11.1995 and accordingly posted. The petitioner also did not state about her registration number with the concerned Employment

Exchange as required under Rule 3 (i) of the said 1977 Rules.

26. The Court by order dated 23.02.2011 passed in said WP(C) No. 5222/2008 that was preferred by the petitioner and 4 others, very specifically observed that if the appointments of the petitioners are found to be valid in law and if they are found to be actually in service against the posts claimed by them, the Director of Elementary Education, Assam would pass consequential and appropriate orders in connection with their salaries.

27. Said finding of the Court passed in WP(C) No. 5222/2008 has become final and absolute as neither the petitioner nor the State respondents preferred any appeal against the said direction dated 23.02.2011 passed in WP(C) No. 5222/2008.

28. The petitioner placed before the Court a copy of the certificate issued by the Head Teacher of Ramugaon L.P. School on 02.02.2018, wherein the said Head Teacher stated that the petitioner since the date of her joining in the said school was receiving her salary regularly upto February, 2012.

29. Pursuant to a Suo-Moto order passed by the Division Bench of this Court, the Director of Elementary Education, Assam by issuing necessary advertisements on 01.02.2012 and 04.02.2012 in local newspapers invited applications from the irregularly/illegally appointed teachers throughout the State. In response to the said advertisements, applications were received from such category of teachers. After conducting the preliminary examination of the applications so received at the Directorate level, the Elementary Education Department constituted 5 (five) Screening Committees headed by the Divisional Commissioners concerned and the Principal Secretaries of the 6th Schedule areas and BTC to examine those applications and the report of the preliminary committee. Thereafter, a Departmental Committee was formed by the Government to verify salary status and qualifications of those illegal/irregular teachers. The said committee prepared three lists based on the Screening Committees' Report-

(i) The teachers who have received salaries upto 2007 and onwards and having Junior Basic Training (JBT)/Diploma in Elementary Education (D.El.Ed.) were included in the List No. 1

(ii) The teachers who received salaries upto 2007 and onwards and does not have JBT/ D.El.Ed.were included in the List No. 2.

(iii) The teachers who have neither received salaries nor having the prescribed training i.e. JBT/ D.El.Ed. were included in the List No.3

30. Later, after receipt of the opinions of various departments and on the basis of said three lists, the State respondents decided to resolve the issue of illegal/irregular appointment by way of preparation of a Cabinet Memorandum for placing the same before the Cabinet.

31. In the said Cabinet Memorandum, it was specified that –

(a) approval was sought for accommodating those teachers who have received salary up to 2007 and have successfully completed the Junior Basic Training/D.El.Ed. course by certain personal/supernumerary posts with prospective effect from the date of approval of the Cabinet. Those posts will cease to exist as and when the incumbent retires from service (i.e. List- 1 as Teacher).

(b) Approval was sought for those who received upto 2007 but have not acquired the professional qualification before 2011, their job can only be accommodated as tutor with prospective effect from the date of approval of the cabinet (i.e., List-2 as Tutor).

32. On 07.10.2020, the State Cabinet gave its approval on the said Cabinet Memorandum prepared by the authorities in the Elementary Education Department of the State.

33. The name of the petitioner was considered in the List-2 as she received salary upto February, 2012 but does not have the requisite teachers training i.e., Junior Basic Training/D.El.Ed. and though the authorities incorporated her name in the List-2 but after the Cabinet approval dated 07.10.2020, noted above, no offer of appointment could be provided to her as Tutor as in the meanwhile, she on 31.01.2018 attained the age of superannuation at 60 years.

34. Considering the above, the respondents in the Elementary Education Department could not consider the case of the petitioner to engage her as "Tutor" after the said Cabinet Memorandum dated 05.10.2020.

35. Though the petitioner urged before the Court for her monthly salary from March, 2012 relying on the decision of the Division Bench passed in WA No. 301/2012 (*State of Assam and Another Vs. Arunima Chetia*) and other connected appeals on 18.03.2015 as well as the order dated 26.05.2015 passed in WP(C) No. 1764/2008 (*Smit Dayawati Dutta and 2 Others Vs. State of Assam and 7 Others*) and the order dated 17.12.2015 passed in said WP(C) No.3470/2015 [*Mrs. Aruna Konch (the petitioner) and 4 Others Vs. the State of Assam and 4 Others*] but as noted above, the Court by order dated 23.02.2011 passed in WP(C) No. 5222/2008 [*Smti.Piyali Kachari and Others (including the*

petitioner) Vs. State of Assam and Others] for payment of such salary of the petitioners therein including the petitioner, categorically observed that the appointments of the petitioners should be valid. But the present petitioner in the case in hand failed to place anything before the Court to show that her appointment order dated 18.11.1995 as an Assistant Mistress of Ramugaon Lower Primary School, a public post, was duly made following the provisions of Articles 14 and 16 of the Constitution of India.

36. Though the Hon'ble Division Bench in its order dated 18.03.2015 passed in said WA No. 301/2015 observed that the writ petitioners/teachers who are continuously working as Teachers, their salaries have been paid by virtue of the order of the Court where the arrear salary from July, 2007 being not paid and as they are serving continuously as teachers, the question whether they are illegally appointed or otherwise it matter-less and since the services rendered by the writ petitioners/private respondents as the case may be, was availed by the State on the principle of "quantum of meruit", the salaries have to be paid being followed in various orders by the Court, some of which are placed before the Court by the petitioner vide order dated 26.05.2015 in WP(C) No. 1764/2008 as well as the order dated 17.12.2015 passed in WP(C) No. 3470/2018 .

37. It is to be noted herein that much before issuance of those orders of the Court dated 18.03.2015, 26.05.2015 and 17.12.2015, noted above, the Hon'ble Supreme Court consisting of a Bench of three Hon'ble judges in the case of *R. Vishwanatha Pillai Vs. State of Kerala*, reported in (2004) 2 SCC 105 agreed with the decision of the Full Bench of the Patna High Court in the case of *Rita Mishra Vs. Director, Primary Education, Bihar*, reported in AIR 1988 Patna 26, where the issue was — *whether a public servant was entitled to payment of salary to him for the work done despite the fact that is letter of appointment was forged, fraudulent or illegal* wherein the said Full Bench had held that — "*It is manifest from the above that the rights to salary, pension and other service benefits are entirely statutory in nature in public service. Therefore, these rights including the right to salary spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of law no statutory entitlement for salary or consequential rights of pension and other monetary benefits can arise. In particular, if the very appointment is rested on forgery, no statutory right can flow it.*"

38. The Hon'ble Supreme Court in the said case of *R. Vishwanatha Pillai* (supra) categorically observed that — "*The right to salary or pension after retirement flow from a valid and legal appointment. The consequential right of pension and monetary benefits can be given only if*

appointment was valid and legal."

39. In the case in hand, with regard to the appointment during the year 1989, the Assam Elementary Education (Provincialisation) Rules, 1977, a statutory recruitment Rules under Article 309 of the Constitution of India was in force, the petitioner failed to place anything before the Court that her appointment was valid and legal following the provisions of said 1977 statutory recruitment Rules. Though the petitioner served as Assistant Mistress in said Ramugaon Lower Primary School under Khelua Education Block of Sivasagar district since 1995 as alleged by her and did not receive her salary from March, 2012, the Court in terms of the said decision of the Honble Apex Court passed by a Bench consisting of three Hon'ble Judges in the case of *R. Vishwanatha Pillai* (supra), is not in a position to pass any such order in favour of the petitioner for payment of arrear salary to her from March, 2012 during her alleged service in the said school till the date of retirement, as she failed to establish that her appointment order was made duly after valid advertisement and selection.

40. It is seen that the learned counsels for the parties appearing in those writ petitions as well as writ appeals did not place before the Court the said decision of the Hon'ble Supreme Court passed in the case of *R. Biswanath Pillai* (Supra).

41. For the reasons above and since the petitioner failed to place anything before the Court that her appointment was made following the provisions of Articles 14 and 16 of the Constitution of India and the Assam Elementary Education (Provincialisation) Rules, 1977, a statutory Rule of Recruitment under Article 309 of the Constitution of India, this Court is of the view that the petitioner is not entitled for any such salary as prayed for, since her appointment to the public post was not valid as it was not made by following the due and legal process of recruitment to the public post.

42. Accordingly, this writ petition, being devoid of merit, stands dismissed.

43. Copy of the instructions placed before the court by Mr. Sarma, learned Standing counsel, Department of School (Elementary) Education, be kept as a part of the record.

JUDGE

Comparing Assistant