

GAHC010065732019



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

Case No. : WP(C)/2032/2019

LEKHAN DUTTA
S/O- LATE ANANDA DUTTA, VILL- NAOPANI GAON, P.O- GOVINDAPUR,
DIST- LAKHIMPUR, ASSAM, PIN- 787055

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT OF ASSAM,
EDUCATION ELEMENTARY DEPT, DISPUR, GUWAHATI- 06

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

3:THE DISTRICT ELEMENTARY EDUCATION OFFICER
LAKHIMPUR
NORTH LAKHIMPUR
P.O AND DIST- LAKHIMPUR
PIN- 787052

4:THE DEPUTY INSPECTOR OF SCHOOLS
DHAKUAKHANA NORTH LAKHIMPUR
P.O AND DIST- LAKHIMPUR
PIN-787055

5:THE BLOCK ELEMENTARY EDUCATION OFFICER
DHAKUAKHANA
P.O- DHAKUAKHANA
DIST- LAKHIMPUR
ASSAM
PIN- 78705

Advocate for the Petitioner : MR. U K NAIR

Advocate for the Respondent : SC, ELEM. EDU

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 04.04.2023

Heard Mr. M.P. Sarma, learned counsel for the petitioner as well as Mr. Mr. N.J. Khataniar, learned standing counsel for the Elementary Education Department, appearing for respondents.

2. In brief, the case of the petitioner is that he was initially appointed as Grade-IV staff (Chowkidar) by order dated 19.08.1994 in the office of the Block Elementary Education Officer (BEEO), Dhakuakhana. His service was regularized by order dated 16.02.1995. The status of the petitioner was temporarily upgraded as Lower Division Assistant (LDA for short) and it is claimed till date the petitioner is serving as In-charge LDA. The petitioner claims that having served in the BEEO as LDA since 16.02.1995 and having served the Department since 19.08.1994, the petitioner has come within the zone of consideration for promotion to the cadre of Junior Assistant (Grade-III) post. In this regard, the petitioner had submitted a representation on 08.01.2018 before the BEEO, Dhakuakhana, which was forwarded to the District Elementary Education Officer (DEEO for short), Lakhimpur. Although the proposal was forwarded to the Director of Elementary Education, Assam, but the same was not been considered.

3. Nonetheless, on 28.02.2019, an advertisement was issued for filling up 67 posts of Junior Assistant by way of direct recruitment. It is claimed that when this writ petition was filed, about 7 posts of Junior Assistant was lying vacant in the District of Lakhimpur. It is also projected that in the year 2014, 2016 and 2017, the Director of Elementary Education, Assam has promoted some similarly situated Grade-IV employee and therefore, the learned counsel for the petitioner submits that the non-consideration of the case of the petitioner for promotion was bad in the eyes of law. It is submitted that the petitioner has a right to be considered for promotion. Thus, it was submitted the denial of promotion and/ or regularization in the post of Junior Assistant was arbitrary and illegal and amounted to discrimination against the petitioner. Hence, by filing this writ petition under Article 226 of the Constitution of India, the petitioner has prayed for quashing of the advertisement dated 28.02.2019, by which applications were invited for the post of Junior Assistant. The petitioner is also seeking direction upon the respondent authorities to consider his case for promotion to the cadre of Junior Assistant pursuant to recommendation made by the DEEO, North Lakhimpur on 10.01.2018 in terms of provisions of the Assam Ministerial District Establishment Service Rules, 1967 (hereinafter referred to as "1967 Rules").

4. The learned counsel for the petitioner has referred to the case of *Nagpur Improvement Trust Vs. Yadaorao Jagannath Kumbhare & Ors.*, (1999) 8 SCC 99, and has submitted that in the absence of statutory rules governing the service conditions, the Executive would have the power to issue instruction and take decision in the matter of consideration for promotion and accordingly, it is submitted that as other similarly situated persons were considered for promotion, the respondent authorities are required to consider the case of the

petitioner for promotion as was done for others.

5. The learned standing counsel for the Elementary Education Department has referred to the affidavit-in-opposition filed by the Director of Elementary Education, Assam and it is submitted that under the 1967 Rules, the educational qualification for being considered for promotion on seniority-cum-merit basis is that the candidate should have passed degree examination in any discipline from a recognized university or any examination declared equivalent thereto and must also have rendered at least 7 years of continued service in the district establishment on the first day of year in which the selection is made. It is submitted that the petitioner does not have the qualification as prescribed by Rule 6(6)(b) of the 1967 Rules. It is submitted that the provision of Rule 6(6)(b) of the 1967 Rules was substituted and the previous rule which required that a candidate should have minimum qualification of "High School Leaving Certificate or equivalent examination" is no longer in force. It is submitted that earlier in point of time vide order dated 19.12.2016, one Sri Dharmeswar Chutia, who was a Grade-IV employee was promoted to the post of Junior Assistant in the office of BEEO, Bordoloni and by order dated 19.12.2017, Sri Jatin Das, who was also a Grade-IV employee was promoted to the post of Junior Assistant in the office of Deputy Inspector of Schools, Dhakuakhana. However, after the same came to their notice, the Director of Elementary Education, Assam by an order dated 28.03.2019, had reverted them back to their original posts although they had superannuated by then.

6. By referring to statement made in para 7 & 8 of the affidavit-in-opposition, it is submitted that the selection process in the establishment of

Elementary Education Department is done under the provisions of Assam Public Services (Direct Recruitment to Class III and Class IV Posts) Rules, 1997 and it is also submitted that as per Rule 6(6)(b) of the 1967 Rules, the promotional quota is earmarked as 10% of the vacancies in the concerned District Educational Establishments. Hence, the learned standing counsel for the respondent has submitted that as the petitioner does not have the requisite educational qualification, there is no question of considering the case of the petitioner for promotion to the post of Junior Assistant.

7. It appears from the provisions of Rule 2(4) of the 1967 Rules that "District Establishment" means and includes all non-gazetted ministerial staff in the offices of the Deputy Commissioner, Sub-Divisional Officers and Sub-Deputy Collectors and Block Development Officers of the District and that as per the note appended thereto, the offices of Deputy Commissioners and Sub-Divisional Officers shall include branches like Supply, Textile, Election, Revenue, Excise, Development and other general branches. Therefore, there is nothing on record to show that for non-teaching Grade-IV staff in the provincialised schools under the Elementary Education Department is covered by 1967 Rules. It is also not found that whether the 1967 Rules has been adopted by the Elementary Education Department for the purpose of conditions of eligibility and appointment.

8. One of the stand taken by the respondent in the affidavit-in-opposition is that the appointments for the post of Junior Assistant by direct recruitment or promotion is covered by the provision of Assam Public Services (Direct Recruitment to Class III and Class IV Posts) Rules, 1997. However, on a conjoint reading of the 1967 Rules as well as 1997 Rules, it appears that both the rules

are for recruitment and not for promotion.

9. It is not in dispute that the petitioner as well as the respondents are both referring to the 1967 Rules for one reasons or the other. Under the 1967 Rules, more specifically Rule 6(6)(b), the Grade-IV employee, for being considered for promotion, must have acquired degree certificate from a recognized University and must have rendered at least 7 years of continuous service. On such parameter, although the petitioner has rendered more than 7 years of continuous service, but he does not have the requisite qualification for being considered for promotion. Therefore, the Court *prima-facie*, does not find the petitioner to have the requisite qualification for being considered for promotion.

10. If others, who did not have the requisite qualification were promoted, such promotion cannot build the authorities and the authorities cannot be ordered to act in breach of law. This is where the principle of negative equality would apply, which would come in the way of the Court to pass any order which is not as per the presumption of law.

11. Be that as it may, as the Director of Elementary Education, Assam has not only referred to the 1997 Rules, but also has referred to the 1967 Rules in his affidavit-in-opposition to project that as the petitioner did not have the requisite prescribed qualification of graduate degree from recognized University under the 1967 Rules, the case of the petitioner could not be considered.

12. Therefore, as the Director of Elementary Education Department has referred to both the 1967 and 1997 Rules, the Court is of the considered opinion that the matter be remanded to the Director of Elementary Education

Department, Assam for a consideration as to whether or not the case of petitioner for considering his entitlement to promotion would be considered under the 1967 Rules or that the recruitment to the post of Junior Assistant would be made only under the 1997 Rules.

13. It is provided that in the event the Director of Elementary Education Department, Assam is of the considered opinion that the 1967 Rules would apply for considering the case for promotion of the petitioner, in that event, as the petitioner does not have the requisite qualification of possessing graduate degree from any recognized University, there would be no requirement for any further consideration.

14. Insofar as the case of *Nagpur Improvement Trust (supra)*, relied by the learned counsel for the petitioner is concerned, the said decision is an authority on the point that in the absence of statutory rules governing service conditions of the employees, executive instruction and or decision taken administratively in the field an appointment/ promotion can be made in accordance with such executive instruction. In the present case in hand, there is no service rules for the Grade-IV and Grade-III employees under the establishment of DEEO, Assam. Therefore, it is left to the prudence of the Director of Elementary Education Department, Assam to bring about a clarity as to the respective Rules for recruitment and promotion so that it may guide the authorities at the District Level to take recourse to the appropriate directions/ orders for the purpose of considering recruitment to the post of Junior Assistant as well as promotion of Grade-IV employee to the promotional post of Junior Assistant.

15. Accordingly, this writ petition stands disposed of on terms as indicated above.

16. The petitioner shall produce a certified copy of this order before the Director of Elementary Education Department, Assam and the said authority shall take a call in the matter and communicate his decision to the petitioner within a period of one month from the date of receipt of the certified copy of this order.

JUDGE

Comparing Assistant