



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)
PRINCIPAL SEAT AT GUWAHATI

WA No. 122/2019

Dilip Kumar Ghosh,
S/O Late Anil Chandra Ghosh,
Village and PO-Kathiatolie, Kampur Road,
District-Nagaon, Assam.

.....Appellant.

-Versus-

1. The State of Assam,
Represented by its Commissioner & Secretary,
Education Department, Dispur, Guwahati-6, Assam.
2. The Director of Higher Education, Assam,
Kahilipara, Guwahati-19.
3. The Governing Body, Khagarijan College,
Chotahaibar, Nagaon, Assam, Pin-782003.
4. The Principal, Khagarijan College, Chotahaibar,
Nagaon, Assam, Pin-782003.
5. Kaushik Kamal Saikia,
S/O Late Naren Saikia,
Village-Chandmari Road, Haiborgaon, PS-Sadar,
Nagaon, Assam.

.....Respondents.

BEFORE
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

For the Appellant:

Mr. A.C. Borbora, Sr. Adv.,
Mr. M. Smith.

.....Advocates.

For the Respondents: Mr. S. Das, SC, Higher Education,
for respondent Nos.1 and 2,
Ms. N. Dey for respondent No.4,
Mr. H.R.A. Choudhury, Sr. Adv., assisted
by Ms. Rimi Deka for respondent No.5.
.....Advocates.

Date of Hearing : 19.04.2023

Date of Judgment : **12th May, 2023**

JUDGMENT AND ORDER

[Sandeep Mehta, CJ]

1. This instant writ appeal is preferred by the appellant herein seeking to assail the common judgment and order dated 22.04.2019 passed by the learned Single Bench disposing of WP(C) Nos.3798/2017 and 4039/2017.

2. The facts in nutshell are that the appellant herein was appointed as a LDA on honorary basis by the Governing Body of the Khagarijan College vide order dated 25.10.2001. Subsequently, an order dated 30.05.2012 was issued whereby, the appellant was appointed against the post of Laboratory Bearer which fell vacant in the college on account of retirement. Another post of LDA in the college fell vacant due to the demise of one Naren Saikia on 19.01.2015. At that stage, the appellant herein, submitted an application dated 18.02.2015 seeking promotion from Grade-IV to Grade-III. The Governing Body of the college drew a resolution dated 19.12.2015 recommending promotion of the petitioner from Grade-IV to Grade-III. The said recommendation was forwarded to the Director of Higher Education, Government of Assam, who passed a speaking order dated 27.02.2017 observing that the appellant incumbent had not completed 5 years of service

in Grade-IV and thus, he was not eligible to be considered for promotion to Grade-III.

3. In the meantime, the respondent No.5 Sri Kaushik Kamal Saikia being the son of Naren Saikia, the deceased LDA, sought appointment on compassionate ground to the post which fell vacant on account of death of his father. Failing to achieve the desired result, Shri Kaushik Kamal Saikia filed a writ petition being WP(C) No.7713/2015, which was disposed of by the order dated 21.12.2015 directing the Inspector of Schools, Nagaon to place the case of Shri Kaushik Kamal Saikia (respondent No.5) before the District Level Committee (DLC) to be considered for appointment on compassionate basis. The DLC, processed the application and forwarded a letter dated 05.06.2017 to the college authorities along with a list of persons recommended to be appointed on compassionate ground. In such list, name of the respondent No.5 appeared at Sl.No.8 and he was recommended to be appointed against the post of LDA falling vacant on account of death of his father Shri Naren Saikia.

4. The appellant herein, filed the captioned writ petition No.3789/2017 raising a plea that the mother of the respondent No.5 Kaushik Kamal Saikia was working as an Assistant Teacher of the Swahid Chandan Singh High School, Nagaon, which is a provincialized school and therefore, the respondent No.5 was not eligible for compassionate appointment. It was also submitted that the writ petitioner (appellant herein), by virtue of his service tenure as a Laboratory Bearer was entitled for promotion to Grade-III under Rule 5(5) of the Assam College Employees (Provincialisation) Rules, 2010. The WP(C) No.3789/2017 filed by the appellant/petitioner came to be dismissed by the learned Single Bench by the order dated 22.04.2019. The WP(C) No.4039/2017 preferred by respondent No.5 Shri Kaushik Kamal Saikia was disposed of in view of the dismissal of the appellant's writ petition being

WP(C) No.3798/2017. The common order dated 22.04.2019 is assailed in this intra-Court writ appeal.

5. Learned Senior counsel Mr. Borbora representing the appellant, vehemently and fervently urged that the order passed by the learned Single Bench, suffers from misreading of facts and overlooking of pertinent averments made in the writ petition. He drew the Court's attention to the subject matter of the writ petition being WP(C) No.3798/2017 as well as the paragraph 19 of the said writ petition filed by the appellant, wherein, specific challenge was made to the order dated 27.02.2017 by impugning the same. Referring to these assertions made in the writ petition, he contended that "the finding recorded by the learned Single Judge at internal page No.6 of the order that the speaking order dated 27.02.2017 rejecting the claim of the petitioner on the ground of ineligibility was not under challenge and hence the same holds the field" is on the face of record, unsustainable because pertinent challenge was given by the petitioner to the said order in the writ petition.

6. He also submitted that the learned Single Judge was not justified in observing that the petitioner could not establish that his claim for promotion came within 25% quota of the ratio 75:25 provided under Rule 5(5) of the Rules of 2010. In this regard, Mr. Borbora drew the Court's attention to the affidavit-in-opposition filed by the Governing Body of the College wherein, the assertion made by the appellant claiming to be eligible for promotion has not been disputed. He urged that as a matter of fact, the Governing Body, approved the claim laid by the petitioner for promotion to Grade-III by Resolution No.3 dated 19.12.2015 which fact was pleaded in paragraph 9 of the writ petition and was admitted in the affidavit-in-opposition filed on behalf of the Governing Body and the Principal of the College.

7. Mr. Borbora drew the Court's attention to paragraph 11 of the affidavit-in-opposition filed by the College wherein, the fact regarding respondent No.5's mother being gainfully employed as an Assistant Teacher in the Swahid Chandan Singh High School, Nagaon, was admitted by the college authorities. He submitted that this pertinent admission in the affidavit would clearly establish that the respondent No.5 was not legally entitled to be considered for appointment on compassionate ground.

8. Mr. Borbora referred to the speaking order dated 27.02.2017 (Annexure-H of the writ petition) and contended that the claim of the appellant for promotion to Grade-III was dismissed by making a reference to the Assam Directorate Establishment (Ministerial) Service Rules, 1973 which prescribes minimum 5 years of service as an eligibility criterion for promotion from Grade-IV to Grade-III. Mr. Borbora submitted that the applicable rules i.e. the Assam Provincialized Colleges Service Rules, 2010 do not contain any stipulation of 5 years experience in Grade-IV as an eligibility criterion for promotion to Grade-III. He thus contended that the said order whereby, the appellant's claim for promotion was negated is bad in the eyes of law on the face of the record. On these submissions, Mr. Borbora implored the Court to reverse the impugned orders and extend the relief sought for by the appellant as per his entitlement.

9. Per contra, Mr. H.R.A. Choudhury, learned Senior counsel representing the respondent No.5, vehemently and fervently opposed the submissions advanced by the appellant's counsel. He supported the findings recorded in the impugned order dated 22.04.2019 urging that as the appellant herein, did not make any prayer in the relief clause of the writ petition for challenging the speaking order dated 27.02.2017, the learned Single Judge was perfectly justified in rejecting the writ petition while observing that the said order not having been challenged, had attained finality. However, qua the allegation regarding the mother of the respondent No.5 Kaushik Kamal Saikia being

employed in a provincialized school, Mr. Choudhury was not in a position to dispute this fact.

10. We have given our full consideration to the submissions advanced at Bar and have carefully perused the impugned order and the material placed on record. At the outset, we would like to refer to certain averments made in the writ petition filed by the appellant. In the subject matter of the writ petition, it is specifically mentioned that the writ petition was being filed in the matter of impugned speaking order dated 27.02.2017 issued by the respondent No.2 rejecting the proposal of the Governing Body of the Khagarijan College to promote the petitioner from Library Bearer (Grade-IV) to the vacant post of LDA on unsustainable ground. The order was placed as Annexure-H in the writ petition. At paragraph 19 of the writ petition, specific averment is made that the impugned speaking order dated 27.02.2017 rejecting the resolution of the Governing Body for promotion of the petitioner to Grade-III is based on a senseless and unsustainable ground by applying the wrong set of rules and thus, the said impugned speaking order is liable to be set aside as unsustainable in the eyes of law.

Pertinent challenge was also given to this order in paragraph 20 of the writ petition. It is correct that in the prayer clause of the writ petition, the said order is not specifically assailed but the fact remains that challenge having been given to the order dated 27.02.2017 in the subject matter of the writ petition as well as paragraphs 19 and 20 of the pleadings, the view taken by the learned Single Bench that the speaking order dated 27.02.2017 was not challenged by the petitioner was too hyper technical approach of appreciating the matter by ignoring the substance of averments made in the writ petition.

11. Perusal of the entire body of the writ petition leaves no room for doubt in our mind that the appellant/writ petitioner laid pertinent challenge to the

speaking order dated 27.02.2017 and hence, the validity of the said order was required to be examined by the learned Single Bench on merits. Having said so, we now proceed to examine the legality and validity of the speaking order dated 27.02.2017 (Annexure-H to the writ petition), which reads as below:-

"Seen the resolution of Governing Body of Khagarijan College dated 23-05-2015. The Governing Body has taken resolution to promote Sri Dilip Kumar Ghosh, Library Bearer (Grade-IV) to the vacant post of L.D.A. The post was lying vacant due to demise of Naren Saikia on 19-01-2015.

The Principal of the College visited this officer and pleaded that their proposal should be considered.

Sri Dilip Kumar Ghosh was appointed on 31-05-2012. The Assam Provincialized Colleges Service Rule, 2010 states that appointment to the post of L.D.A. should be made in the ratio of 75:25 i.e. 75% through direct recruitment and 25% from eligible Grade-IV.

Eligibility means the Grade-IV must have the required educational and professional qualification. The rules does not state the number of years that have to be completed on the post of Grade-IV to get eligibility.

In the case of non mentioning of criteria we may consult the Assam Directorate Establishment (Ministerial) Service Rule, 1973 which states minimum 5 years of service as Grade-IV to be considered for promotion.

As Dilip Kumar Ghosh appointed on 31-05-2012 has not completed 5 years on the date of consideration of promotion, he is not eligible to be promoted to Grade-III inform all concerned."

There is no dispute that the service of the appellant herein is governed by the Assam Provincialized Colleges Service Rules, 2010. It is also an admitted position that the Governing Body of the College considered the application of the appellant and recommended his case for promotion to the post of Junior Assistant vide resolution dated 11/19.12.2015 (Annexure-F to the writ petition). The Rules of 2010 do not stipulate qualifying criterion of minimum 5 years of service experience as Grade-IV to be considered for promotion to Grade-III. While passing the speaking order dated 27.02.2017,

the Director, Higher Education, Assam, took recourse to the Assam Directorate Establishment (Ministerial) Service Rules, 1973 and imported the condition in the said Rules, which stipulates that minimum 5 years of service experience as Grade-IV is necessary to be considered for promotion to Grade-III. There cannot be two views that the Rules of 1973 do not govern the services of the appellant and hence, the same could not have been applied so as to negate the claim of the appellant for promotion to Grade-III. Thus, the speaking order dated 27.02.2017 is illegal and perverse on the face of record. The learned Single Judge, did not examine the legality of the said order by making an erroneous observation that this order was not under challenge in the writ petition. The impugned order dated 22.04.2019 passed by the learned Single Judge suffers from the vice of non-consideration of material facts and applicable statutory Rules.

12. The learned Single Bench further held that the writ petitioner could not be said to be a person aggrieved which is also incorrect in view of the observations made (supra). The finding recorded in the order dated 22.04.2019 that the post which fell vacant following the death of Naren Saikia came within the 25% promotion quota is also erroneous because the speaking order dated 27.02.2017 does not indicate that the claim of the appellant was being negated on account of non-availability of the post in the promotional quota.

13. The petitioner gave a specific challenge to the proposed appointment of the respondent No.5 on compassionate basis by making an averment that his mother was gainfully employed in a provincialized school. The affidavit-in-opposition filed by the Governing Body and the Principal of the College establishes that mother of the respondent No.5 is Smt. Prabhabati Saikia was indeed working as an Assistant Teacher in the Swahid Chandan Singh High School at Nagaon. The respondent No.5 did not file any affidavit to controvert this allegation.

14. Law is well settled by a catena of judgments of Hon'ble Supreme Court that compassionate appointment is an exception to general mode of recruitment on a civil post and cannot be claimed as a matter of right. It is a mode of providing immediate relief to the family members of the Government employee dying in harness from financial distress and penury. Since the wife of the deceased Government employee and the mother of the respondent No.5 was already serving as an Assistant Teacher, manifestly the family would neither face financial distress nor penury on account of death of Shri Naren Saikia. Furthermore, the family would also get the advantage of the terminal benefits pursuant to the death of the employee and hence, there was no chance of them facing any financial distress. Reference in this regard may be had to judgment rendered by Hon'ble Supreme Court in the case of ***State of Maharashtra v. Madhuri Maruti Vidhate***, reported in **2022 AIR SC 5176**.

As a consequence, there is no doubt in the mind of the Court that the respondent No.5 was not entitled to be considered for appointment on compassionate ground pursuant to the death of his father.

15. On a perusal of the record, we do not find any perceivable legal impediment which could disentitle the appellant to claim promotion as Grade-III. As has been stated above, the Governing Body of the college recommended the case of the appellant for promotion which fact is clearly borne out from the affidavit-in-opposition. The Governing Body took a resolution dated 11/19.12.2015 to promote the appellant from the post of Library Bearer (Grade-IV) to the vacant post of LDA. The Director of Higher Education, rejected the appellant's claim by taking recourse to the minimum 5(five) years' experience criterion as stipulated in the Assam Directorate Establishment (Ministerial) Service Rule, 1973, which action has been found to be illegal by us in the preceding discussion. The fact that the speaking order dated 27.02.2017 suffers from gross non-application of mind is further

fortified because the said order refers to the resolution of the Governing Body of the Khagarijan College dated 23.05.2015 purportedly for promoting Dilip Kumar Ghosh. However, the resolution available on record was actually drawn on 19.12.2015 pursuant to meetings held on 18.03.2015 and 11.12.2015. Thus, it is apparent that the Director, Higher Education Assam failed to consider the final resolution dated 11.12.2015/19.12.2015 communicated vide letter dated 19.12.2015. As per the applicable rules, i.e. the Assam Provincialized Colleges Service Rules, 2010, the appellant is eligible to be promoted to Grade-III. The learned Single Judge/Bench observed that there was only 25% quota for filling up the post of LDA by promotion and that the appellant could not bring on record reliable material to show that the post which fell vacant following the death of Naren Saikia comes within the said 25% quota. However, this observation of the learned Single Bench is not in sync with the pleadings and material available on record, because the appellant's claim was not rejected on the ground that posts were not available under the 25% quota against promotion. The affidavit-in-opposition of the College authorities also does not indicate that the appellant could not claim promotion because no post was available under such quota. Since the appellant's claim was not rejected on this ground, there was no occasion for him to have raised such a plea in the writ petition. Hence, we are of the firm view that the appellant is definitely entitled to be considered for promotion on the post of Grade-III which fell vacant in the college on account of death of Naren Saikia.

16. Resultantly, the impugned order dated 22.04.2019 passed by the learned Single Bench cannot be sustained and is reversed. As a consequence, the order dated 27.02.2017 passed by the Director of Higher Education, Assam, is also reversed. The Director of Higher Education shall consider the recommendation dated 19.12.2015 of the Governing Body of the College for promotion of the appellant from Grade-IV to Grade-III in accordance with the Rules of 2010

by passing a speaking order within next 2(two) months from the date of receipt of copy of this order.

17. The writ appeal is allowed accordingly. No order as to cost.

Sd/- Parthivjyoti Saikia
JUDGE

Sd/- Sandeep Mehta
CHIEF JUSTICE

Compassing Assistant