

GAHC010261472022



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

Case No. : WP(C)/8310/2022

DR. DIBYAJYOTI MAHANTA
S/O LATE LAKSHMI KANTA MAHANTA, R/O RAJA RAJESWAR SINGHA
PALACE, NEAR HOTEL RHINO (BLOCK B, 3RD FLOOR), SILPUKURI,
GUWAHATI, ASSAM, P.O.-SILPUKHURI, P.S.-CHANDMARI, DIST-KAMRUP
(M), PIN-781003

VERSUS

KRISHNA KANTA HANDIQUE STATE OPEN UNIVERSITY AND 2 ORS.
A STATUTORY BODY ESTABLISHED UNDER THE ASSAM ACT XXXVII,
2005, REPRESENTED BY ITS VICE CHANCELLOR, HAVING ITS HQ AT
KRISHNA KANTA HANDIQUE OPEN UNIVERSITY, RESHAM NAGAR,
KHANAPARA, NH-37, GUWAHATI, ASSAM-781022

2:THE REGISTRAR
KRISHNA KANTA HANDIQUE OPEN UNIVERSITY
RESHAM NAGAR
KHANAPARA
NH-37
GUWAHATI
ASSAM-781022

3:THE STATE OF ASSAM
REPRESENTED BY ITS COMMISSIONER AND SECRETARY TO THE HIGHER
EDUCATION
KAHILIPARA
GUWAHATI
ASSAM-78101

Advocate for the Petitioner : MR K K MAHANTA (Sr. Advocate)

Advocate for the Respondent : SC, HIGHER EDU

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

Date : 19-01-2024

**JUDGMENT AND ORDER
(C.A.V.)**

Heard Mr. K.K. Mahanta, learned senior counsel, assisted by Ms. N. Begum, learned counsel for the petitioner. Also heard Mr. A.M. Bora, learned senior counsel, assisted by Mr. J. Patowary, learned counsel for respondent nos. 1 and 2, as well as Mr. S. Bhuyan, learned standing counsel for Higher Education Department, representing respondent no.3.

2. It may be mentioned herein that by an interim order dated 22.12.2022, this Court had directed that till the next returnable date, the parties to this proceeding shall maintain status quo with regard to the post of Dean (Study Centre) in Krishna Kanta Handiqui State Open University (hereinafter referred to as 'KKHSOU' in short). The respondent nos. 1 and 2 had filed an interlocutory application for vacating the said interim order, which has been registered and numbered as I.A.(C) 510/2023. This Court by an order dated 16.06.2023, passed in the said interlocutory application had expressed that this writ petition be disposed of instead of considering the said interlocutory application. Accordingly, it was ordered that the said interlocutory application would be treated as counter-affidavit. Thus, on the joint prayer made by all sides, the writ petition has been heard.

3. In brief, the case of the petitioner is that he was holding a

substantive post of Assistant Professor in Nowgong Girls' College, Nagaon.

Pursuant to an advertisement inviting applications for appointment to the post of Dean (Study Centre), KKHSOU [also referred to in several places as Dean (Study), KKHSOU], the petitioner had applied for being selected and appointed to the said post. Vide appointment letter dated 06.10.2015, the petitioner was appointed to the said post for a term of 5 (five) years from the date of joining. Accordingly, the petitioner had joined in the said post on 03.11.2015.

Accordingly, it is projected that the tenure of the petitioner to the said post was upto 02.11.2020. On 21.09.2020, the KKHSOU (respondent no. 1) had issued an advertisement inviting applications for appointment to the said post of Dean (Study Centre), KKHSOU for a period of 5 (five) years from 2020 till 2025 and accordingly, the petitioner had applied for the said post. The petitioner was again selected. However, as per the appointment letter dated 20.10.2020, the tenure of the petitioner for the post of Dean (Study Centre) was made for 5 (five) years or till attaining the age of 60 years, whichever is earlier. The petitioner claims that the capping of his tenure of service till the age of 60 years was arbitrary, which was not altered despite bring it to the notice of the competent authorities. In the meanwhile, the petitioner was served with a notice dated 29.11.2022, informing him that his last working day would be 31.12.2022.

4. Therefore, the petitioner has filed this writ petition under Article 226 of the Constitution of India praying for, amongst others, a direction upon the respondent authorities (1) to withdraw, rescind, revoke, cancel and forbear from giving effect to the notice dated 29.11.2022, issued by the Registrar, KKHSOU (respondent no.2); (2) to withdraw, rescind, revoke, cancel and forbear from giving effect to the later part of the condition under the head of

"Nature of Post" and "Service Condition" i.e. "*or till attainment of 60 years whichever is earlier*" contained in the appointment letter dated 20.10.2020, issued by the Registrar, KKHSOU (respondent no.2); (3) for quashing the herein before referred notice dated 29.11.2022; and (4) to allow the petitioner to complete his tenure as Dean (Study Centre), KKHSOU from 03.11.2020 to 02.11.2025.

Submissions on behalf of the petitioner:

5. The learned senior counsel for the petitioner had meticulously referred to the pleadings and the documents annexed to the writ petition.

6. It was submitted that after the expiry of the first tenure of the petitioner as Dean (Study Centre), KKHSOU from 03.11.2015 to 12.11.2020, the subsequent appointment was a fresh appointment. Accordingly, it was submitted that the petitioner's appointment as Dean (Study Centre), KKHSOU from 03.11.2020 to 12.11.2025 was not a renewal, but it was a re-appointment to the tenure post, and that the said post carried a fixed tenure of 5 (five) years from the date of taking over charge.

7. To support his submissions regarding 5 year tenure of the post of Dean (Study Centre), KKHSOU, the learned senior counsel for the petitioner had referred to the provisions of Rule 3 of Chapter-V of KKHSOU First Statute, 2009, which also permitted re-appointment. The provisions of Rule 9 of Chapter-V of the KKHSOU First Statute was also cited to show that though under the said Rule the age of retirement was prescribed as 60 years, but the said Rule specifically excluded persons holding 'tenure' post. Moreover, by referring to Section 29(1) of the KKHSOU Act, 2005, it was submitted that the respondent authorities were prohibited from imposing a condition in the contract of

appointment, which was inconsistent with the provisions of KKHSOU Act, 2005 and KKHSOU First Statute, 2009.

8. Moreover, by referring to the provisions of Ordinance 7: *Ordinance on Appointment on Contract Basis or Fixed Tenure Contract Basis* framed under Section 23(1)(d) of the KKHSOU Act, it was submitted that under Clause 3(iv) thereof it has been provided that the contractual appointment could not be made beyond 65 years, which meant that it was permissible for a 'tenure' appointee to render service upto the age of 65 years.

9. It was also submitted that prior to issuing the appointment letter petitioner, a Meeting of the Board of Management of KKHSOU held on 19.10.2020, wherein it was decided that the appointment letters for the posts mentioned therein be issued as per the terms of appointment under the University Rules without waiting for confirmation of the proceeding.

10. Accordingly, it was also submitted that the term of appointment of the petitioner as Dean (Study Centre) KKHSOU from 03.11.2020 was restricted till attaining of 60 years, which was *de hors* the provisions of Section 3 of Chapter-V of the KKHSOU First Statute, 2009. It was submitted that the restriction of employment upto the age of 60 years could not have been applied in respect of the petitioner.

11. In support of his contention, the learned senior counsel for the petitioner had cited the case of *Union of India & Ors. v. Arun Kumar Roy, (1986) 1 SCC 675*, and it was submitted that in the said case, the Supreme Court of India had held that the contract cannot be contrary to the Rules. It was submitted that the said decision was followed by the Division Bench of this Court in the case of *Tabong Pasar v. State of Arunachal Pradesh & Ors., 1999*

(3) GLT 90.

12. To counter the possible opposition to the writ petition on the ground of delay, by citing the case of *Somesh Thapliyal & Anr. v. Vice Chancellor, H.N.B. Garhwal University & Anr., (2021) 10 SCC 116*, it was submitted that as the State had greater bargaining power, it was permissible for the petitioner to challenge inconsistent condition in his appointment letter when he is aggrieved.

Submissions on behalf of the respondent nos. 1 and 2, i.e. the KKHSOU and its Registrar:

13. The learned senior counsel for the respondent nos. 1 and 2 had submitted that there is no dispute that the initial appointment of the petitioner as Dean (Study Centre), KKHSOU was for a period of 5 (five) years. But on his re-appointment, the condition of retirement at the age of 60 years was provided in the petitioner's appointment letter, which was a condition that the petitioner had willingly and voluntarily accepted without any demur. Thus, by referring to the principle that one cannot be permitted to approbate and reprobate in the same time, it was submitted that the petitioner is estopped from objecting to one part of the appointment letter, having accepted the other part which was favourable to him. In this regard, reliance was placed on the case of *U.P. State Road Transport Corporation v. Ram Singh & Anr., (2008) 17 SCC 627*.

14. It is submitted that under the KKHSOU First Statute, 2009, the age of superannuation is provided as 60 years and therefore, it was not permissible for the respondent nos. 1 and 2 to extend the age of superannuation in respect of the petitioner. In support of the said contention, the learned senior counsel for the respondent nos. 1 and 2 has cited the case of

Dr. L.P. Agarwal v. Union of India & Ors., (1992) 3 SCC 526.

Submissions on behalf of the respondent no.3:

15. The learned standing counsel for the respondent no.3 had fairly submitted that the respondent no. 3 had not filed any affidavit-in-opposition. However, it was submitted that he would support the stand of the respondent nos. 1 and 2.

Reasons and decision:

16. At the outset, it would be relevant to extract the provisions of (i) Section 2(e) of the KKHSOU Act, 2005; (ii) Section 2(k) of the KKHSOU Act, 2005; (iii) Clause (7) of Section 7 of the KKHSOU Act, 2005; (iv) Section 12 of the KKHSOU Act, 2005; (v) Clause (7) of Sub-section 1 of Section 17 of the KKHSOU Act, 2005; (vi) Clause (iv) of Sub-section 1 of Section 18 of the KKHSOU Act, 2005; (vii) Section 21(d) of the KKHSOU Act, 2005; (viii) Section 23 of the KKHSOU Act, 2005; (ix) Section 29 of the KKHSOU Act, 2005; (x) Rule 3 of Chapter-V of the KKHSOU First Statute, 2009; (xi) Rule 9 of Chapter-V of KKHSOU First Statute, 2009; (xii) Rule 12 of the Ordinance No.8. The said provisions have been extracted in serial order.

2. *In this Act, unless the context otherwise requires,-*

(a) * * *

(e) *"employee" means any person appointed by the University and includes academic and nonacademic staff of the University.*

* * *

(k) *"Study Centre" means a centre established, maintained or recognized for conducting examination and evaluation by the University and for the purpose of advising, counseling or for rendering any other assistance required by the students.*

* * *

CHAPTER III
OFFICERS OF THE UNIVERSITY

7. The Officers of the University.- The following shall be the officers of the University:-

(1) * * *

(7) The Dean (Study Centre).

* * *

12. The Dean.- Every Dean shall be appointed in such manner, on such emoluments and other conditions of services and shall exercise such power and perform such functions as may be prescribed by the Statutes.

* * *

17. Board of Management.- (1) The Board of Management shall be the principal executive body of the University consisting of the following members, namely:-

(1) * * *

(7) The Dean (Study Centre).

18. The Academic Council.- (1) The Academic Council shall consist of the following members, namely:

(1) * * *

(7) The Dean (Study Centre).

* * *

21. Statutes.- Subject to the provisions of this Act, the Statutes may provide for all or any of the following matters, namely:

(a) * * *

(d) the appointment of teachers and other employees of the University, their emoluments and their conditions of service.

* * *

23. Ordinances.- Subject to the provisions of this Act and the Statutes, the Ordinances may provide for all or any of the following matters, namely:-

(1) * * *

(2) The First Ordinances shall be made by the Chancellor with the previous approval of the State Government and the Ordinances so made may be amended, repealed or added to at any time by the Board of Management in the manner prescribed by the Statutes.

* * *

29. Conditions of service of employees.- (1) Every employee of University shall be appointed under a written contract and such contract shall not be inconsistent with the provisions of this Act, the Statutes and the Ordinances.

(2) * * *

* * *

Manner of appointment of Registrar, Finance Officer, Deans and Directors of the University, their emoluments, conditions of service, powers, functions and duties.

* * *

3. ***Term of Office.***- The term of office of the Registrar, the Finance Officer, the Deans and the Directors shall be five years but they may be eligible for re-appointment.

* * *

9. The officers mentioned above shall ordinarily retire at the age of 60 provided that the Board of Management in the interest of the University may re-employ any officer (except the holders of tenure post) beyond 60 years but not exceeding 63 years, if it is satisfied that such re-employment is absolutely necessary for the interest of the university and that the officer is certified to be fit mentally and physically by a Doctor of Medicine of a Medical College of Assam not below the rank of Associate Professor. However, such re-employment shall not be made for more than one year at a time.

* * *

ORDINANCE NO.8

Ordinance on Recruitment, Service Condition, Workload and Leave Rules for Professors, Readers, Regional Directors, Lecturers, Assistant Regional Directors and other officers of the University.

1. * * *

12. ***Superannuation and re-employment of teachers:*** Teachers, Officers and other Employees will retire at the age of 60 years. The University can consider re-employing a superannuated Teacher according to the existing guidelines framed by the UGC.

* * *

17. The learned senior counsel for the petitioner had laid much stress on the provision of Rule 9 of the KKHSOU First Statute, 2009, specifically on the words "(except the holders of tenure post)". It was emphasized that (i) the petitioner was given a fresh appointment to the post of Dean (Study Centre), which cannot be considered as re-employment; and (ii) that the said words "(except the holders of tenure post)" excluded *tenure posts*. The said contention has been considered and would be answered later.

18. It may be mentioned that Annexure-3 to the writ petition is a

photocopy of the advertisement no. R3/2020 inviting applications for the post of Dean (Study Centre). Appended to the said Annexure-3 is a sheet containing "qualifications and requirements" and in the paragraph relating to requirement of age, it has been mentioned as follows – "*Age: Should not be more than 55 years as on the date of application. However, the University reserves the right to relax the upper age limit for deserving candidates.*"

19. From the herein before extracted provision of Section 23(2) of KKHSOU Act, 2005 it can be seen that the KKHSOU First Statute, 2009 was required to have been made by the Chancellor with the prior approval of the State Government. The office of the Dean (Study Centre) is referred to in Rule 9 of Chapter-V of the KKHSOU First Statute, 2009. Accordingly, it appears that the incumbent holding the office of the Dean (Study Centre) would ordinarily retire at the age of 60. The said Rule also provides that the Board of Management, in the interest of the University, may re-employ any officer (except the holders of tenure post) beyond 60 years but not exceeding 63 years. Therefore, it *prima facie* appears that the condition imposed in the appointment letter dated 20.10.2020, issued in favour of the petitioner by the Registrar of the KKHSOU (respondent no.2), cannot be said to be inconsistent with Rule 9 of the KKHSOU First Statute, 2009. Rule 12 of the Ordinance No. 8 also provides that the age of superannuation of *officers* would be at the age of 60 years. The post of Dean (Study Centre) is an "*Officer*" category post as per Section 7 of the KKHSOU Act.

20. The Court is of the further opinion that Rule 3 of Chapter-V of the KKHSOU First Statute, 2009 cannot be read in isolation of Rule 9 thereof. On a conjoint reading of both the said provisions, which have been extracted hereinbefore, it is seen that although Rule 3 of Chapter V provides that "*The*

term of office of the Registrar, the Finance Officer, the Deans and the Directors shall be five years but they may be eligible for re-appointment”, but Rule 9 thereof permits re-employment of any officer (except the holders of tenure post) beyond 60 years but not exceeding 63 years.

21. The KKHSOU Act, 2005 and KKHSOU First Statute, 2009 must be read in harmony because as per the provision of Section 12 of the KKHSOU Act, 2005, it has been provided that “*Every Dean shall be appointed in such manner, on such emoluments and other conditions of services and shall exercise such power and perform such functions as may be prescribed by the Statutes.*”

22. Thus, from the provision of Section 12 of the KKHSOU Act, 2005, it appears that the legislative intention was to give precedence to the Statute, in so far it is related to the *other conditions of services*, which is inclusive of the tenure of appointment. Therefore, as the condition contained in the petitioner’s appointment letter dated 20.10.2020, issued by the respondent no. 2 cannot be said to be a condition that has arbitrarily imposed on the petitioner by unfair and/or superior bargaining power of the University. Accordingly, the case of *Arun Kumar Roy (supra)* and *Tabong Pasar (supra)*, is found to have no application in this case.

23. The Board of Management, in the proceedings of its 59th Meeting held on 19.10.2020 did not specify the age of superannuation of the petitioner. The Board had merely directed that the appointment letters be issued as per the terms of the appointment under the University Rules. Thus, the Registrar, KKHSOU (respondent no. 2) had issued the appointment letter dated 20.10.2020, prescribing therein that the age of superannuation would be 60 years.

24. It is reiterated at the cost of repetition that the provisions of Rule 9 of Chapter-V of the KKHSOU First Statute, 2009 as well as Rule 12 of the Ordinance No. 8 prescribe the age of superannuation of "Officers", which include the post of "Dean (Study Centre)", to be 60 years. Therefore, the condition contained in the appointment letter dated 20.10.2020 that the petitioner would superannuate on attaining the age of 60 years cannot be said to be inconsistent and/or contrary to the KKHSOU First Statute.

25. Therefore, in light of the discussions above, the first issue raised by the learned senior counsel for the petitioner emphasizing that the petitioner was given a fresh appointment to the post of Dean (Study Centre), which cannot be considered as re-employment is answered by holding that notwithstanding that appointment of the petitioner for the second term would be a circumstances which is nothing but "re-employment" of the petitioner.

26. The second issue raised by the learned senior counsel for the petitioner as to whether the words "(except the holders of tenure post)" appearing in Rule 9 of the KKHSOU First Statute excluded "*tenure posts*" is answered by holding that the provisions of Rule 9 of Chapter-V of the KKHSOU First Statute, 2009 read in harmony with Rule 12 of Ordinance No. 8, makes it clear that the age of superannuation of Officers, which includes the post of "Dean (Study Centre)" is 60 years with further prescription that the age of superannuation cannot exceed 63 years. Thus, the condition contained in the appointment letter dated 20.10.2020 to the effect that the petitioner would superannuate on attaining the age of 60 years cannot be said to be inconsistent or contrary to the (i) KKHSOU Act, 2005, (ii) KKHSOU First Statute, 2009, and (iii) Ordinance No. 8, being "*Ordinance on Recruitment, Service Condition, Workload and Leave Rules for Professors, Readers, Regional Directors,*

Lecturers, Assistant Regional Directors and other officers of the University."

27. Moreover, as per document appended to Annexure-3 to the writ petition (pp.31), the age of the applicant was required to be 55 years, which means that the age of superannuation was envisaged at 60 years. By the said document, the KKHSOU had reserved the right to relax the upper age for applying for the post of Dean (Study Centre). Therefore, the indelible impression of the Court is that in this case, the KKHSOU had taken a conscious decision to accept the candidature of the petitioner and as per the legal requirement, discussed herein before, prescribed the age of superannuation of the petitioner on his attaining the age of 60 years. Thus, the condition contained in the appointment letter dated 20.10.2020 is not found to be arbitrary or inconsistent with the prescription of age contained in the said document appended to the advertisement (Annexure-3 to the writ petition).

28. In terms of the decision of the Supreme Court of India in the case of *Somesh Thapliyal & Anr. (supra)*, the Court is not inclined to dismiss the writ petition on the ground of delay on part of the petitioner to assail the conditions contained in his appointment letter dated 20.10.2020. As per the facts of this case, the delay on part of the petitioner in approaching the Court would not be fatal.

29. Nonetheless, in light of the discussions above, the Court is of the unhesitant opinion that the condition no. 2 contained in the appointment letter of the petitioner bearing Ref. KKHSOU/ Recruit/53/2013/PT/3177 dated 20th October, 2020, prescribing the term and/or tenure of appointment to the office of the Dean (Study Centre) for 5 (five) years or till attainment of 60 years, whichever is earlier, is consistent and/or in consonance with (i) KKHSOU Act,

2005, (ii) KKHSOU First Statute, 2009, and (iii) Ordinance No. 8, being
"Ordinance on Recruitment, Service Condition, Workload and Leave Rules for
Professors, Readers, Regional Directors, Lecturers, Assistant Regional Directors
and other officers of the University."

30. Therefore, in the light of the discussions above, the Court is
inclined to pass the following –

O R D E R

- a. The petitioner is not found to be entitled to any relief(s) as prayed for.
- b. Accordingly, this writ petition stands dismissed.
- c. The interim order passed on 22.12.2022 stands vacated.
- d. The parties are left to bear their own cost.

Comparing Assistant