

GAHC010149502022



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

Case No. : WP(C)/4938/2022

NABANITA SARMA
D/O- KARAM PRASAD SARMA, R/O- VILL.- FAKIRAMA, P.O. JURIGAON,
P.S. LAKHIMPUR, DIST. GOALPARA, ASSAM-783120.

VERSUS

THE STATE OF ASSAM AND 2 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, HEALTH AND FAMILY WELFARE (B) DEPARTMENT, DISPUR,
GUWAHATI-6.

2:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HEALTH AND FAMILY WELFARE (B) DEPARTMENT
DISPUR
GUWAHATI-6.

3:THE DIRECTOR OF HEALTH AND FAMILY WELFARE (B) DEPARTMENT
DISPUR
GUWAHATI-6

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

For the petitioner : Mr. S. Borthakur,
Mr. P.H. Konwar. Advocates.

For the respondents : Mr. D.P. Borah SC, Health.

Date of hearing : 18.09.2023

Date of Judgment : 26.09.2023

JUDGMENT AND ORDER (CAV)

1. Heard Mr. S. Borthakur, learned counsel for the petitioner and Mr. D.P. Borah, learned Standing Counsel, Health Department for all the respondents.
2. The petitioner's prayer in this writ petition is for a direction to be issued to the State respondents to consider the petitioner's service under Regulation 3(f) of the Assam Public Service Commission (Limitation of Functions) Regulation, 1951 (hereinafter referred to as "the 1951 Regulation) from 24.03.2017 to 15.10.2019, as regular service and consider her case for promotion to the grade of Assistant Professor.
3. The petitioner's case is that the petitioner was appointed as a Lecturer in Psychiatric Nursing at BSc Nursing College, Silchar vide Notification dated 09.10.2013 under Regulation 3(f) of the Assam Public Service Commission (Limitation of Function) Regulation, 1951 pursuant to an advertisement. Thereafter, pursuant to an Advertisement dated 03.07.2015, for filling up various regular posts of Lecturers in different disciplines of the Nursing College of Assam and under the Assam Health & Family Welfare (B) Department, the petitioner took part in the selection process for the post of Lecturer, Psychiatric Nursing under the Nursing College of Assam.

4. The Assam Public Service Commission (APSC), vide letter dated 24.03.2017, recommended various candidates for different posts of Lecturers "Discipline" wise. As per the APSC's letter dated 24.03.2017, Lecturers in four departments/disciplines were recommended, which are as follows :

1. Lecturer of Community Health Nursing in the Nursing Colleges of Assam under H&FW(B) Department.
2. Lecturer in Obstetrics & Gynaecological Department under H&FW(B) Department.
3. Lecturer, Medical Surgical Nursing/Medical Nursing under H&FW(B) Department.
4. Lecturer, Psychiatric Nursing in the Nursing College of Assam under H&FW(B) Department.

5. For the fourth category of posts of Lecturer, Psychiatric Nursing, the APSC recommended the following candidates (i) Dulmoni Das, (ii) Nabanita Sarma (**petitioner**) and (iii) Hiramoni Barman.

6. The petitioner's counsel submits that those persons who were recommended as Lecturers in the three other disciplines, vide letter dated 24.03.2017, were given appointment orders in the year 2017 itself, vide letter dated 07.08.2017. However, the petitioner, Dulmoni Das and Hiramoni Barman were not appointed in the year 2017, as one Kalpana Nath, who was not recommended for the post of Lecturer, Psychiatric Nursing filed WP(C) No. 1991/2017 against Dulmoni Das and Hiramoni Barman, on the ground that they were in-eligible to participate in the selection process. A stay order was issued

in WP(C) No. 1991/2017, restraining the State respondents from issuing appointment orders to Dulmoni Das and Hiramoni Barman. Though the petitioner was not made a party in WP(C) No. 1991/2017 and though the stay order did not extend to stoppage of the petitioner's appointment, the petitioner was also not given any appointment order by the State respondents due to the above stay order. However, the petitioner was allowed to continue working as a Lecturer of Psychiatric Nursing in terms of Regulation 3(f) of the 1951 Regulation, as she had been appointed as Lecturer, Psychiatric Nursing under Regulation 3(f) of the 1951 Regulation, on 09.10.2013.

7. WP(C) No. 1991/2017 was dismissed vide order dated 25.07.2019 and subsequently, the petitioner, Dulmoni Das and Hiramoni Barman were appointed as Lecturers, Psychiatric Nursing in the Nursing College of Assam on 15.10.2019. The petitioner's prayer in the writ petition is to issue a direction to the respondent authorities, to consider her service as Lecturer under Regulation 3(f) of the 1951 Regulation, from 24.03.2017 to 15.10.2019, as regular service, for the purpose of promotion only. In the alternative, the petitioner prays that the petitioner's promotion should be from the date the other persons were appointed to their posts in other disciplines and who had been recommended in the APSC letter dated 24.03.2017, for appointment to other disciplines along with the petitioner.

8. The petitioner's counsel submits that the appointment of the petitioner to the post of Lecturer on the basis of the Advertisement dated 03.07.2015 could not be done earlier, due to WP(C) No.1991/2017 having been filed against Dulmoni Das and Hiramoni Barman and it was not due to any fault on the part

of the petitioner. The stay order passed in WP(C) No.1991/2017 thus adversely affected the case of the petitioner for early appointment. He submits that as persons selected as Lecturers in other disciplines by the APSC, vide the same letter dated 24.03.2017, were appointed in the year 2017, the petitioner herein should also be considered to be in regular service from the time the other persons in the other disciplines in the APSC's letter dated 24.03.2017, had been appointed to their respective posts.

In support of his submission, the learned counsel for the petitioner has relied upon the judgment of the Apex Court in ***C. Jayachandran vs. State of Kerala & Others***, reported in ***(2020) 5 SCC 230*** and in the case of ***Balwant Singh Narwal & Others vs. State of Haryana & Others***, reported in ***(2008) 7 SCC 728***.

9. Mr. D.P. Borah, learned Standing Counsel for the Health Department, on the other hand, submits that if the petitioner was aggrieved for not being appointed in terms of the APSC letter dated 25.03.2017, the petitioner could have approached this Court earlier, However, the petitioner has approached this Court only on 28.07.2022. As the petitioner was not aggrieved by the delay in his appointment, he cannot be allowed to agitate the issue after 5 (five) years. He submits that the petitioner cannot be considered to have been appointed from the year 2017 in the absence of any appointment order being given to the petitioner pursuant to the Advertisement dated 03.07.2015, prior to 15.10.2019. He further submits that the seniority of the petitioner cannot be counted for the period of service undergone in terms of Regulation 3(f) of the 1951 Regulation. Further the petitioner was borne into the cadre of Lecturer only from the date of

her appointment and her seniority would have to be counted only from the said date, i.e., 15.10.2019.

10. I have heard the learned counsels for the parties.

11. In the case of ***Balwant Singh Narwal (supra)***, the Supreme Court quoted the decision of another Supreme Court judgment in ***Surendra Narain Singh vs. State of Bihar***, reported in ***(1994) 1 SCC 431***, wherein it held that candidates, who were selected against earlier vacancies, but who could not be appointed along with the others of same batch due to certain difficulties, when appointed subsequently, will have to be placed above those who were appointed against subsequent vacancies. In the above case of ***Balwant Singh Narwal (supra)*** an advertisement had been issued in the year 1992 by the Haryana Public Service Commission inviting applications for filling up 18 (eighteen) posts of temporary Principals in Higher Secondary Schools. The advertisement made it clear that the number of posts advertised was subject to variations to any extent. On 01.06.1993, the State Education Department made a fresh requisition to the Haryana Public Service Commission, increasing the number of posts to be filled up to 37 (thirty seven). The respondent Nos. 4 to 16 were applicants against the said advertisement and underwent the process of selection. The Commission declared the merit list of 30 (thirty) selected candidates, which included respondent Nos. 4 to 16. However, before the State Government could make appointments in terms of the merit list, a non-selected candidate filed a writ petition contending that the Commission could not make recommendations for selection of 30 (thirty) candidates as only 18 (eighteen) posts had been notified in the advertisement. The writ petition was allowed by

the learned Single Judge of the Punjab & Haryana High Court and the Division Bench dismissed the appeal. In view of the above, the Government appointed only 16 (sixteen) candidates out of the 30 (thirty) candidates. The respondent Nos. 4 to 16, who were denied appointments challenged the same before the Supreme Court. The Supreme Court thereafter allowed the appeal filed by the respondent Nos. 4 to 16 and held that the recommendation made by the Commission for appointment of 30 (thirty) persons was in accordance with law. Thereafter, the State Government appointed the respondent Nos. 4 to 16 and gave them notional seniority w.e.f. the date the other candidates have been appointed as temporary Principals, i.e., 02.06.1994. A challenge was made to the fixation of the seniority of the respondent Nos. 4 to 16 from 02.06.1994, on the ground that the selection by the Commission being merely recommendatory, the same did not imply automatic appointment and that the respondent Nos. 4 to 16 were entitled to claim seniority only from the date of their actual appointment, namely, 26.05.2000 and not from the date of their selection. The challenge made was rejected by the High Court and the Supreme Court on the ground that the respondent Nos. 4 to 16 could not be appointed due to litigations and in view of the judgment of the Supreme Court in ***Surendra Narain Singh (supra)***, the persons who could not be appointed earlier due to no fault of theirs, would have to be appointed against the vacancies they were selected against.

12. The judgment of the Supreme Court in the above case shows that persons who could not be appointed earlier due to no fault of theirs would have to be appointed against the vacancies they were selected against, in view of similarly situated persons having been appointed earlier. Though the said ratio

appears to be applicable in this case, this Court is of the view that the facts herein are slightly different. The petitioner has been selected in a different discipline and late entry/appointment into the post has occurred due to a case being filed against Dulmoni Das and Hiramoni Barman. Thus, their appointment orders could not be issued earlier due to a stay order. While the other persons who were selected as Lecturers in other disciplines, vide the Assam Public Service Commission letter dated 25.06.2017, have been appointed earlier to the petitioner, i.e. in the year 2017 itself and had been further promoted to the next higher post in September, 2021, the petitioner herein, who was appointed in the year 2019, has filed the present writ petition on 28.07.2022.

13. The petitioner having been borne into the cadre of Lecturer, Psychiatric Nursing, on being appointed to the post of Lecturer only on 15.10.2019, the question to be decided is whether the period of service of the petitioner under Regulation 3(f) of the 1951 Regulation can be counted for the purpose of seniority.

14. In the case of **Anup Kumar Das Vs. Sanjib Kakati**, reported in **2000 (1) GLT 429**, the Division Bench of this Court has held that service rendered under Regulation 3 (f) of the 1951 Regulation cannot be counted for the purpose of seniority. The Division Bench in paragraphs 5, 6 and 7 of **Anup Kumar Das Vs. Sanjib Kakati (Supra)** has stated as follows:-

“5. We have heard the learned counsel of all the parties. It emerges from their rival contentions that the controversy revolves around the sole question as to whether the period of service of an appointee under Regulation 3 (f) of the Assam Public Service Commission (Limitation of Functions) Regulation, 1951 could be counted for the purpose of seniority on final appointment or on regularisation of appointment. In order to appreciate this question in its proper perspective, it is necessary to examine

the nature and spirit of appointment contemplated under Regulation 3 (1), which reads as follows:

3. It shall not be necessary for the Commission to be consulted in matters relating to methods of recruitment to civil services and posts or the suitability of the candidates for such appointments, in the following cases, namely: &

(f) when an appointment is to be made by direct recruitment to a temporary post created in a service if it is necessary in the public interest that the appointment should be made immediately and reference to the Commission would cause undue delay; provided that if the post has been sanctioned for, or is likely to last for more than four months, the Commission shall, as soon as possible, be consulted in all matters mentioned in sub-clause (3) of Article 320 of the Constitution &

6. It would appear from the language employed in Regulation 3 (f) that the provisions therein contemplate immediate appointment to a temporary post for a period of four months only. Regulation 3 (f) obviously do not empower the State to make any appointment against any permanent post. The appointment made under Regulation 3 (f) is obviously non est and, therefore, the services rendered on appointment under Regulation 3 (f) cannot be counted for the purpose of fixing the inter se seniority of the incumbent. The appointment, as the language employed suggest, being ad hoc in nature and de hors the rules, subsequent regularisation or substantive appointment will not make the incumbent eligible for seniority with effect from the date of his initial appointment.

7. In support of what is stated above, we may refer to some of the decisions of the Supreme Court. In the Direct Recruit Class II Engineering Officers Association & others vs. State of Maharashtra & others, AIR 1990 SC 1607, the Supreme Court was of the view that once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not from the date of his confirmation. The Supreme Court further held that where the initial appointment is only ad hoc and not according to rules and made as a stop gap arrangement, the officiation in such post cannot be taken into account for considering the seniority. This view is also available in the judgment of the Supreme Court in Union of India vs. SK Sharma AIR 1992 the ratio laid down in DN Agarwal vs. State of Madhya Pradesh, AIR 1990 SC 1311 was followed. In V. Srinivisan Reddy vs. Govt of AP, AIR 1995 SC 586, it was held that appointment/promotion must be made in accordance with rules and the direct recruit takes his seniority from the date on which he starts discharging the duty of the post borne in the cadre. According to the Supreme Court, a temporary appointee appointed de-hors the rules on ad hoc basis or to a fortuitous vacancy gets seniority from the date of regular appointment. In YH Pawar vs. State of Karnataka, (1996) 10 SCC 444, the Supreme Court was of the opinion that when appointment was made on ad hoc basis without any competitive examination, such appointment although made prior to commencement of the recruitment rules are ad hoc and not regular appointment and that on subsequent regularisation of the appointment sometime after the coming into force of the recruitment rules, the appointee is entitled to seniority not from the date of initial appointment but from

the date of regularisation. In the State of UP & others vs. Dr. RK Tandon & others, (1995) 3 SCC 616, reiterating the same view the Supreme Court held that all ad hoc appointments de hors the rule do not confer any right to pension or seniority, they acquire the rights only from the date of their regular appointment according to this rule. If, however, the initial appointments are according to rules though on ad hoc or temporary basis, the seniority then would be counted from the date of initial appointment."

15. The Division Bench of this Court in the case of **Nabin Chandra Bordoloi Vs. State of Assam & Others**, reported in **2003 (2) GLT 147** has stated at paragraphs 8, 9 and 10 as follows:-

"8. In Anup Kumar Das Vrs. Sanjib Kakati, 2000 (1) GLT 429, a Division Bench of this Court has held that services rendered by an incumbent to a post appointed under Regulation 3 (f) of the regulation 1951 is not to be counted for the purpose of seniority.

9. The Supreme Court in Rudra Kumar Sain and others Vrs Union of India and Ors., (2000) 8 SCC 25, while dealing with the nature of the appointment held that if an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a 'stopgap' arrangement and a appointment in the post as 'ad-hoc' appointment.

10. Regulation 3 (f) of Regulation 1951 contemplates exactly the same situation where the appointments are made on the temporary basis for four months because of the fact that regular appointments could not be made within the short span of time."

16. Though the petitioner's appointment under Regulation 3(f) was for a period longer than 4 months, the same being a stop gap appointment on ad-hoc basis and the same not having been regularized, the petitioner's service on ad-hoc basis cannot be counted for the purpose of seniority. The service of the petitioner would have to be counted only from the date he was regularly appointed to the post of Lecturer, Psychiatric Nursing i.e. on 15.10.2019. There is another aspect of the matter which has to be considered, i.e. if the prayer of the petitioner is allowed, the same could cause prejudice to Dulmoni Das and Hiramoni Barman, as Dulmoni Das is the first in the merit list of Lecturer,

Psychiatric Nursing. The case of the Dulmoni Das would also have to be considered, as her appointment had been held up on due to the writ petition, which had been ultimately dismissed. As her seniority vis-à-vis the petitioner would be affected, the non-joinder of the Dulmoni Das as a party in the writ petition is also an issue that will have to be considered, as the issue of inter-se-seniority between the Lecturers of Psychiatric Nursing would crop up. As such, the ad-hoc service of the petitioner under Regulation 3(f) cannot be considered as regular service.

17. In view of the reasons stated above, the prayer of the petitioner to consider his service from 24.03.2017 to 15.10.2019 as regular service cannot be granted.

18. The writ petition is accordingly dismissed.

JUDGE

Comparing Assistant