

(2017) 05 GAU CK 0054
In the Gauhati High Court
Case No : 476 of 2013

AADITYA INGTI S/O. LT. BALIRAM INGTI, & ORS.	APPELLANT
Vs	
THE DIRECTOR OF STATE COUNCIL OF EDUCATIONAL RESEARCH AND TRAINING (SCERT), ASSAM, & ORS.	RESPONDENT

Date of Decision : 29-05-2017

Acts Referred:

Citation : (2017) 05 GAU CK 0054

Hon'ble Judges : Achintya Malla Bujor Barua

Bench : SINGLE BENCH

Advocate : G Rahul, B Deka, SK Barkataki, B Sarma, DK Nath, J Deka, N Dutta, SK Talukdar, A Barman, NC Das, B Begum, M Devi, C Sarma, N Sarma

Judgement

1. Heard Mr. NC Das, learned Senior counsel for the petitioners in WP(C) No.434/2013 and Mr. SK Barkataki, learned counsel for the petitioners in WP(C)No.6262/2013 and Mr. PK Goswami, learned counsel for the petitioner in WP(C)No.63/2013. None appears for the petitioner in WP(C)No.476/2013. Also heard Mr. N Sarma, learned Standing counsel, Education Department, Assam, including State Council of Educational Research and Training, Assam (for short, SCERT). None appears for the Finance Department when the matter was taken up for hearing.

2. This batch of four writ petitions are taken up together for its disposal, inasmuch as, the core issue involved in all the four writ petitions are one and the same and the common order passed thereon would cover all the four petitions.

3. In WP(C) No.476/2013, out of the 3 writ petitioners, the petitioner No.1 was appointed as LDA cum typist on adhoc basis on 30.01.1996, whereas the petitioner Nos.2 and 3 were appointed as grade IV employee on adhoc basis on 25.09.1996 and 31.09.1996, respectively, in the office of the Director, SCERT. Subsequently, the services of the said petitioners were extended from time to time and they have been drawing their increment from the date of joining and also paid subscription towards GPF, GIS etc. In WP(C)No.6262/2013 there are 17

petitioners where all of them were appointed during the period from 1991-1997 and since then all of them are working continuously from the respective dates of initial appointment. The petitioners had also been contributing towards the payment of GPF, GIS etc. In WP(C)No.63/2013, the lone petitioner was appointed as grade IV employee in the Office of the Director of SCERT pursuant to a regular selection. The said petitioner was appointed as a day Chowkidar in the Office of the Director in the pay scale of Rs.370/- to 490/- per month. Subsequently by the letter dated 09.06.1995 of the Director, SCERT, the petitioner of the said writ petition was temporarily appointed on adhoc basis as an LDA cum Typist in the pay scale of 1065/- to 2095/- per month. The petitioner in WP(C)No.434/2013, was appointed initially as a peon in the Office of the Officer-in-Charge of E.T.Cell under the Directorate of SCERT w.e.f., 01.08.1986. Subsequently by the order dated 30.01.1996 of the Director SCERT, the said petitioner was upgraded to the post of LDA cum Typist against the existing post initially for a period of 4 months but subsequently extended from time to time.

4. In the aforesaid circumstances, all the petitioners in the writ petitions have a common factual background, inasmuch as, around the year 1996 and all of them were initially appointed on adhoc basis for a particular period, but subsequently extended from time to time and as a result they remained in continuous service. In respect of some of the petitioners, they were subsequently adjusted from a lower post to that of the post of LDA-cum-typist.

5. It is stated by the learned counsel for the petitioners that at the time of appointment/adjustment for the post of LDA cum Typist, the respondent authorities had followed the required procedure of advertisement and selection etc. In any view of the matter, the learned counsel for the respondent could not refer to any specific Rule regulating the appointment procedure for the post of LDA cum Typist in the Directorate of SCERT. In the absence of any such Rules regulating such appointment procedure, this Court deems it appropriate that a procedure of advertisement and selection as has been adopted in case of the petitioners would be a good procedure under the law to consider that the appointment/adjustment of the petitioners were made by following the required procedure of law.

6. It is stated that in all the four writ petitions after the respective petitioners were appointed/adjusted as LDA-cum-typist on an adhoc basis, they were subjected to a screening test which was held in the year 2004. After subjecting the petitioners to the screening test a decision was arrived at by the respondent authorities that the services of the petitioners are required to be regularized.

7. Accordingly, the petitioners in WP(C)No.476/2013 were regularized by the order dated 04.09.2013 of the Director-in-Charge of the SCERT. As per the said order, the petitioner No.1 of the said writ petition is at Sl.7 and his services were regularized as LDA-cum-typist while the petitioner No.2 is at Sl.32 and his services were regularized as Gr-IV and the petitioner No.3 is at Sl. No.33 and his services were regularized as Gr-IV. In WP(C) No.6262/2013, the services of the

petitioner No.1 was regularized by the same order dated 04.09.2013 and was placed at Sl.No.6 as Librarian. Similarly, the petitioner No.2 was regularized and placed at Sl.No.1 as Graduate Instructor, the petitioner No.3 at Sl.No.3 as Normal Instructor, the petitioner No.4 at Sl.No.5 as Craft Instructor, the petitioner No.5 at Sl. 8 as LDA-cum-typist, petitioner No.6 at Sl.10 as LDA-cum-typist, petitioner No.7 at Sl.11 as LDA-cum-typist, petitioner No.8 at Sl.No.12 as LDA-cum-typist, petitioner No.9 at Sl.No.15 as Librarian Assistant, petitioner No.10 at Sl.No.16 as Library Assistant, petitioner No.11 at Sl.17 as Library Assistant, petitioner No.12 at Sl.No.18 as Gr-IV, petitioner No.13 at Sl.No.19 as Library Assistant, petitioner No.14 at Sl.No.23 as Library Assistant, petitioner No.15 at Sl.No.25 as Library Assistant, petitioner No.16 at Sl.No.29 as Gr-IV, Petitioner No.17 at Sl.No.34 as Gr-IV.

8. In respect of WP(C)No.63/2013, the services of the petitioners were regularized by the same order of 04.09.2013 and was placed at Sl.No.31 as Library Assistant. Similarly, in respect of WP(C)No.434/2013, the services of the petitioner was regularized as LDA-cum-typist and was placed at Sl.No.13.

9. It is also submitted that in respect of the petitioner in WP(C)No.434/2013, the petitioner was also earlier regularized by the order dated 28.10.2009 as LDA cum Typist and accordingly, it is submitted that, perhaps, in such view of the matter, the services of the said petitioner was not required to be regularized again by the order dated 04.09.2013.

10. In the aforesaid facts and circumstances of the case, it is the common grievance of all the petitioners that as they were initially appointed in their respective posts on adhoc basis in the year 1996, and, that too, by following required procedure of law i.e., pursuant to an advertisement and selection, therefore, the date of regularization should be considered to be from the date of initial appointment and not from the date of the order dated 04.09.2013 and nor from 27.09.2007 as provided in the order dated 04.09.2013.

11. It can be noticed from the order dated 04.09.2013 that although the said regularization order was issued on 04.09.2013, but, in fact, the regularization had been given effect from 27.09.2007. In such view of the matter also, it is construed that the regularization of the petitioner was given effect with some retrospective operation from the order dated 04.09.2013.

12. In the aforesaid circumstances, the issue before this Court is to whether under the law and the facts of the given case, the petitioners are entitled to have their regularization w.e.f., from the date of initial appointment in the year 1996 or from the given date of 2007 as provided in the order dated 04.09.2013.

13. The factual background narrated by the petitioners is that all the petitioners were appointed in their respected posts pursuant to an advertisement and selection and as such, although the petitioners were initially appointed on an adhoc basis for a given period and their services being extended from time to time, but the initial entry to their respective services were as per the due

procedure of law. As already concluded, the SCERT does not have any recruitment Rules in place for regulating the procedure for appointment and as such the procedure for advertisement and selection, which is in conformity with the constitutional scheme can be deemed to be a procedure which is in conformity with due procedure of law.

14. The question, in the given circumstances, where although the initial appointment was on adhoc basis but made after following due procedure of law, is whether the incumbents shall be entitled to be regularized from the date of their initial appointment or from the date on which such incumbents were regularized.

15. The aforesaid question of law has been settled by the Constitutional Bench of the Hon"ble Supreme Court in its decision rendered in Direct Recruit Class II Engineering Officers" Association Vs. State of Maharashtra and Others reported in (1990) 2 SCC 715. In paragraph 47 of the said pronouncement of the Hon"ble Supreme Court it has been provided that where an incumbent is appointed to a post according to Rules his seniority has to be counted from the date of his appointment and not according to the date of his confirmation and a corollary to the above was held to be that where the initial appointment is only on an adhoc basis and not according to Rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the Rules, the period of officiating service will be counted. The relevant portion of paragraph 47(A) and (B) are as follows:

(A) 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 according to the date of his confirmation. The corollary of the above rule is 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.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted....."

16. When the aforesaid law is applied to the facts and circumstances of this case, it can be seen that in the event the petitioners were initially appointed by following the procedure of advertisement and selection, they would be covered either by clause A of Paragraph 47 and if not by clause B of the paragraph 47.

17. In both the circumstances, under the law laid down by the Supreme Court, the petitioners, upon being regularized by the order of 04.09.2013, w.e.f., 27.09.2007, under the law, are entitled to their regularization and seniority to be counted from the date of their initial appointment, provided their initial appointment was made by following the procedure of advertisement and selection.

18. Mr. N Sarma, learned Standing counsel for the Education Department has raised an objection that the initial appointment of the petitioners may not have been made by following the procedure of advertisement and selection. But on a pointed query, the learned Standing counsel, could neither produce any material to indicate that the initial appointment of the petitioners were not made after following the procedure of advertisement and selection, and nor he could produce any material indicating as to by what procedure the petitioners were initially appointed.

19. In view of such absence of the relevant materials to conclude as to whether the petitioners were appointed by following the procedure of advertisement and selection, this Court would not be in a position to give a conclusive finding as to whether the petitioners are entitled to have their seniority counted from the date of their initial appointment, or the date from which the regularization had been given effect in the order dated 04.09.2013 would stand as it is.

20. It is provided that, in the event, the initial appointment of the petitioners were made by following the procedure of advertisement and selection, meaning thereby that the Constitutional Scheme had been duly followed, the petitioners are entitled to have their seniority and regularization w.e.f., date of their initial appointment. But the order of regularization had already been given effect in the year 2013 by order dated 04.09.2013, the petitioners would not be entitled to a regular scale of pay from the date of their initial appointment, but in respect of all other service conditions and requirements, their date of regularization shall be counted from the date of their respective initial appointment.

21. Accordingly, as the appropriate material is not available before this Court to adjudicate upon as to whether the petitioners were appointed by following the procedure of advertisement and selection, it is deemed appropriate that the matter be remanded back to the Director of SCERT, to make a factual enquiry as to whether the petitioners were initially appointed by following the procedure of advertisement and selection, or not.

22. In the event, the Director arrives at a conclusion that the initial appointment of the petitioners were made by following the procedure of advertisement and selection, appropriate orders shall be passed to grant them their regularization w.e.f., the date of their initial appointment. On the other hand, if the Director arrives at a conclusion that the initial appointment of the petitioners were not made by following the procedure of advertisement and selection, the Director may either retain the order dated 04.09.2013 whereby the effect of regularization was given from 27.09.2007, or may on his own discretion prepone the date of giving effect to the regularization to any date prior to it., but in no event shall bring the effective date of regularization to any date after 27.09.2007.

23. Further, the other issue is as to whether the petitioners will come within the purview of the Assam Services (Pension) Rules, 1969 or their cases would be covered by the New Pension Scheme, 2005. Under the Assam Services (Pension)

Rules, 1969, if the petitioners meet the requirement of the last qualifying services they are entitled to a regular pension as provided under the said Rules. Whereas under the new pension Scheme which has been made effective from 01.02.2005, any person appointed/regularized from the said date of 01.02.2005 would be covered by the new pension scheme of 2005. The Director of SCERT would refer the matter to the Commissioner and Secretary, in the Finance Department, to take a decision and pass an appropriate order as to whether in such cases where the order of regularization had been passed from a date subsequent to 01.02.2005, but its effect is given from a date prior to it, as to whether such category of employees would be covered by the Assam Services (Pension) Rules, 1969 or by the New Pension Scheme, 2005.

24. While considering the matter, the Commissioner and Secretary to the Finance Department to the Govt. of Assam shall give due credence to the factor that such employees were earlier illegally deprived from being regularized from a prior date and only upon an effective correction being made to such illegal deprivation that they are being regularized by an order which may be dated subsequent to 01.02.2005. The Commissioner and Secretary shall also take into account that the State respondents cannot put its employees in an disadvantageous position which may be caused either due to an illegality or due to certain laches on the part of the authorities in the State Government.

25. The aforesaid exercise of arriving at a conclusion by the Director regarding the manner in which the petitioners were initially appointed and the subsequent requirement of the Commissioner and Secretary to the Finance Department regarding the question as to whether the Assam Services (Pension) Rules, 1969 or the New Pension Scheme, 2005 shall be applicable, would be made within a period of 6(six) months from the date of receipt of a certified copy of this order.

26. In terms of the above, this writ petition stands disposed of.