

GAHC010127332017



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

Case No. : WP(C)/2363/2017

PABINDRA KUMAR DAS
SON OF RAJENDRA KUMAR DAS, R/O VILLAGE-KHATIKUCHI, PO-
KHATIKUCHI, DIST. NALBARI, ASSAM

VERSUS

THE STATE OF ASSAM and 5 ORS.
REPRESENTED BY THE COMMISSIONER AND TO THE GOVERNMENT OF
ASSAM, SECONDARY EDUCATION DEPARTMENT, DISPUR, GUWAHATI-06

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

3:INSPECTOR OF SCHOOL

NDC
NALBARI
DIST. NALBARI
ASSAM
PIN-781335

4:THE TREASURY OFFICER

NALBARI ASSAM

5:THE PRINCIPAL
PASCHIM BANBHAG HIGHER SECONDARY SCHOOL
P.O. KHATIKUCHI
DIST. NALBARI
ASSAM.

6:THE MANAGING COMMITTEE
PASCHIM BANABHAG HIGHER SECONDARY SCHOOL
KHATIKUCHI
P.O. KHATIKUCHI
DIST. NALBARI
ASSA

Advocate for the Petitioner : MR.J KALITA

Advocate for the Respondent : GA, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

10.05.2023

- 1.** Heard Mr. J. Kalita, learned counsel for the petitioner. Also heard Mr. U. Sarma, learned Standing Counsel for the Secondary Education Department appearing for the respondent nos. 1, 2 & 3 and Mr. B. Gogoi, learned Standing Counsel for the Finance Department appearing for the respondent no. 4.
- 2.** Although the cause list reflects the name of Ms. R.P. Baruah as the counsel for the respondent nos. 5 & 6, none appears on call.
- 3.** The case of the petitioner is that he was appointed on temporary basis on the leave vacancy of one Shri Binod Ch. Baishya as per by Memo No. EST-4/94/88/3003-07 dated 28.03.1991 issued by the Inspector of School, Nalbari District Circle (NDC), Nalbari. It is projected that the service was extended by an order dated 19.04.1991 issued by the Inspector of School, Nalbari District Circle, Nalbari. Thereafter, the petitioner continued to serve the Pachim Banabthag High School as Grade-IV employee / Night Chowkidar of this School.

4. The petitioner claims that the Principal of the said School (respondent no. 5) issued an appointment letter to the petitioner on 05.01.1992 and the petitioner re-joined the said School. The petitioner as well as the school authorities had written to the Director of Secondary Education, Assam for sanctioning a Grade-IV post in the said School and to regularize the service of the petitioner, however, the same has not been done till date. The learned counsel for the petitioner has submitted that from time to time the petitioner had drawn its salary and lastly he was allowed to draw salary against the vacancy which arose out of retirement of one Krishna Deka, Grade-IV employee of Gangapukhuri Barkuriha High School vide order dated 06.09.2004, w.e.f. 31.05.2002 which was issued by the Inspector of School, N.D.C., Nalbari.

5. Accordingly, by filing the writ petition under Article 226 of the Constitution of India, the petitioner has prayed for a direction upon the respondent authorities to regularize his service w.e.f. the date of 28.03.1991 and to release his arrear salary from 01.01.2006 till date.

6. The learned counsel for the petitioner has submitted that the petitioner has been working in the said school from 28.03.1991 and despite rendering service for about 22 years without any break, his service has not been regularized till date. It is also submitted that the representations of the petitioner has not been responded to or considered.

7. Heard the submissions made by the learned Standing Counsel for the Secondary Education Department as well as the Finance Department, opposing

the prayer made in the writ petition.

8. It is not in dispute that the school in which the petitioner is rendering service was provincialised with effect from 01.10.1977. The date of provincialisation appears to be in consonance with the provisions of Section 1 (3) of the Assam Secondary Education (Provincialisation) Act, 1977 (hereinafter referred to as the "1977 Act") which mandates that the said Act would come into force on 01.10.1977. The provision of Section 2 (v) provides that "employee means a person in the employment of a school working against a regularly sanctioned post and whose appointment has been approved by the School authority wherever such approval was necessary". As per Section 2 (xii) "School Authority" means the "Director" or "Inspector" whose approval is necessary for the appointment or regularisation of the appointment of an employee of a Secondary School.

9. In the light of the said definition, the Court is of the considered opinion that the petitioner is not been able to demonstrate that the employment offered to him was in accordance with the scheme of the said 1977 Act.

10. As per Section 3 (1) of the said 1977 Act, it is provided that all Rules including Service Rules and Rules of conduct and discipline which are applicable to Government servants of corresponding ranks shall be applicable to all employees. In this regard, the petitioner has not been able to demonstrate that he was employed by following any selection procedure conducted in a transparent manner and /or in accordance with any service rules. Therefore, the

employment to the petitioner was not offered in a transparent selection process by giving others to participate.

11. It has been pointed out at the Bar by the learned Standing Counsel for the Secondary Education Department and learned Standing Counsel for the Finance Department that the non-teaching staff of provincialised Secondary schools would be covered by the provisions of Assam Secondary Education (Provincialisation) Service Rules 2003 which provides for the manner of recruitment of Grade-IV staff.

12. Although the petitioner has rendered for a long period of service of 22 years, but the law settled by this Court in the case of *Abdul Bari vs. State of Assam & Ors.* reported in (1999) 3 GLT 31, is that the persons appointed by the Managing Committee after the Provincialisation of the School on honorary basis are not eligible for regularization. The said judgment was also approved of by the Division Bench of this Court in the case of *Dambarudhar Kalita vs. State of Assam & Ors., WA No. 252/2003*, decided on 17.06.2003.

13. Even otherwise, pursuant to the decision of the Supreme Court of India in the case of *Secretary, State of Karnataka vs. Uma Devi (3)*, reported in (2006) 4 SCC 1, the petitioner would not be covered as a candidate eligible for regularization having not been appointed in accordance with law.

14. Accordingly, in view of the discussion above, the writ petitioner is not

found entitled to relief as prayed for and as such this writ petition is dismissed.

15. Nonetheless, the Court is noted with concern that the petitioner claims that he has not been perished salary or remuneration from 01.01.2006.

16. In respect of the claim for arrear salary, the learned counsel for the petitioner has referred to the judgment by the Division Bench of this Court in the case of *Harendra Ch. Nath vs. State of Tripura & Ors.* reported in 2013 (2) GLT 1094, whereby recovery of arrear salary was restricted to a period of 3 years prior to the date of filing of the writ petition. Reference is also made to the decision of the Division Bench of this Court in the case of *Md. Mazid Ali vs. the State of Assam & Ors., WA 187/2018* which relates to team of salary by a retired Assistant Teacher of the same schools, Pachim Bonbhag Higher Secondary School. It is submitted that in the said case, although the writ petition was dismissed, in appeal, the Division Bench of this Court had entertained the appeal only on the issue of entitlement of arrear salary w.e.f. 01.01.2006. The said order is extracted below:

"Heard Mr. K.N. Choudhury, learned Senior Counsel representing the appellant, assisted by Mr. J. Kalita, Advocate as well Mr. A. Deka, learned counsel representing the Elementary Education Department.

This intra-Court appeal is directed against the order dated 06.03.2018 passed in WP(C)/6225/12013, which was instituted by the appellant herein seeking a direction to the respondent State to adjust his service as an Assistant Teacher in the vacant post of one

Shri Sibanath Kalita who retired from service from Pachim Bonbhag H.S. School on 28.02.2012, as well as for payment of his salary on and from 01.01.2006. The said writ petition having been answered in the negative, hence, the present appeal.

Adjudication of this appeal lies only on the issue of entitlement of arrear salary w.e.f. 01.01.2006. There is no dispute to the fact that the appellant has been discharging duties as an Assistant Teacher at Pachim Bonbhag H.S. School for the period from which arrear salary is claimed.

The question of regularizing the service of the appellant in the facts of this case and in view of the law laid down in Secretary, State of Karnataka vs. Uma Devi (3) reported in (2006) 4 SCC 1, does not arise. However, the appellant cannot be denied salary for the period he has discharged duties as an Assistant Teacher and / or for the period during which the respondents have utilized his services. Having said so, regard is also had to the Division Bench judgment of this Court in Harendra Ch. Nath vs. State of Tripura and Others, reported in 2013 (2) GLT 1094, whereby recovery of arrear salary was restricted to a period of 3 (three) years prior to the date of filing of the writ petition. In the instant case, the writ petition seeking arrear salary was instituted on 08.10.2013. Therefore, in view of Harendra Ch. Nath (supra), the appellant would be entitled to receive arrear salary only from the three year period prior to the date of institution of the WP(C) 6225/2013. In other words, the appellant cannot claim arrear salary beyond three years before the filing of the writ petition.

In view of the above, the present appeal stands partly allowed with direction to the State respondent in the Elementary Education Department to make necessary verification and to take steps for releasing the arrear salary that may be due to the appellant on and from the date prior to three years from the date of institution of WP(C)/6225/2013, which is 08.10.2013. The entire exercise of making verification and for payment of arrear salary that may be found due to the appellant, be complete within a period of 4 (four) months from today. Ordered accordingly."

17. Accordingly, it is submitted that as the issue relating to payment of arrear salary of the same school is involved, this Court should invoke the principle of parity and grant same relief to the petitioner.

18. Coming to the claim made by the learned counsel for the petitioner for the arrear salary of the petitioner for the period from 01.01.2006, as already mentioned herein before in this case, there is no material on record that the petitioner was appointed in a transparent recruitment process after advertising any vacancy. There is no record that a formal approval of the appointment was made by the competent authority in the Secondary Education Department, i.e., the Inspector of Schools. In light of such factual matrix, it would be relevant to refer to the case of *State of Orissa & Anr. vs. Mamata Mohanty*, (2011) 3 SCC 436. Para 36 thereof is quoted below:

"36. *Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting*

applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the noticeboard, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."

19. In the case of *National Fertilizer Limited vs. Sombir Singh (2006) 5 SCC 493*, the observations made by the Supreme Court of India in para 23 to 26 are quoted below.

"23. *The contention of the learned counsel appearing on behalf of the respondents that the appointments were irregular and not illegal, cannot be accepted for more than one reason. They were appointed only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee had not been properly constituted. In view of the ban on employment, no recruitment was permissible in law. The reservation policy adopted by the appellant had not been maintained. Even cases of minorities*

had not been given due consideration.

24. *The Constitution Bench thought of directing regularisation of the services only of those employees whose appointments were irregular as explained in State of Mysore v. S.V. Narayanappa [(1967) 1 SCR 128 : AIR 1967 SC 1071] , R.N. Nanjundappa v. T. Thimmiah [(1972) 1 SCC 409 : (1972) 2 SCR 799] and B.N. Nagarajan v. State of Karnataka [(1979) 4 SCC 507 : 1980 SCC (L&S) 4 : (1979) 3 SCR 937] wherein this Court observed: [Umadevi (3) case [(2006) 4 SCC 1 : (2006) 4 Scale 197] , SCC p. 24, para 16] “16. In B.N. Nagarajan v. State of Karnataka [(1979) 4 SCC 507 : 1980 SCC (L&S) 4 : (1979) 3 SCR 937] this Court clearly held that the words ‘regular’ or ‘regularisation’ do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments.”*

25. *Judged by the standards laid down by this Court in the aforementioned decisions, the appointments of the respondents are illegal. They do not, thus, have any legal right to continue in service.*

26. *It is true that the respondents had been working for a long time. It may also be true that they had not been paid wages on a*

regular scale of pay. But, they did not hold any post. They were, therefore, not entitled to be paid salary on a regular scale of pay. Furthermore, only because the respondents have worked for some time, the same by itself would not be a ground for directing regularisation of their services in view of the decision of this Court in Umadevi (3) [(2006) 4 SCC 1 : (2006) 4 Scale 197].”

20. Similar view was taken by the Supreme Court of India in the case of *State of Manipur vs. Y. Token Singh & ors.* reported in (2007) 5 SCC 65 where it has been held that if the claim is based on illegal appointment, the appointees are not entitled to receive any salary for the period during which they rendered work on the basis of such illegal appointment. Similar view has also been taken by this Court in the case of *Rukiya Khatun vs. State of Assam & Ors., 2012 (1) GLT 532* equivalent to (2012) 4 NEJ 80 where this Court had held that the petitioners therein were the products of illegal appointments and consequently, they cannot claim payment of salary and accordingly the writ petitions were dismissed. The said view has also been followed by this Court in the case of *Md. Harunar Rashid vs. State of Assam & Ors., 2019 (4) GLT 771* where by referring to the judgments referred herein before, the claim towards the salary was refused.

21. Be that as it may, although the Court is disinclined to issue any direction to the State respondents to make payment of the salary of the petitioner, by following the order dated 03.09.2018 passed by the Division Bench of this Court in the case of *Md. Mazid Ali* (supra) cited by the learned counsel for the

petitioner, the Court is inclined to provide that the School Managing Committee of Pachim Banbhag, Higher Secondary School shall be liable to pay the arrear salary of the petitioner, restricting his entitlement to a period of 3 years prior to 19.04.2017, the date of filing of the writ petition. The payment of the salary to the petitioner shall be released by the School Managing Committee out of their own funds within a period of 6 (six) months from the date of service of certified copy of this order before the said School Managing Committee.

JUDGE

Comparing Assistant