

(2006) 01 GAU CK 0086
In the Gauhati High Court
Case No : Writ Appeal No. 689 of 2005

Abdul Kalam Borbhuya

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 31-01-2006

Acts Referred:

Assam Elementary Education (Provincialisation) Act, 1974 — Section 27
Assam Elementary Education (Provincialisation) Rules, 1997 — Rule 3
Constitution of India, 1950 — Article 14, 226

Citation : (2006) 2 GLR 367 : (2006) 1 GLT 771

Hon'ble Judges : B. Sudershan Reddy, C.J;B.P. Katakey, J

Bench : Division Bench

Advocate : M.U. Mahmud, K.R. Patgiri, I. Choudhury and B.R. Kalita, for the Appellant; A. Deka, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Katakey, J.—This appeal by the unsuccessful writ petitioner has been preferred against the judgment and order dated 6.9.2005 passed by the learned Single Judge in WP(C) No. 5824/2003 dismissing the writ petition wherein the orders dated 30.6.1999 and 19.8.1999 issued by the Director of Elementary Education, Assam and Deputy Inspector of Schools, Silchar, respectively, terminating the services of the writ petitioner were challenged.

2. The facts in brief is that the petitioner was appointed as Assistant Teacher in No. 856 Digorkhal L.P. School by the Deputy Inspector of * Schools, Silchar vide order dated 30.10.1990, without there being any advertisement and selection as required under the Rules. As the petitioner was not paid his salaries pursuant to the said appointment, a writ petition being Civil Rule No. 127/94 was filed by him which was disposed of vide order dated 26.11.1998 with a direction to the Deputy Inspector of Schools, Cachar, Silchar and the Block Elementary Education Officer, Katigharah Block,Cachar, respondent Nos. 3 and 4 therein, to make an enquiry and pass necessary order relating to the payment of salary. An enquiry

pursuant to the direction issued by this Court was made, where after the District Elementary Education Officer vide communication dated 26.6.1999 informed the Director of Elementary Education, Assam, that the petitioner was appointed as Assistant Teacher against the vacancy caused due to retirement without any selection and in pursuant to which he joined his service on 1.11.1990 and continued upto 10.11.1990 and put his signatures in the Attendance Register but thereafter he was not allowed to sign the Attendance Register on and from 11.11.1990, as per instruction of the Block Elementary Education Officer. In the said communication it has further been informed that as his services were not terminated, he was attending his duties in the School. The Director of Elementary Education, Assam thereafter vide order dated 30.6.1999 directed the Deputy Inspector of Schools to terminate the services of the petitioner immediately, and to pay his salary for the period in which he has rendered services, by holding that the petitioner was appointed without any selection and approval by the Advisory Board. Consequently the Deputy Inspector of Schools, Silchar by order dated 19.8.1999 terminated the services of the petitioner as Assistant Teacher of No. 856 Digorkhal L.P. School. The appellant being aggrieved by the said orders dated 30.6.1999 and 19.8.1999 filed the writ petition which has, however, been dismissed by the learned Single Judge vide judgment and order dated 6.9.2005. Hence the present appeal.

3. I have heard Mr, M.U. Mahmud, learned Counsel for the appellant as well as Mr. A. Deka, learned standing counsel Education Department appearing on behalf of the respondents.

4. Mr. Mahmud, learned Counsel for the appellant challenging the judgment and order passed by the learned Single Judge as well as the orders dated 30.6.1999 and 19.8.1999 passed by the Director of Elementary Education, Assam and Deputy Inspector of Schools, Silchar, respectively, has submitted that as the petitioner was appointed vide order dated 30.10.1990 by the competent authority, namely, Deputy Inspector of Schools, Silchar, he cannot be terminated from service without issuing any notice and without affording any opportunity of showing cause as has been done in the instant case. The further submission of the learned Counsel is that there were other persons appointed by the Deputy Inspector of School, Silchar as Assistant Teacher, without there being any selection along with the present appellant, whose services have been regularised. But the authority has singled out the appellant for the purpose of terminating his services without giving the similar benefit as has been given to the other similarly situated persons with that of the appellant. According to the learned Counsel, the appellant has already rendered services for a period of about 9 years till the order of termination of service was issued by the Deputy Inspector of Schools and, therefore, such long period of service generated hope in the mind of the appellant that his services would be regularized. The authority, according to the learned Counsel, has committed illegality in not regularising his services even if he was not appointed after selection, as required under the Rules.

5. The learned standing counsel Education Department, on the other hand, has submitted that the appellant himself in the writ petition admitted that he was not selected and appointed as required under the Rules and, therefore, he was rightly terminated from service by the authority concerned upon making an enquiry as directed by this Court vide order dated 26.11.98 passed in Civil Rule No. 127/94. According to the learned standing counsel, the petitioner is not entitled to any further notice to show cause as to why his services shall not be terminated, as admittedly the appellant was appointed without any appointment and without any selection and in violation of the statutory rules. The appellant having entered the service by back door has to go through the back door only. The learned standing counsel further submits that the Rules of natural justice cannot be stretch to such an extent that the appellant must be heard even when he has admitted his illegal appointment. According to the learned standing counsel, the non-issuance of any notice did not cause any prejudice to the appellant as he knew that his entry to the service was through the back door. Countering the submissions of the learned Counsel for the appellant that the services of the other similarly placed persons were regularized, the learned standing counsel has submitted that though such statement has been made in the writ petition, the writ petitioner has failed to give any particulars about the persons whose services have been regularised though they were similarly placed with that of the writ petitioner-appellant. The learned standing counsel has further submitted that the petitioner does not deserve any sympathy at the hands of the Court as his appointment to the service was made in complete violation of the Rules and there cannot be any regularisation of service of any person, who were appointed dehors the rules.

6. We have considered the submission of the learned Counsel for the parties and also perused the materials available in the writ petition as well as in the appeal.

7. The writ petitioner in the writ petition has categorically stated, that though he appeared in the interview conducted in the year 1990 for selection of candidates for appointment of L.P. School teachers, pursuant to the advertisement issued for that purpose, no select list was published, he, therefore, approached the Government (without specifying the authority) for his appointment as L.P. School teacher and the Government in Education Department accordingly forwarded the said application to the Deputy Inspector of Schools, Silchar for consideration and necessary action. It is the case of the writ petitioner in the writ petition that the Deputy Inspector of Schools held an oral interview of the petitioner/appellant along with some other candidates and on being satisfied with the interview appointed him as Assistant Teacher against the permanent vacancy vide order dated 30.10.1990. The petitioner has, therefore, admitted that he was not appointed pursuant to the advertisement and interview conducted in the year 1990, but on the basis of some oral interview conducted by the Deputy Inspector of Schools, pursuant to his application filed before the Government.

8. The Governor of Assam in exercise of powers conferred by Section 27 of

Assam Elementary Education (Provincialisation) Act, 1974 has framed the Assam Elementary Education (Provincialisation) Rules, 1977 (for short 1977 Rules). Rule 3 of the said Rules, lays down the method of recruitment stipulating that the Deputy Inspector of Schools shall invite applications in the prescribed form for filling up the vacancy of Elementary School teachers and selection has to be conducted by a Selection Committee to be constituted by the State Level Advisory Board for Elementary Education. The select list prepared by such Selection Committee is required to be approved by such Board. The said Rules also provides that after approval of the select list by the Board, the same is required to be sent to the Director of Elementary Education for his final approval and only after such approval is accorded, the Deputy Inspector of Schools can appoint the selected candidates, in order of merit, from the list approved by the Director.

9. In the instant case as discussed above, the writ petitioner/appellant himself admitted in the writ petition that he was appointed by the Deputy Inspector of Schools, Silchar on the basis of the oral interview conducted by him pursuant to his application, submitted before the Government, which was forwarded to the Deputy Inspector of Schools. 1977 Rules does not permit such a course of action for the purpose of selection of candidates for appointment as Assistant Teacher in L.P. School. Rules provides that selection has to be by the Selection Committee which has to be approved by the Advisory Board first then by the Director of Elementary Education, Assam. The Deputy Inspector of Schools, Silchar in the instant case appointed the appellant/writ petitioner in complete violation of the provisions contained in 1977 Rules. In fact, the learned Counsel for the appellant has admitted that the appointment of the writ petitioner/appellant was dehors the rules.

10. The appellant's contention is that the authority is required to issue a notice to show cause as to why he shall not be terminated from service on the ground of appointment being in violation of the Rules. According to the learned Counsel for the appellant, since no such notice was issued, the order of termination from service is in violation of the principles of natural justice and, therefore, bad in law.

11. In the instant case, a Single Bench of this Court while disposing of the Civil Rule No. 127/94 vide order dated 26.11.1998 directed the authorities to make an enquiry about the claim of the writ petitioner/ appellant for salary, which according to the writ petitioner/appellant was not paid to him since his date of appointment. It is evident from the communication dated 26.6.1999 issued by the District Elementary Education Officer, that the matter was enquired into by the Block Elementary Education Officer and in the said enquiry it was found that the petitioner was appointed without any advertisement and without any selection, as required under the Rules. The Director of Elementary Education, Assam vide order dated 30.6.1999 directed the Deputy Inspector of Schools to terminate the service of the petitioner immediately and to pay salary for the period for which he has rendered his services. Consequently, the Deputy

Inspector of Schools, Silchar passed the order dated 19.8.1999 terminating the services of the petitioner. The case of the petitioner is that before the order of termination was issued no notice was issued to him and hence it violates the principles of natural justice.

12. The principles of natural justice cannot be put in a straight jacket formula and not inflexible. Whether a person is entitled to a notice before taking any action against him depends on the fact of each case. If a person is appointed de hors the Rules and in complete violation of the statutory rules framed for that purpose, without any advertisement and without any selection, his entry into the service is through the back door. The person who entered the service through the back door, by depriving other eligible candidates from competing in selection, cannot subsequently complained of the violation of the principles of natural justice, when his services are terminated on the ground of illegal appointment, as such appointment does not confer any right on such person to continue in service. Even, in the case where a person is entitled to notice before termination, non-issuance of such notice, ipso facto, will not render such order of termination invalid, as he has to show what prejudice has been caused to him for non issuance of such notice. In the instant case, the appellant has admitted that he was appointed without any advertisement and without any selection and in complete violation of Rules, therefore, petitioner's entry into service being through back door cannot be allowed to say that the order of termination is bad in law being violative of natural justice, as he is not entitled to such notice. Moreover, non-issuance of any notice before passing the order of termination has not caused any prejudice to the petitioner. Therefore, the contention of the appellant that the order of termination of service is bad in law for non-issuance of notice cannot be accepted. The decision, cited by the learned Counsel for the appellant, in *Commandant 60 BN CRPF and Ors. v. J.K. Medhi* reported in 1999(2) GLT 175 is not applicable in the instant case as the said decision relates to giving an opportunity to a delinquent officer to make representation against the finding recorded by the enquiry officer in a disciplinary proceeding against such officer.

13. The next submission of the learned Counsel for the appellant is that other similarly situated persons, who were illegally appointed along with the petitioner have been retained in service by regularising their services, but the petitioner has been singled out for the purpose of termination and, therefore, the action of the State respondents are discriminatory and violative of Article 14 of the Constitution of India.

14. The appellant in the writ petition has made a vague allegation in para 15 that the candidates who were appointed with him are still continuing in service getting regular pay, without specifying who are those candidates, what were their nature of appointment and when the orders of regularization were passed. On the basis of such vague statement, without there being any particulars supporting such statement and foundational background the writ court cannot

arrive at any conclusion as to whether the petitioner has been subjected to any hostile discrimination. We have examined the contention of the learned Counsel for the petitioner in somewhat details. On such examination, we are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been filed, is unsustainable and indefensible in principle.

15. Since we have come across many such instances, we think it necessary to deal with such pleas in somewhat details. The mere fact that the authorities have passed a particular order in case of another person similarly situated can never be a ground for issuing a writ in favour of the petitioner in a proceeding under Article 226 of the Constitution on the plea of discrimination. The order in favour of the other person may be legal and valid or it might not be, that had to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary jurisdiction and discretionary powers of the High Court under Article 226 of the Constitution of India cannot be exercised for such purposes. Merely because the authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality again and again. The illegal/unwarranted order must be corrected, if it can be done according to law - indeed, where it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law- but even if it cannot be corrected, it is difficult to see how it can be made the basis for its repetition. Two illegal orders added together cannot make or result in one lawful order. This Court's extraordinary jurisdiction cannot be used for perpetuating illegalities. That apart, the orders and actions of the authorities cannot be equated to the judgments of the Constitutional Courts nor can they be elevated to the level of precedents as understood in the judicial world. This Court's power is available only for setting a wrong right, but not for perpetuating another wrong. The concept of equal treatment on the logic of Article 14 of the Constitution cannot be pressed into service in such cases. What the concept of equal treatment" pre-supposes is existence of similar legal foothold. It does not countenance repetition of a wrong action to bring both wrongs on a par. If any authorities are required in support of the proposition they can be found in M/s. Style (Dress Land) Vs. Union Territory Chandigarh and Another, ; State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, ; and Union of India (UOI) and Another Vs. International Trading Co. and Another,

16. The next contention of the learned Counsel for the appellant is that he has already rendered services for about 9 years till the date of passing of the order of termination from service, therefore, the Government may be directed to regularise his services. The said contention of the learned Counsel is also not acceptable on the ground that there cannot be any regularisation of appointment which was made without any advertisement and without any selection as the

same will have the effect of depriving other eligible candidates from applying to the said post. No direction for regularization of illegal appointment can be passed as prayed for by the appellant.

17. In view of the aforesaid discussions, we do not find any merit in the present writ appeal, as the learned Single Judge has rightly dismissed the writ petition filed by the petitioner.

18. The appeal is accordingly dismissed. However, keeping in view the facts and circumstances of the case, we do not make any order as to costs.