

GAHC010076382019



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

Case No. : WP(C)/2389/2019

MOHIBUR RAHMAN
S/O. LT. MD. ASHRAF ALI, VILL- BARTHAL KACHARIGAON, P.O.
DOLOIGAON, DIST. MORIGAON (ASSAM). PIN- 782126.

VERSUS

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

2:THE FINANCE DEPARTMENT
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
DISPUR
GHY.-06.

3:THE DIRECTOR
HIGHER EDUCATION
ASSAM
KAHILIPARA
GHY.-19.

4:THE GOVERNING BODY

MOIRABARI COLLEGE
REP. BY THE PRESIDENT OF THE GOVERNING BODY OF MOIRABARI
COLLEGE
P.O.- MOIRABARI
DIST.- MORIGAON
ASSAM- 782126.

5:THE PRINCIPAL
MOIRABARI COLLEGE

P.O. MOIRABARI
DIST.- MORIGAON
ASSAM- 782126

Advocate for the Petitioner : MR A R BHUYAN

Advocate for the Respondent : SC, HIGHER EDU

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 06.04.2023

Heard Mr. A.R. Bhuyan, learned counsel for the petitioner. Also heard Mr. K. Gogoi, learned standing counsel for the Higher Education Department, appearing for respondent nos.1 and 3, Mr. A. Chaliha, learned standing counsel for the Finance Department, respondent no.2 and Mr. S. Muktar, learned counsel appearing for respondent nos.4 and 5.

2. In brief, the case of the petitioner is that pursuant to an advertisement dated 22.03.1998, issued by the Secretary, Special Body of Moirabari College ('college' for short) for recruitment to various posts including two posts of Lower Divisional Assistant ('LDA' for short), the petitioner had offered his candidature and by a call letter dated 06.06.1998, the petitioner was asked to attend the college on 14.06.1998 for interview along with the original documents. As per resolution no.4, dated 12.07.1998, taken in the meeting of the Special Body of the college, the petitioner who had stood first was selected and thereafter, by an appointment order dated 05.08.1998, the petitioner was appointed as LDA of the college against non-sanctioned post in a consolidated pay of Rs.400/- per month from the date of joining. The petitioner had joined

served on 07.08.1998. The authorities of the college had submitted various request letters to the competent authorities in the Higher Education Department for regularization/ provincialization of the post of the petitioner, but those representations are projected to have not been responded to. Subsequently, by a letter dated 02.05.2008, the Director, Higher Education, Assam had recommended creation of post of LDA and Library Assistant in the college, addressed to the Commissioner & Secretary, Govt. of Assam, Education (Higher) Department. As nothing materialized, the petitioner had approached this Court by filing WP(C) 3827/2010 and this Court by order dated 02.07.2010 had directed the Commissioner & Secretary, Govt. of Assam, Education (Higher) Department to examine whether the petitioner's college needs a post of LDA and a post can be sanctioned and to do the needful in accordance with law. The petitioner as well the college authorities again represented the cause of the petitioner.

3. Thereafter, the Director, Higher Education, Assam by the impugned letter dated 07.03.2019 has observed that the petitioner did not have the requisite qualification as per notification dated 22.12.2016 by the Director of Higher Education, Assam and the Principal of the college was also informed that there was no provision for regularization of service of non-teaching staff appointed by the college authority against non-sanctioned post in the Assam College Employees (Provincialization) Rules, 2010 ('2010 Rules' for short) and accordingly, the Principal was directed to remove the petitioner from service. Accordingly, by a letter dated 08.03.2019, the petitioner was removed from service by the college authorities. Accordingly, by filing this writ petition under Article 226 of the Constitution of India, the petitioner has assailed the impugned orders dated 07.03.2019, issued by the Director of Higher Education, Assam as

well as order dated 08.03.2019 by the Principal of Moirabari College, thereby removing the petitioner from the post of Jr. Assistant. The petitioner has also prayed for consequential reliefs to direct the respondent authorities to sanction the post of Jr. Assistant/LDA and to adjust the petitioner in the vacant post of LDA w.e.f. 31.12.2014.

4. The learned counsel for the petitioner has submitted that the petitioner has rendered 21 years of service and has almost spent a major part of life to serve the college and therefore, the termination and removal of service of the petitioner was harsh, which affected his livelihood as well as has caused great hardship to his family. It is submitted that the authorities would always have the power to create a supernumerary post or to sanction a post of LDA and to adjust the petitioner in the said post. It is also submitted that the only irregularity in the issuance of appointment order of the petitioner was that the college authorities did not take prior permission from the Director of Higher Education, Assam, they have otherwise complied with the requirement of Rule 4(3) of the Assam Aided College Employees Rules, 1960 ('1960 Rules' for short) by issuing advertisement and the petitioner was selected pursuant to regular recruitment process initiated through an advertisement. It is submitted that the petitioner has been arbitrarily removed from service, whereas several other persons, who were similarly appointed, had got their service regularized by the Govt. It is submitted that since 1998 and till the impugned order was passed, several representations were submitted by the petitioner as well as the college authorities and therefore, the Higher Education Department was aware that the petitioner was rendering service since 1998. It is also submitted that as the petitioner had joined service in the year 1998, subsequent rules and notification of 2010 and thereafter could not have been applied on the petitioner to deny his

regularization of service. It is submitted that the petitioner was not put to notice and was not heard before terminating his service. In support of his submissions, the learned counsel for the petitioner has relied in the cases of (i) *Nihal Singh & Ors. vs. State of Punjab & Ors.*, (2013) 14 SCC 65; (ii) *Secretary, State of Karnataka & Ors. vs. Uma Devi (3) & Ors.*, (2006) 4 SCC 1; (iii) *State of Assam vs. Upen Das*, (2017) 4 GLR 493; and (iv) *Sudarsanan K. & Anr. vs. State of Kerala & Ors.*, 2019 SCC OnLine KER 1736.

5. The learned counsel for the respondent nos.4 and 5 has supported the claim of the petitioner for his regularization of his service and it is submitted that as the petitioner had rendered long service to the college, the college authorities have all sympathies for the petitioner. However, as they were bound by the direction issued by the Director of Higher Education, Assam, by the impugned letter dated 07.03.2019, the college authorities had no option but to terminate the service of the petitioner by issuing the order dated 08.03.2019.

6. Per contra, the learned standing counsel for the Higher Education Department has submitted that the post in which the petitioner was appointed was a non-sanctioned post and therefore, the Govt. at the Higher Education Department is not bound to regularize the service of the petitioner, who was appointed despite repeated directions not to engage any person in the non-sanctioned post. It is submitted that even if a post is created and/or sanctioned, the respondent authorities would be bound to follow the procedure prescribed under the 2010 Rules, under which the prescription of a recruitment for the post of LDA and Library Assistant would be as per Sub Rule (5) of Rule 5 of the said 2010 Rules, which required that the post should be filled up by direct recruitment and from the Laboratory Bearers/Library Bearers/Grade-IV having

qualification as prescribed in notification no. DHE/CE/Misc./341/2016/39 dated 22.12.2016 (page 57), whereby, the minimum qualification for appointment is prescribed as Graduate in any discipline under the ratio of 75:25. It is submitted that regularization cannot be a mode of recruitment insofar as the Govt. is concerned and it is further submitted that the State is bound by the ratio laid down in the case of *Uma Devi (supra)*. It is also submitted that as per the judgment of the Supreme Court of India in the case of *Bibhuti Shankar Pandey Vs. State of Madhya Pradesh & Ors., (2023) 0 Supreme (SC) 96*, it has been laid down that the initial appointment must have been done by the competent authority and that the person appointed must have the minimum qualification prescribed for the said post and as the appellant in the said case lacked in both the qualifications/prescription, the Supreme Court of India had approved the order passed by the Division Bench of Madhya Pradesh High Court, upholding the reversal of benefit of regularization. By referring to the case of *State of Gujarat vs. R.J. Pathan, (2022) 5 SCC 394*, it is submitted that the said decision is an authority on the point that in exercise of power under Article 226 of Constitution of India, the Court would not have power to direct the State Govt. to create supernumerary post and to absorb a particular candidate in the said service by regularizing their services. It is submitted that in both the cases cited by him, the Supreme Court of India had relied on the decision of *Uma Devi (supra)*.

7. In the present case in hand, it is seen that the petitioner has not been able to show that prior to issuance of the employment advertisement by the respondent nos.4 and 5, any approval of the Director of Higher Education, Assam was taken. Moreover, the respondent nos.4 and 5 have also not been able to show that they had the prior approval of the competent authority before

issuing the said employment advertisement for filling up the non-sanctioned post of LDA. Therefore, it appears that the requirement of Sub Rule 3 of Rule 4 of the 1960 Rules has not been followed. Therefore, the Court would have to accept the submission made by the learned standing counsel for the Higher Education Department that regularization cannot be a mode of appointment and if one needs an authority on the point, the decision of the Supreme Court of India in the case of *Uma Devi (supra)* may be referred to.

8. One of the submissions made by the learned counsel for the petitioner is that the subsequent enhancement of educational qualification, which has been prescribed as minimum qualification for appointment to the post of LDA could not have been applied to the petitioner. In the said connection, the Court is of the considered opinion that in order to get the service of the petitioner regularized, the petitioner would have to fulfill the criteria which is prescribed at the present to seek employment in the college as LDA. It was submitted by the learned counsel for the petitioner that in several cases where services of large number of people were regularized, the Govt. had granted time to the said employees to acquire higher qualification. However, the said principle cannot be applied in the present case as there is no decision by the Govt. to regularize the service of the petitioner or other similarly situated persons. Therefore, the appointment of the petitioner must be in accordance with the prescribed rules.

9. Insofar as the case of *Nihal Singh (supra)* is concerned, the said ratio would not apply in the present case in hand because of the peculiar facts in which the said case was decided by the Supreme Court of India. In the said case, it was permissible for the prescribed authorities to appoint persons as

Special Police Officers because at that point of time, the State of Punjab was in a grip of certain subversive activities by a class of persons and on appointment, the appellant therein was allowed to work as a Guard in a bank and the salary of the appellant was given by the bank and therefore, when the issue of regularization arose, the State of Punjab had tried to wash off its hands by taking a plea that the petitioner was placed in service with the bank and under the said circumstances, it was held that the State had extracted service from the appellant and therefore, he was entitled to regularization. Therefore, on the facts of the present case, the cited case of *Nihal Singh (supra)* is distinguishable.

10. Insofar as the case of *Uma Devi (supra)* is concerned, the ratio is culled down in paragraph 53 of the said decision. In the present case in hand, the Court has not been able to accept the submission made by the learned counsel for the petitioner that his service was irregular because the Moirabari College, while appointing the petitioner in a non-sanctioned post did not take the prior approval of the competent authority as required under Sub Rule 3 of Rule 4 of the 1960 Rules, because lack of approval before appointment is made would make such appointment as illegal. Therefore, the case of *Uma Devi (supra)* does not help the cause of the petitioner.

11. Insofar as the case of *Upen Das (supra)* is concerned, the State Govt. had taken a decision to regularize the service of Muster Roll workers and it is under the said context that this Court while referring to the case of *Uma Devi (supra)*, had held that the issue of regularization of service of the respondent therein was out of question, and therefore, following the ratio laid down in the case of *State of Punjab vs. Jagjit Singh, (2017) 1 SCC 148*, a direction was

issued to the State to pay minimum pay scale to the Muster Roll workers. Therefore, the said ratio cannot be applied to the present case in hand.

12. Insofar as the case of *Sudarsanan K. (supra)* is concerned, although in the said case, a direction was issued to interfere with the decision of the Tribunal and direct regularization of service of the petitioners therein, but in view of the subsequent decision of the Supreme Court of India in the case of *R.J. Pathan (supra)*, the Court is of the considered opinion that with utmost respect to the decision of the Kerala High Court in the case of *Sudarsanan K. (supra)*, the said ratio would not have persuasive value in light of decision of the Supreme Court of India in the case of *R.J. Pathan (supra)*.

13. The learned standing counsel for the Higher Education Department has referred to the order dated 02.07.2010, passed in WP(C) 3827/2010 to point out that in the said decision, an observation was made to the following effect:

“... This apart, the petitioner, being a contractual employee, cannot be absorbed against a sanctioned post even if such a post is sanctioned...”

14. Accordingly, the Court is inclined to accept the submission of the learned standing counsel for the Higher Education Department that even if a sanction is made for the post of LDA, the right of the petitioner has already been determined in the order dated 02.07.2010, passed in WP(C) 3827/2010, which has attained finality.

15. Accordingly, the Court is of the considered opinion that the petitioner is not entitled to any of the reliefs as prayed for and therefore, the writ petition stands dismissed.

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

17. The learned counsel for the petitioner has submitted that the petitioner has become over aged for any other employment. If that be so, it would be open to the petitioner that when he applies for any post, he would approach the competent authority with a representation for relaxation of his age and if such a prayer is made, it is expected that the concerned competent authority shall take a decision thereon at an earliest so that the petitioner is not deprived for applying for any post.

JUDGE

Comparing Assistant