

GAHC010168042016



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

Case No. : WP(C)/127/2016

CHANDRA KANTA RAJBONGSHI
S/O. LT. KANU RAM RAJBONGSHI, VILL. NAMATI, P.O. HATI NAMATI, P.S.
NALBARI, DIST. NALBARI ASSAM, PIN-781337.

VERSUS

THE STATE OF ASSAM AND 8 ORS
REP. BY THE ADL. CHIEF SECY. TO THE GOVT. OF ASSAM, HIGHER
EDUCATION TECHNICAL DEPTT., DISPUR, GHY.-06.

Advocate for the Petitioner : MR.J I BORBHUIYA

Advocate for the Respondent : SC, FINANCE

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 11.05.2023

Heard Mr. J.I. Borbhuiya, learned counsel for the petitioner. Also heard Mr. K. Gogoi, learned standing counsel for the Higher Education Department, representing respondent nos. 1, 2, 7, 8 and 9, Mr. T.J. Mahanta, learned senior counsel, assisted by Mr. T. Gogoi, learned standing counsel for the APSC,

respondent no.4, Mr. G. Pegu, learned Govt. advocate appearing for respondent no.5 and Mr. A. Chaliha, learned standing counsel for the respondent no.6.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has prayed for a direction upon the respondent authorities to promote the petitioner from the post of Planning Officer to the post of Research Officer, in the establishment of the Directorate of Technical Education, Assam, which is lying vacant since 2011.

3. The case of the petitioner is that after working in various departments, the petitioner was ultimately appointed as Research Assistant in the office of Directorate of Technical Education, Assam on recommendation made by the APSC, where he had rendered the service from 31.10.1995 to 31.10.1999. After stint on deputation in other service, the petitioner was adjusted as Planning Officer vide notification dated 30.07.2003 effective from 01.11.1999 and since then the petitioner has been rendering service in the establishment of the Directorate of Technical Education, Assam. It is claimed that the petitioner is otherwise eligible to be promoted to the post of Research Officer and in this regard, the petitioner relies on the draft Assam Technical Education Planning Service Rules, 2013. By referring to the provision of clause 2 of Rule 5 of the draft Rules, it is projected that the recruitment to the post of research Officer shall be made by promotion only. It is projected that the said post is lying vacant since the year 2011. Accordingly, the petitioner has submitted a representation dated 11.05.2011 to the authorities for being considered for promotion.

4. The learned counsel for the petitioner has submitted that the draft service rules had received approval from the (1) Legal Remembrancer and Secretary, Judicial Department, Assam (2) APSC, (3) Personnel Department of

Govt. of Assam. It is submitted that for the purpose of promotion, Rules, 11, 12 and 13 of the draft rules were relevant. The learned counsel for the petitioner has referred to the stand taken in the affidavit-in-opposition filed by respondent no.7 and has submitted and has submitted that the draft service rules has not been implemented would not be acceptable because the draft rules has already received the approval from the various authorities. It is submitted that previously also one A. Hachib the then Planning Officer under the Directorate of Technical Education, Assam was given officiating promotion by order dated 23.03.1995 and subsequently the APSS has regularized such promotion by its notification dated 19.07.1999. It is submitted that the said draft rules has been acted upon. It is also submitted that the scale of hierarchy shown in the additional affidavit filed by the respondent no. 7 appears to him to be incorrect because of the fact that there is no promotional avenue for a Planning Officer. It is also submitted that from the documents annexed to the additional affidavit, the petitioner has demonstrated that in the case of one Bipul Dutta, the hierarchy as projected in the additional affidavit filed by the respondent no.7 was not maintained. In support of his submissions, the learned counsel for the petitioner has placed reliance on the case of *Abraham Jacob and Ors. Vs. Union of India (1998) 4 SCC 65* and *High Court of Gujarat and another Vs. Gujarat Kishan Majdoor Panchayat and Ors., (2003) 4 SCC 712*.

5. Countering the submissions made by the learned counsel for the petitioner, the learned departmental counsel for the Higher Education and Technical Education has submitted that the draft rules prepared in the year 2013 is still at the draft stage and was not implemented and/ or applied. It is submitted that no person was promoted on the strength of the draft rules, including the case of A. Hachib. It is submitted that so far as the records of

Directorate of Technical Education is concerned, their current hierarchy is as per the stand taken in the additional affidavit filed on 23.05.2022 by the respondent no.7. It is submitted that as per the chart filed therein, the post of Research Officer is not the promotional avenue for a Planning Officer. In support of his submissions, reliance has been placed on the case of *Ghaziabad Development Authority Vs. Delhi Auto General Finance Pvt. Ltd. and ors.* (1994) 4 SCC 42, *Vimal Kumari Vs. State of Haryana and Ors.*, (1998) 4 SCC 114 and *Er. Kekhriezhali Sorhie Vs. The State of Nagaland and Ors.*, WP(C) 111(K)/2015 decided on 27.03.2015 and reported in Manu/GH/054/2017.

6. Considered the materials on record as well as the submissions made by the respective learned counsel. The promotion made to Mr. A. Hachib, vide notification dated 23.03.1995 cannot be said to have been made under 2013 Draft Rules. On a perusal of the notification dated 23.03.1995, issued by the Joint Secretary to the Govt. of Assam, Education (CTM) Department, it is observed that the said person was given an officiating promotion for a period of one year. The APSC had accorded its approval for the said promotion under Regulation 4(d) of the APSC (Limitation of Functions) Regulation, 1951. Such a promotion is permissible under the said APSC Regulation, 1951. Therefore, it could not be demonstrated by the petitioner that the draft rules was acted upon at any point of time in the Directorate of Technical Education, Assam and that any promotion was given to any person under the draft rules. No other example has been cited to show that any person was appointed in a manner, which was prescribed in the draft rules. Therefore, the Court is unable to accept that the draft rules were acted upon.

7. In the case of *Abraham Jacob (supra)* cited by the learned counsel for the petitioner, it appears that the facts before the Supreme Court of

India was that from 1969 after formulation of the set of draft rules, promotion was being given to the Junior Engineer to the post of Assistant Engineer in accordance with the provisions contained in the draft rules and that, such promotion were even given before the draft rules were approved by the government authorities. In this case merely because the approvals were given by various authorities referred above would not mean that the draft rules was accepted by the competent Authority in the Government and as it could not be demonstrated that the draft rules were acted upon, the case of *Abraham Jacob (supra)* would be of no help to the petitioner.

8. In the case of *High Court of Gujarat (supra)*, the factual matrix was that the draft rules was framed by the High Court, which was pending for approval before the Government. The promotion of the person concerned was made on the recommendation of the High Court after considering all aspects of the matter and in the said context, it was held by the Supreme Court of India that appointment can validly be made under the rules even in the draft stage, if there is a clear intention of the Government to enforce them in near future.

9. In the present case in hand, the factual matrix is distinguishable. In this case, the government has not expressed its desire to promote anyone from the post of Planning Officer to the post of Research Officer in the Directorate of Technical Education, Assam. Had such an attempt been made, it could have been presumed by the Court that the Government has a clear intention to enforce the draft service rules. Therefore, the case of *High Court of Gujarat (supra)* is also not found to help the petitioner. In view of the categorical finding of the Court that the draft service rules were never acted upon, the Court is of the considered opinion that no purpose would be served to deal with the cases cited by the learned standing counsel for the Higher

Education Department and Department of Technical Education.

10. Under such circumstances, the writ petition fails and the same is dismissed. Interim order, if any, stands vacated.

11. Before parting with the records, the Court is inclined to opine that in the absence of service rules in respect of a class of persons like the petitioner, there is every likelihood that there would be heart-burning of all employees in that category. Therefore, the Court hopes and trusts that the appropriate authorities in the Government will take note of the situation where a class of employees are working without any approved service rules, which is duly notified. Therefore, the Court hopes that the Government wakes up to the issue and resolves the same as earliest as possible.

12. In this case the Court takes note of the submissions made by the learned counsel for the petitioner that the petitioner would be superannuating in the month of December, 2023.

13. Therefore, the learned standing counsel for the Higher Education Department and Technical Education Department shall transmit the order of this Court to the concerned Head of the Department so as to enable them to take an expeditious decision of the matter.

JUDGE

Comparing Assistant