

GAHC010179042022



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

Case No. : Review.Pet./147/2022

MAMONI PAHADI @ MAMONI PAHADI.
W/O- SRI MONOJ KUMAR MILI, DOJ AS MR- 01.04.1992, DATE OF
REGULARISATION- 22.07.2005, HS WITH DIPLOMA IN COMPUTER
APPLICATION AND TYPING, UNDER JORHAT PHE DIVISION, JORHAT,
ASSAM, R/O NO. 1 CHENGELIGAON, P.O. CHENGELIGAON, PS AND DIST.
JORHAT, ASSAM, PIN- 785010.

2: BOLIN SHARMA
S/O- LT. JADAV SHARMA
DOJ AS MR- 18.12.1986
DATE OF REGULARIZATION- 03.02.2005
HS WITH DIPLOMA IN COMPUTER APPLICATION AND TYPING
UNDER JORHAT PHE SUB-DIVISION
JORHAT
ASSAM
R/O- BORHOOZ GAON
PO PANICHAKUA
PS PULIBOR
DIST. JORHAT
ASSAM
PIN- 785006

VERSUS

THE STATE OF ASSAM AND 3 ORS
REP. BY THE COMMISSIONER AND SECRETARY, TO THE GOVT. OF ASSAM,
DEPTT. OF P.H.E., ASSAM CIVIL SECRETARIAT, DISPUR, GUWAHATI,
ASSAM, PIN- 781006.

2: THE CHIEF ENGINEER
P.H.E.
(WATER) ASSAM
HENGRABARI
GUWAHATI

ASSAM
PIN- 785001.

3:THE SUPERINTENDENT ENGINEER
P.H.E.
JORHAT CIRCLE
JORHAT
ASSAM
PIN- 785001.

4:THE EXECUTIVE ENGINEER
P.H.E.
JORHAT DIVISION
JORHAT
ASSAM
PIN- 785001

Advocate for the Petitioner : MR. A K DUTTA

Advocate for the Respondent : SC, P H E

**BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

ORDER (CAV)

Date : 29-03-2023

1. Heard Mr. B Purkayastha, learned counsel for the petitioner. Also heard Mr. Mr. D. Gogoi, learned counsel for the PHE Department.

2. Mr. B. Purkayastha, learned counsel for the petitioner, who submits that the present review petition has been filed in view of the order dated 29.07.2022 passed in W.A. No.238/2022, wherein the Division Bench held that it would be appropriate for the review petitioners to approach this Court by way of an appropriate review petition, as the questions raised in the appeal were not raised before the learned Single Judge, i.e. this Court. The petitioner's counsel has thus prayed that the impugned order dated 01.06.2022 passed in WP(C)

No. 3214/2022 should be reviewed due to the contention raised in this review petition.

3. Mr. B. Purkayastha submits that the question that is sought to be raised before this Court is that in terms of the Assam Ministerial District Establishment Service Rules, 1967, (hereinafter referred to as the "1967 Rules"), the minimum educational qualification for promotion to a Grade-III post is graduation. However, in the "Assam Public Health Engineering Department Grade-III and Grade-IV Field Level Employees (Non-Gazetted) Service Rules" (hereinafter referred to as Non-Gazetted Service Rules), there is no requirement for a candidate to be a graduate, for promotion from a Grade-IV post to a Grade-III post. He further submits that though the Non-Gazetted Service Rules has not come into force by publishing the same in the Official Gazette, the same is being applied by the State respondents, for promoting Grade-IV employees to Grade-III posts in the Public Health Engineering Department, Assam. He accordingly submits that the petitioners who have been regularised to Grade-IV posts against personal posts, should be promoted to Grade-III posts, in terms of the Non-Gazetted Service Rules. The petitioner's counsel further submits that the names of the petitioners have been recommended for promotion to the Grade-III posts, by the Selection Committee, in its meeting minutes dated 13.08.2020.

4. Mr. D. Gogoi, learned counsel for the PHE Department, on the other hand submits that in terms of the Division Bench judgment of this Court in ***Dilip Talukdar & 21 Others vs. State of Assam & Others***, reported in **2017 (2) GLT 135**, it has been held that persons who have regularized against personal posts cannot be promoted to Grade-III posts, as persons regularized against

personal posts are holding ex-cadre posts. As such, they cannot be promoted to a cadre post. Mr. D. Gogoi further submits that when this Court had dismissed this case in the earlier round, on the basis of the contentions raised by the petitioners, the petitioners could not have challenged the decision of this Court before the Appellate Authority, on some other contentions/grounds that had not been pressed in the earlier round of litigation in this Court.

5. As can be seen from the records, in the earlier round of litigation, the writ petition had been dismissed, vide order dated 01.06.2022 on 2(two) grounds.

6. The writ petitioner's case in the earlier round of litigation was that the vacancies to Grade-III posts having occurred, prior to enhancement of the educational qualifications of candidates, from HSLC passed to Graduates, the vacancies in Grade-III posts would have to be filled up by promotion, in terms of the Rules in force at the time when the vacancies occurred. The case of the respondents in the earlier round of litigation was that as the petitioners service had been regularized against posts which was made personal to them, the petitioners could not be promoted to Grade-III posts, as they were holding ex-cadre posts in Grade-IV.

7. This Court in the earlier round of litigation, dismissed the writ petition vide order dated 01.06.2022, by holding that the law laid down by the Apex Court in ***Y.V. Rangaiah & Ors. -Vs- J. Sreenivasa Rao & Ors.***, reported in ***(1983) 3 SCC 284***, wherein it had held that vacancies that occurred prior to the amendment of the Rules should be filled up on the basis of the un-amended Rules, was held to be a wrong proposition of law by a subsequent 3(three)

Judges Bench of the Apex Court in the case of ***State of Himachal Pradesh & Ors. -Vs- Raj Kumar & Ors.***, in ***Civil Appeal No. 9746/2011***. The impugned order dated 01.06.2022 stated that in terms of the judgment of the Apex Court in the ***State of Himachal Pradesh*** (supra), there was no obligation for the Government to make appointments as per the old Rules, when there was no statutory duty cast upon the State to do so. This Court in the impugned order dated 01.06.2022 had dismissed the writ petition also on the ground that in terms of the judgment and order dated 18.05.2021 passed in WP(C) No.9451/2019, persons regularised against personal posts did not have any right to be promoted to a cadre posts, as those persons were holding ex-cadre posts.

8. Being aggrieved, the writ petitioners filed an appeal before the Division Bench, which was registered as Writ Appeal No.238/2022.

9. Writ Appeal No.238/2022 was disposed of vide order dated 29.07.2022, by observing that the case of the appellants/writ petitioners before the learned Single Bench was only limited to the contention that the filling up of vacancies should be as per the Rules that were in operation when the vacancies occurred and that the appellants attempted to raise other questions in the appeal, which had not been raised before the Single Judge. It accordingly gave liberty to the writ petitioners to approach this Court by way of an appropriate review petition. The order dated 29.07.2022 passed in Writ Appeal No.238/2022 is reproduced below as follows:-

“Heard Mr. B. Purkayastha, learned counsel for the appellants and Mr. R.R. Gogoi, learned counsel for the PHE Department/respondents.

By way of this writ appeal, the appellants/original petitioners have challenged the order dated 01.06.2022 passed by the learned Single Judge of this Court in W.P.(C) No. 3214/2022.

Mr. B. Purkayastha, learned counsel appearing for the appellants raised further grounds which obviously have not been raised before the learned Single Judge. From the order impugned, it transpires that what was challenged was the action of the respondents in not following the rules which were in operation when the vacancies occurred. The case of the appellants/original petitioners before the learned Single Judge was only limited to the said contention as can be seen from the contentions raised before the learned Single Judge.

Mr. B. Purkayastha, learned counsel appearing for the appellants attempted to raise other questions picking it from the grounds raised in the petition as the same were not raised before the learned Single Judge.

In the peculiar facts and circumstances, it would be appropriate for the appellants/original petitioners to approach the learned Single Judge by way of an appropriate review petition.

If any such review petition is filed, the same may be decided in accordance with the rules.

Accordingly, the writ appeal stands disposed of at this stage.”

10. As can be seen from the judgment of the Apex Court in ***State of Himachal Pradesh*** (supra), there is no Rule of universal application that vacancies must necessarily be filled on the basis of the law existing on the date when the vacancies arose and there is no obligation for the Government to make appointments as per the old Rules, when there is no statutory duty cast upon the State to do the same. However, the petitioners counsel is not pressing this issue, as he lays emphasis that promotions would have to be made in pursuance to the Non-Gazetted Service Rules.

11. The Non-Gazetted Service Rules not having come into force in the State of Assam, I am unable to come to terms with the submission made by the petitioners counsel that the said Draft Service Rules could supersede the Assam

Ministerial District Establishment Service Rules, 1967, which requires the minimum educational qualification of a person for promotion to a Grade-III post to be a Graduate. Even otherwise, the fact remains that in terms of the law laid down by the Division Bench of this Court in ***Dilip Talukdar*** (supra), which has upheld the judgments passed in WP(C) No.2416/2014 and WP(C) No.3116/2014, persons who are regularised against personal posts cannot be considered for promotion to cadre posts, when they are deemed to be holding ex-cadre posts. The Division Bench in ***Dilip Talukdar*** (supra) has held that a claim for promotion from a person holding an ex-cadre post was not legally tenable and that promotion in the Water Resources Department, Government of Assam could be considered only from eligible employees in the feeder cadre post. Persons who were holding posts personal to them could not have any enforceable right for promotion. The promotions in the Water Resources Department, Government of Assam had been made on the basis of the 1967 Rules. Though the petitioner's counsel has stated that the 1967 Rules is not being used by the PHE Department and that they are using the Draft Non-Gazetted Service Rules, which has not come into force, this Court is of the view that the said argument is not sustainable, as it would amount to saying that a non-existent Rule would have to take the place of an existing Rule. In any event, as stated earlier, petitioners have no right to be promoted to the cadre posts, as they are holding ex-cadre posts. Further, the Full Bench of this Court in the case of ***Jitendra Kalita & Ors. -Vs- State of Assam & Ors.***, reported in ***2006 (2) GLT 654***, has held that inclusion in the Muster Roll or engagement against specific works does not follow adherence to any acceptable principle of recruitment in public service. The eligibility, suitability and fitness of such employees are hardly decided at the time of their induction and Courts had

frowned upon the continuance of such employment, as long employment by itself, have always given rise to claims for regularisation. Regularisation not being a mode of appointment, the existence of a large work force under the State on an uncertain basis had been perceived by all concerned, to be posing a human problem. The Full Bench further held that Courts have repeatedly emphasised that the State must make all endeavours not to allow the situation to go out of hand, so as to become a constitutional aberration. In view of the judgments of the Full Bench and Division Bench of this Court, it is crystal clear that persons regularised against personal posts cannot be promoted to cadre posts, unless their ex-cadre posts are encadred.

12. On considering all the above aspects, this Court finds that the writ petitioner has basically come in appeal against the order dated 01.06.2022 passed in WP(C) No.3214/2022. In the case of ***State of West Bengal & Ors. -Vs- Kamal Sengupta & Anr.***, reported in ***(2008) 8 SCC 612***, the Apex Court has held that review cannot partake the character of appeal.

13. In view of the reasons stated above, this Court is of the view that no ground for review has been made out. The review petition is accordingly dismissed.

JUDGE

Comparing Assistant