

GAHC010183432021



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

Case No. : WP(C)/6144/2021

JAHIRUL ISLAM
S/O LATE MOTIUR RAHMAN, VILLAGE JHARPARA PART I, PO
LENGTISINPA, PS ABHAYAPURI, DIST BONGAIGAON, ASSAM, 783384

VERSUS

THE STATE OF ASSAM AND 5 ORS
REPRESENTED BY THE CHAIRMAN AND SECRETARY TO THE GOVT.OF
ASSAM, EDUCATION (HIGHER) DEPARTMENT, DISPUR GUWAHATI 781006

2:THE DIRECTOR OF HIGHER EDUCATION
ASSAM

KAHILIPARA
GUWAHATI 781019

3:THE GOVERNING BODY OF RAJIB GANDHI MEMORIAL COLLEGE

REPRESENTED BY ITS PRESIDENT
LENGTISINGA
ABHAYAPURI
DIST BONGAIGAON
ASSAM
783384

4:THE PRINCIPAL

RAJIV GANDHI MEMORIAL COLLEGE
LENGTISINGA
ABHAYAPURI
DIST BONGAIGAON
ASSAM

783384

5:SOIFUL ISLAM
SON OF AYNAL HOQUE
VILLAGE BADAIPARA
LENGTISINGA
ABHAYAPURI
DIST BONGAIGAON
ASSAM
783384

6:SHAHIL RANA
S/O AMZAD HUSSAIN
VILLAGE BADAIPARA
LENGTISINGA
ABHAYAPURI
DIST BONGAIGAON
ASSAM
78338

Advocate for the Petitioner : MR H R A CHOUDHURY
Advocate for the Respondent : SC, HIGHER EDU

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

Date : 07-12-2023

JUDGMENT & ORDER (ORAL)

Heard Mr. HRA Choudhury, learned senior counsel for the petitioner and Mr. K Gogoi, learned counsel for the respondents in the Higher Education Department, Government of Assam.

2. The petitioner Jahirul Islam was appointed as a Grade-IV employee in the Rajiv Gandhi Memorial College as pr the resolution No. 6 dated 01.08.1993 of the Governing Body of the College. The teaching and non-teaching staffs of the Rajiv Gandhi Memorial College were subjected to provincialisation under the Assam Venture Educational Institution (Provincialisation of Services) Act, 2011

(in short Act of 2011) and in the said process, some other employees were provincialised. The petitioner assails the provincialisation of two such employees namely Soiful Islam and Shahil Rana in WP(C) No. 1463/2014, which was given a final consideration by the order dated 19.02.2015, wherein, the following the order, as extracted, is passed:-

“I am of the view that both the writ petitions do not survive for consideration and are, accordingly, disposed of by directing the Director of Higher Education Department of Assam to provincialise the service of the petitioner (Jahirul Islam) against the post of Grade-IV in Rajiv Gandhi Memorial College, Lengtisinga, Bongaigaon district. The exercise shall be completed within one month from the date of receipt of this order. In so far as the fixation of the inter-se-seniority among the petitioner and the private respondents is concerned, the respondent authorities shall fix them in accordance with Section 4 of the Assam Venture Educational Institutions (Provincialisation of services) Act, 2011 as amended from time to time. It is made clear that the provincialisation of the petitioner (Jahirul Islam) shall take effect from the date when the services of the respondent Nos. 5 and 6 (Saiful Islam and Shahil Rana) were provincialised.”

3. A reading of the direction issued in the order dated 18.02.2015 in WP(C) No. 1463/2014 makes it discernible that there is a specific mandamus to the Director of Higher Education, Assam to provincialise the services of the petitioner Jahirul Islam against the Grade-IV post in the Rajiv Gandhi Memorial College, Lengtisinga.

4. But, in response thereof, the respondents in the Higher Education Department had provincialised the service of the petitioner Jahirul Islam under the Assam Education (Provincialisation of services of non-teaching staff of venture educational institutions) Act, 2018 (in short Act of 2018) on a fixed salary of Rs. 8700/- per month w.e.f. 01.01.2021. It has been clarified by Mr. K Gogoi, learned counsel for the Higher Education Department that under the Act of 2018, a non-teaching staff is entitled to a fixed salary and accordingly, the

service of the petitioner was provincialised against the fixed salary. Being aggrieved by the provincialisation under the Act of 2018 by ignoring the legal right of the petitioner to be provincialised under the Act of 2011, WP(C) No. 2339/2021 was instituted, wherein the judgment and order dated 06.08.2021 has been passed by directing the Director of Higher Education, Assam to take note of the legal right of the petitioner for provincialisation under the Act of 2011 that had accrued in terms of the order dated 19.02.2015 in WP(C) No. 1463/2014, meaning thereby, it was a clear mandamus to the Director to reconsider the order dated 05.08.2021 in terms of the earlier direction of the Court in the order dated 19.02.2015 in WP(C) No. 1463/2014. This writ petition is instituted on the grievance that the said requirement had not been done by the respondents.

5. In course of the hearing, Mr. K Gogoi, learned counsel for the Higher Education Department refers to a judgment of the Hon'ble Supreme Court rendered in State of Manipur and others –vs- Surajkumar Okram and others, reported in (2022) SCC Online SC 130, which was decided on 01.02.2022, wherein in paragraph 22, it had been held as extracted:-

“Where a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void, it constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made.”

6. By relying on the proposition laid down by the Hon'ble Court in Surajkumar Okram (supra), a submission is made by Mr. K Gogoi, learned counsel that when the Act of 2011 was declared ultra-vires, all actions that were undertaken under the ultra-vires Act are null and void and as such even the order dated 19.02.2015 of this Court in WP(C) No. 1463/2014 would also have to be

considered to be null and void.

7. In principle, we are in agreement with the proposition laid down by the Hon'ble Supreme Court and if the said proposition as proposed by Mr. K Gogoi is strictly implemented, we will also have to make a declaration that all such provincialisations which had been done under the Act of 2011, which may be involved in 1000 of numbers of employees in the Government of Assam would also become by implication null and void. The acceptance of being null and void cannot be confined to one petitioner in whose favour the order dated 19.02.2015 in WP(C) No. 1463/2014 was passed. Further, nothing has been submitted that even the proposition laid down by the Hon'ble Supreme Court in Surajkumar Okram (supra) also has retrospective effect so as to declare null and void all such actions taken under an Act declared to be ultra-vires in a retrospective manner.

8. Secondly, we also take note that the Act of 2011 was declared ultra-vires by the judgment of the Division Bench rendered in Chandan Kumar Neog and others –vs- State of Assam and others, reported in 2016 (5) GLT 296. But, against the said judgment, a review was also instituted before the same bench being Review Petition No. 167/2016, which was decided on 02.01.2017 and reported as 2017 (1) GLT 405. In paragraph 19 of the review judgment in State of Assam –vs- Bimal Kutum and others, it provided as extracted:-

“19.In the above circumstances, we are of the considered view that the rights of the employees who have been benefited under the struck down statue can be taken care of by giving retrospective effect to the proposed legislation, if the legislature so decides. Till then it is ordered that the services of the provincialised category and their status as govt. employees shall not be disturbed and they will continue to receive all the benefits which they are getting under the Provincialisation Act, 2011, since struck down by the judgment under Review. With this observation and direction, the matter stands

disposed of."

9. A reading of the proposition provided by the review Court which had declared the Act of 2011 to be ultra-vires makes it discernible that the rights of the employees who have been benefited under the struck down statute can be taken care of by giving retrospective effect to the proposed legislation, if the legislature so decide and till then the service of the provincialised category and their status as government employee shall not be disturbed and they will continue to receive all the benefits which they are getting under the Provincialisation Act, 2011.

10. In other words, the Court which had declared the Act of 2011 to be ultra-vires upon review had also clarified that the legal right of the employees which had crystallised under the Act of 2011 are to be protected and the principle of retrospective effect of it become void had not been accepted.

11. In the circumstance, we have already noticed that a legal right of the petitioner to be provincialised under the Act of 2011 had been crystallized by the order dated 19.02.2015 in WP(C) No. 1463/2014, which again had been approved and accepted in the judgment dated 06.08.2021 in WP(C) No. 2339/2021.

12. Accordingly, the submissions of the respondents by relying on the proposition in Surajkumar Okram (supra) that the said right had become void in the meantime would be unacceptable in law and also in the circumstances as indicated above.

13. With the aforesaid clarification, the Director of Higher Education, Assam is directed to do the needful of provincialisation of the petitioner under the Act of 2011 in compliance of the order dated 19.02.2015 in WP(C) No. 1463/2014. The

requirement be done by the Director within a period of three months from the date of receipt of a certified copy of this order.

14. It is clarified that the present order is passed in the facts and circumstance of the present matter and should not be construed to be a precedent in general.

The writ petition is allowed as indicated above.

JUDGE

Comparing Assistant