

GAHC010132262013



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

Case No. : WP(C)/6585/2013

HASAN BAKT CHOUDHURY and 8 ORS.
S/O- AZIZUR RAHMAN CHOUDHURY, R/O- VILL- BUHADURPUR, POand PS-
NILAMBAZAR, DIST- KARIMGANJ, ASSAM.

2: SRI MANOJ MALAKAR
S/O- LT. MATILAL MALAKAR
R/O VILL- SUPRAKANDI
PO- MANIKGANJ
PS- KARIMGANJ
DIST- KARIMGANJ

3: AKBAR HUSSAIN CHOUDHURY
S/O LT. ABDUL HASIB CHOUDHURY
R/O VILL- GOUASHPUR
PO- JANAKALYA N BAZAR
PS- KARIMGANJ
DIST- KARIMGANJ

4: MANSUR AHMED KHAN
S/O LT. ABDUS SUKKUR KHAN
R/O VILLPO-SUDARASHI
DIST- KARIMGANJ

5: ABDUL KADIR CHOUDHURY
S/O LT. HAJI MAULAVI SAID ALI CHOUDHURY
R/O VILL- DHIT BATARASHI
PO- TILLABAZAR
DIST- KARIMGANJ

6: HUSNA BEGUM CHOUDHURY
W/O- ABDUL SALAM
R/O VILL- LAFASHAIL
PO- LAKSHMI BAZAR
DIST- KARIMGANJ

7: NASRIN SULTANA CHOUDHURY
W/O- KAMAL UDDIN
R/O VILL- DHIT BATARASHI
PO- TILLABAZAR
DIST- KARIMGANJ

8: MUSTAQUE AHMED
S/O- MUHIBUR RAHMAN
R/O VILL- BONUGRAM
POandPS- NILAMBAZAR
DIST- KARIMGANJ

9: ON THE DEATH OF HABIBUR RAHMAN
HIS LEGAL HEIRS
S/O- LT. FIROZ ALI
R/O VILL- FAROMPASHA
PO and PS- NILAMBAZAR
DIST- KARIMGANJ

9.1: FATIMA BEGUM
W/O LATE HABIBUR RAHMAN
R/O FARAMPASHA
NILAM BAZAR
FARAMPASHA PART-I
NILAM BAZAR
DIST-KARIMGANJ
ASSAM

9.2: DILWAR HUSSAIN TALUKDAR
S/O LATE HABIBUR RAHMAN
R/O FARAMPASHA
NILAM BAZAR
FARAMPASHA PART-I
NILAM BAZAR
DIST-KARIMGANJ
ASSAM

9.3: SAHMINA BEGUM TALUKDAR
D/O LATE HABIBUR RAHMAN
R/O FARAMPASHA
NILAM BAZAR
FARAMPASHA PART-I
NILAM BAZAR
DIST-KARIMGANJ
ASSAM

9.4: AHMED HUSSAIN TALUKDAR

S/O LATE HABIBUR RAHMAN
R/O FARAMPASHA
NILAM BAZAR
FARAMPASHA PART-I
NILAM BAZAR
DIST-KARIMGANJ
ASSAM

9.5: SAHARA SULTANA TALUKDAR
D/O LATE HABIBUR RAHMAN. R/O FARAMPASHA
NILAM BAZAR
FARAMPASHA PART-I
NILAM BAZAR
DIST-KARIMGANJ
ASSA

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM, EDUCATION ELEMENTARY DEPARTMENT,
ASSAM SECRETARIAT, DISPUR, GUWAHATI-781006.

2:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
EDUCATION ELEMENTARY DEPARTMENT
ASSAM SECRETARIAT
DISPUR
GUWAHATI-781006

3:DIRECTOR OF ELEMENTARY EDUCATION
ASSAM
KAHILIPARA
GUWAHATI-781019

4:DEPUTY INSPECTOR OF SCHOOLS
KARIMGANJ
PO- KARIMGANJ
DIST- KARIMGANJ
ASSAM
PIN

Advocate for the Petitioner : MR.K KONWAR

Advocate for the Respondent :

**BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR
JUDGMENT & ORDER (ORAL)**

Date : 15-12-2023

Heard Mr. K.K. Mahanta, learned senior counsel assisted by Ms. N. Begum, learned for the petitioners and Ms. D. Mushahary, learned standing counsel for the respondents in the Education (Elementary) Department.

2. The petitioners by way of this writ petition have assailed the appointment orders issued to them on 22.12.2009 and 18.02.2010 to the extent that the same being prospective in nature has the effect of wiping out the services rendered by the petitioners w.e.f. 20.11.1999 in terms of the orders of appointment issued to them and available at Annexures II(A) to II(I) and also has the effect of ousting the petitioners from the purview of the provisions of the Assam Services (Pension) Rules, 1969.

3. The petitioners in pursuance to a recruitment process initiated vide an advertisement dated 28.12.1996 came to be appointed by the Deputy Inspector of Schools, Karimganj as Stipendiary Teachers. The petitioners submitted their respective joining reports and continued in their services against the post so allotted to them. As the petitioners were continuing in their services, a fresh select list came to be prepared by the respondent authorities and the persons so included therein came to be appointed against the posts held by the petitioners. The petitioners along with others thereafter instituted WP(C) No. 4079/2001 before this Hon'ble Court. This Hon'ble Court vide order dated 02.11.2006 took up the said writ petition being WP(C) No. 4079/2001 along with other analogous matters and on considering the issues arising therein, directed that the petitioners were not entitled to any relief and the petitioners

were granted liberty to approach the Civil Court of competent jurisdiction for establishing their rights in the matter.

4. The petitioners thereafter instituted WA No. 111/2007 assailing the judgment and order dated 02.11.2006. The said writ appeal along with other analogous matters was given a final consideration by this Court on 28.03.2007 remanding back the matter to the State authorities particularly the Commissioner and Secretary to the Government of Assam in the Education (Elementary) Department, to resolve the issues arising in the proceedings after carrying out the requisite enquiry. The Secretary to the Government of Assam in the Education (Elementary Department thereafter passed a speaking order of 19.08.2009 (Annexure 7 to the writ petition) holding that the select list wherein the names of the petitioners figured, appears to be the only available reliable document to proceed with the recruitment process and accordingly, it was directed that the persons, including the petitioners, whose name figured in the said select list dated 27.10.1999 be appointed. Accordingly, the Director of Elementary Education, Assam vide orders dated 22.12.2009 appointed the petitioners in terms of the selection held in the year 1999. In the said appointment orders issued to the petitioners, a condition to the following effect came to be incorporated:

“The appointees shall have to furnish an undertaking alongwith joining report as prescribed by the Finance(Budget) Department vide letter No.BW.3/2003/Pt-II/1 dtd.25-01-2005, regarding introduction of "New Pension Rules. The content of the undertaking is as follows:-

“I understand and accept that Govt, servants joining the service of the State Govt. on or after 1st February, 2005 shall

not be governed by the existing Assam Service (Pension) Rules 1969 and order issued there-under from time to time and that their pension and other retirement benefits will be governed by a set of New Pension Rules which are being formulated in line with the Contribution Pension Scheme of the Govt. of India and going to be notified in due course".

5. It is the said condition that the petitioners have challenged in the present proceeding. The petitioners were initially appointed from a select list prepared on 27.10.1999 by the competent authorities which select list was approved by the concerned authorities. Thereafter on account of another select list coming into existence, the services of the petitioners came to be disturbed against which proceedings were initiated before this Court.

6. The matter on being remanded back to the State authorities by the Division Bench of this Court in the proceedings initiated in WA No. 9/2007, 111/2007, 418/2007, 86/2008, a thorough examination was carried out by the State authorities and the Secretary to the Government of Assam in the Education (Elementary) Department thereafter arrived at a conclusion that the select list dated 27.10.1999 in which the name of the petitioners figured was the only reliable document available on record and accordingly, directions came to be issued for appointing the petitioners in their respective services.

7. What is noticeable is that the petitioners were already appointed in the year 1999 in terms of the same very select list and they were continuing in their services. No termination orders have been brought on record to demonstrate that before the passing of the order dated 19.08.2009, the services of the petitioners continuing since 1999 against appointments effected in their case from the same very select list dated 27.10.1999 was in any manner terminated.

The order dated 19.08.2009 (Annexure VII to the writ petition) at best would be an order which had the effect of validating the appointments effected in the case of the petitioners way back in the year 1991 from the same very select list which was approved vide the order dated 19.08.2009. Accordingly, the petitioners have to be deemed in regular service w.e.f. 19.08.1999 and the order dated 19.08.1999 has to be understood to be an order validating the appointment of the petitioners effected in the year 1999 from the select list dated 27.10.1999.

8. The petitioners have made categorical statements in the writ petition that they had been working continuously since their dates of the initial appointment but their salaries for the said period have not been released to them and that the authorities had never terminated the services of the petitioners after their initial appointment effected way back on 20.11.1999.

9. The contentions made by the petitioners in this connection in the writ petition have not been countered by the State authorities by way of filing any affidavit and/or by brining any material on record. The present writ petition is pending in the files of this Court since the year 2013 and no affidavit has been filed till date by any of the State respondents.

10. In view of the said position, the statements made by the petitioners having not been countered by the State respondents, the same have to be held to have been admitted.

11. It is settled law that the averments made in the writ petition uncontroverted by the respondents should be presumed to be admitted and this Court has to proceed in the matter that the statements in the writ petition have been admitted by the respondents [*Naseem Bano Vs. State of UP*, reported in

1993 Supp (4) SCC 46].

12. In view of the above conclusions, the petitioners have to be deemed to be in service with effect from the dates of their initial appointment in terms of the appointment orders dated 20.11.1999 (Annexures II(B) to II(I) to the writ petition). Accordingly, the petitioners' services would be reckoned for all intent and purposes from 20.11.1999. The petitioners were initially appointed as Stipendiary Teachers and the position with regard to the entitlement of the petitioners (Stipendiary Teachers) have been led to rest by this Court in the decision in the case of *Purnima Hore and Anr. Vs. State of Assam and Ors.* passed in *WP(C) No. 6403/2021*. The relevant paragraphs of the said judgment are extracted hereinbelow for ready reference:

“29. The condition of undergoing such in-service training was purely dependent upon the Government providing the said Stipendiary Teachers the opportunity to avail the training. Though it was mandated in the appointment letters of the petitioners who were appointed on stipend that their appointment was subject to passing out the training in question and upon passing the said training they would be given the regular time scale of pay, but for all purposes, the writ petitioners who were appointed on a fixed stipend were duly appointed to the Government service and their services were regulated by the general Rules framed by the Government including for pension which were the Rules of 1969. It is also be relevant herein to take note of that the Government vide an Office Memorandum dated 27.04.2015 had also duly admitted the fact that due to lack of facilities, the petitioners herein along with others who were appointed on stipend could not be sent to training and accordingly has decided to grant the regular scale of pay to those teachers on the basis of the said Officer Memorandum dated 27.04.2015. This clearly

shows that on account of an unworkable condition, some of the petitioners herein could not undergo the training. In the opinion of this Court, such conditions admittedly being unworkable and the imposition thereupon to deprive the petitioners of their benefits under the Rules of 1969 would be arbitrary and unfair. More so, when by virtue of Section 12 of the Act of 1974 and the Rules of 1977, the petitioners duly qualify under the Rules of 1969 for entitlement of pension. It would also be relevant that it is not the case of the respondent State that the petitioners were afforded training and they failed.

30. The respondent State, however, on the basis of the communication dated 23.02.2010 issued by the Director of Finance (Budget) Department to the Deputy Accountant General (P&A) had observed that the teachers who were appointed on stipendiary basis on fixed pay prior to 01.02.2005, but brought under the regular time scale of pay on or after 01.02.2005, would not be entitled to a GPF Account as well as the provisions of the Rules of 1939 as the services of these employees are governed by the New Pension Scheme and not by the Rules of 1969. This on the face of it, in the opinion of this Court, is erroneous in as much as the Rule 2A of the Rules 1969 which was brought into effect from 01.02.2005 as well as the newly inserted proviso brought into effect by the General Provident Fund (Assam Services) (Amendment) Rules, 2011 do not in any manner mention that teachers appointed on stipendiary basis on fixed pay prior to 01.02.2005, but brought under the regular time scale of pay on or before 01.02.2005 would not be entitled to subscribe to a GPF Account as per the provisions of the Rules of 1939 as well as the benefits under the Rules of 1969. Even upon perusal of the NDCPS, 2009 it does not deprive the teachers appointed on stipendiary basis who have been granted the regular time scale of pay on or after

01.02.2005, the benefits under the Rules of 1969. Under such circumstances, this Court, therefore, is of the opinion that the writ petitioners herein who have been initially appointed on stipendiary basis but granted the regular scale of pay after 01.02.2005 would be entitled to the benefits under the Rules of 1969 or in other words would be covered under the Old Pension Scheme in terms with the Rules of 1969. Further to that, these writ petitioners who were appointed on stipendiary basis but granted the regular time scale of pay after 01.02.2005 would also be entitled to subscribe to the GPF Account as per the Rules of 1939. This aspect of the matter is also covered by the judgment of the Coordinate Bench of this Court in the case of Manati Basumatary vs. State of Assam & Others, reported in (2021) 6 GLR 659 wherein also the issue involved is similar to the case of the writ petitioners who were appointed on stipendiary basis. Paragraph Nos.10, 11, 12, 13 & 16 being relevant are reproduced herein below:-

“10. It is evident on the face of the record that by relying on the OM dated 6.10.2009, the Government of Assam in the Department of Pension and Public Grievance, had issued the Office Memorandum dated 14.1.2016 laying down the guidelines for payment of invalid/extraordinary/special family pension to the Government servants appointed on or after 1.2.2005.

11. The learned departmental counsel have argued that the eligibility of the petitioner's husband to receive regular pay scale was only with effect from 20.9.2007 and, therefore, his appointment prior to 20.9.2007 cannot be treated to be regular. However, it is to be noted herein that by the order dated 12.3.2001, the petitioner's husband was appointed against a regular vacancy. He was not allowed to draw the regular pay

scale merely because he had not completed the Junior Basic Training.

12. Rule 4 of the Assam Elementary Education (Provincialised) Services and Conduct Rules, 1981 lays down the provisions for confirmation of an employee and as per rule 4(b). Successful completion of the departmental training is one of the criteria for confirmation of services of the employee. From a perusal of the said rules, it is clear that the employees coming within the purview of the Rules of 1981 would be entitled to confirmation only upon completion of the Jr. Basic Training. Accordingly, the petitioner has been allowed to draw the regular pay scale upon completion of the basic training. However, the Rules of 1981 does not debar appointment of Assistant Teachers who have not completed the Jr. Basic Training. Rather, it appears that Jr. Basic Training is a part of in-service training and fulfillment of that criteria merely has a bearing on the confirmation of the employee and his right to receive regular pay scale. Therefore, it cannot be said that under the Rules, non-completion of Jr. Basic Training would make the appointment of the candidate itself as irregular. If a candidate is appointed in the post of Assistant Teacher by following the prescription of the relevant Rules and against a regular vacancy, his appointment cannot be termed as irregular merely on the ground that the candidate had not acquired the qualification of having passed the basic training since the rules do not say so.

13. Regular appointment in services is one thing and permitting an employee to draw a regular pay scale upon achieving certain qualification is altogether a different thing. It may be the case that the petitioner was not allowed to draw the regular pay scale due to want of his qualification of having successfully

completed the Junior Basis training. Completion of Junior Basic Training, in the considered opinion of this court, was one of the condition prescribed by the Rules for confirmation in service and also to permit drawal of regular pay scale and, therefore, non-completion of Junior Basic Training may create a bar for the employee to avail certain in service benefit including regular pay scale but the same by itself cannot be a valid ground to treat the appointment itself as irregular. Moreover, unless the initial appointment of the candidate is against a regular vacancy and in accordance with the Rules, his services cannot be regularized merely on completion of the Jr. Basic Training. It is not the case of the department that the initial appointment of the petitioner's husband was de hors the Rules.

16. In another decision of this court rendered in the case of Binoy Kumar Nath and Others v. State of Assam and Others [WP(C) Nos.5559 and 3999/2014 decided on 12.4.2018] relied upon by Mr. R. Borpujari, the learned Single Judge has observed that the NPS scheme introduced by the OM dated 6.10.2009 would also be applicable to those employees whose services are regularized against regular post after 1.2.2005. However, as has been held above, this is not a case when the service of the petitioner's husband had been regularized after 1.2.2005. He had merely been allowed to draw regular time scale of pay after 1.2.2005. Therefore, the ratio laid down in the aforesaid decision, in the opinion of this court, would not be applicable in this case."

31. Another very important aspect of the matter to be taken note of are the provisions of the Assam Elementary Education (Provincialisation) Service and Conduct Rules, 1981 (for short, 'the Rules of 1981'). Rule 2 (iv) defines the term 'Period of Service' as the

period of continuous service against a sanctioned post. Rule 2(xii) defines 'Service' to mean service rendered under the State Board for Elementary Education under the Assam Elementary Education Act, 1968 and the service rendered under the Government before or after provincialisation both in respect of teachers and other employees. Rule 2 (xiii) defines 'Teachers Training' to mean the Junior Basic Training, Senior Basic Training, Normal Training, Pre-Primary Training or any other training recognized by the Government. Rule 3 of the Rules of 1981 stipulates the terms and conditions. Taking into account its relevance Rule 3 (v), (vi) & (vii) are extracted herein below:-

“3. (v) The minimum qualification for the posts of elementary schools shall be Matriculation.

The teachers on appointment should be required to undergo Junior Basic or Normal Teachers Training Course or any other training recognized by the Government. (vi) Recruitment to the posts of teachers of elementary schools shall be made under the provisions of Part I, Rule 3 of the Elementary Education (Provincialisation) Rules, 1977.

(vii) Unless otherwise directed by Government the cadre of a teacher of a provincialised school shall be the cadre to which he is entitled to be admitted on the date of Provincialisation as shown in the Schedule I.”

It may be relevant herein to mention that from the above, it would be seen that the minimum qualification for the posts of elementary schools shall be Matriculation and the teachers on appointment should be required to undergo Junior Basic or Normal Teachers Training Course or any other training recognized by the Government. In terms with Rule 3 (vi), the recruitment to the post of

teachers of elementary school shall be made as per Rule 3 of the Rules of 1977.

32. Rule 4 of the Rules of 1981 stipulates when the member of the service would be confirmed. The said Rule being very relevant is reproduced herein below:-

“4. Confirmation.

Subject to availability of a permanent vacancy every member of the service shall be confirmed in the cadre/class/grade to which he/she is appointed substantively, if- (a) he/she has completed at least 3 years' continuous service after Provincialisation; (b) he/she has successfully undergone necessary training as may be prescribed by this Department and facilities for which have been offered to him/her by the department during the period of 3 years:

Provided that those teachers who have completed 45 years of age or have completed 3 years of continuous service after Provincialisation but no facilities have been provided to him/her for the prescribed training, will be confirmed provided there is nothing adverse against him/her:

Provided further that all teachers whose services have been confirmed and approved by the State Board or the Regional Board prior to 5th September, 1975 shall be deemed to have been duly confirmed with effect from the date of such confirmation.”

It would show from Rule 4 (b) that a member of the service would be confirmed when he/she had successfully undergone necessary training as may be prescribed by the Government and facilities for which have been offered to him/her by the Department during the period of 3 years. The proviso further mandates that in

case those teachers who had completed 45 years of age or had completed 3 years of continuous service but no facilities have been provided to him/her for the prescribed training, such teachers will be confirmed provided there is nothing adverse against him/her. Pertinent herein to mention that it not the case of the respondent State there was anything adverse against the petitioners for which they were not confirmed after 3 years of continuous service.

33. Rule 6 of the Rules of 1981 is also relevant for which the same is reproduced herein under:-

“6. Pension and gratuity etc.

The teachers shall be entitled to pension, gratuity and other pensionary benefits as admissible to the Government employees. The teachers who opt for pension scheme will discontinue their C.P.F., contribution and open fresh G.P.F. account and deposit the amount of their own C.P.F. contribution along with interest accrued thereon into the G.P.F. account so opened.

For the purpose of pension the period of service shall be counted from the date on which they were qualified to receive the benefit of C.P.F. during the Boards’ regime.”

This Rule categorically mandates that the teachers shall be entitled to pension, gratuity and other pensionary benefits as admissible to the Government employees. The said Rule does not differentiate between Trained Teachers and Untrained Teachers. The reason is obvious in as much as Rule 3 (vii) of the Rules of 1981 stipulates the cadre of teachers of a provincialised school in terms with Schedule I and Schedule I contains both trained and untrained teachers.

34. In view of the above reasons, this Court, therefore, holds that the

petitioners herein would be entitled to pension in terms with the Rules of 1969 and would further be entitled to subscribe to GPF. The petitioners in respect to present category which also be entitled to all other pensionary benefits as admissible to the Government employees of equal rank who are regulated in terms with the Rules of 1969."

13. In view the said decision of a Coordinate Bench of this Court in *Purnima Hore (supra)*, the petitioners upon clearing the JBT and upon being authorised a scale of pay, will be entitled to count the stipendiary period of services rendered by them as qualifying service for the purpose of computation of pension and pensionary benefits by application of the provisions of the Assam Services (Pension) Rules, 1969.

14. It is further clarified that the petitioner although have been permitted to count their services from 1999, however in the background of the facts involved in the matter, the petitioners would not be entitled to salary and/or stipend for the period of their initial appointment w.e.f. 20.11.1999 to the date the fresh appointments were effected in their cases on 22.12.2009. The petitioners would be entitled to salary/stipends only w.e.f. the dates they had joined their respective services in pursuance to the order dated 22.12.2009.

15. However, the period from 20.11.1999 till passing of the fresh appointment orders dated 22.12.2009, shall be reckoned for the purposes of computing the pension and pensionary benefits of the petitioners.

16. With the above directions, writ petition stands disposed of.

17. No order as to cost.

JUDGE

Comparing Assistant