

(2018) 11 GAU CK 0008

In the Gauhati High Court

Case No : Civil Writ Petition No.1228 of 2015

**Arabinda Kumar Sarma And 26 Ors @APPELLANT@Hash State Of Assam
And 3 Ors**

Date of Decision : 09-11-2018

Acts Referred:

Assam Venture Educational Institutions (Provincialization of Services) Act, 2011 —
Section 4(1)

Citation : (2018) 11 GAU CK 0008

Hon'ble Judges : Michael Zothankhuma, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

1. Heard Mr. B.D. Konwar, learned senior counsel, assisted by Mr. R. Kalita, learned counsel for the petitioners. Also heard Mr. K. Gogoi, learned

counsel for the respondent Nos. 1 & 2, Mr. A. Chamuah, learned counsel for the respondent No. 3 and Mr. R. Borpujari, learned counsel for the respondent No. 4.

2. The petitioners are aggrieved by Condition No. 3 mentioned in the order dated 22.01.2015, passed by the Director of Higher Education, Assam,

requiring the petitioners to qualify in NET/SLET within 2 (two) years of their regularization, as per the provisions of Clause-4(d), laid down in the O.M

dated 17.07.2004, on the threat of their service being discontinued and till then, the petitioners would be entitled to get only fixed basic pay.

3. The petitioners counsel submits that the petitioners were appointed to different deficit grant-in-aid colleges in Assam as Assistant Professors

between the year 1992 and 1996 by the Governing Body of the respective Colleges, against non-sanctioned posts. The service of the petitioners were

thereafter regularized vide order dated 22.01.2015 in different provincialized

colleges, with the stipulation that they would be required to qualify in NET/SLET within 2 (two) years from the date of their regularization.

4. The petitioners' case is that at the time of their appointment in the deficit colleges, i.e., between 1992 and 1996, the UGC Regulation, 1991

were in force, and as the said 1991 UGC Regulation did not require a Lecturer/ Assistant Professor of a college to have NET qualification, the

respondents could not force them to acquire the NET qualification subsequently. The requirement of passing NET came about only with the

promulgation of the 1998 UGC Regulation. Thus, the stand of the State respondents, as stipulated in Condition No. 3 of the order dated 22.01.2015,

requiring the petitioners to acquire NET is not justified and has to be set aside.

5. The petitioners counsel further submits that in respect to appointment of teachers in various Universities in the State of Maharashtra, who were

appointed between 19.09.1991 and 03.04.2000, the exemption given to them for not qualifying in NET for appointments as teachers, had been

approved by the UGC, as reflected in the letter dated 26.08.2011, issued by the UGC. The petitioners counsel further submits that besides the above,

the Government of Assam vide orders dated 20.01.2014 and several other orders, provincialized a number of Assistant Professors of various colleges

in the State of Assam. Some of the above persons did not have NET and as such, the State respondents cannot be allowed to discriminate between

those provincialized Assistant Professors, who did not have NET vis-à-vis the present petitioners. He also submits the petitioners are being given

only Rs. 8,000/- per month, while those provincialized Assistant Professors, who do not have NET, as reflected in the order dated 20.01.2014 and

subsequent orders, issued by the Director of Higher Education, Assam have been given a Scale of Pay of Rs. 15,600-39100+AGP 6,000/-. He submits

that the Pay Scale of all the above Assistant Professors mentioned in the order dated 20.01.2014 and subsequent orders have been revised and they

are given pay fixation, while the petitioners have been given only Rs. 8,000/- per month, till date. The petitioners counsel thus submits that a direction

should be issued for setting aside the Condition No. 3, requiring the petitioners to qualify NET/SLET and also direct the respondents to pay the same

Pay Scale as is being given to the other Assistant Professors, who have been regularized to provincialized colleges, as per the order dated 20.05.2014

and subsequent orders.

6. Mr. K. Gogoi, learned counsel for the respondent Nos. 1 & 2 submits that the petitioner has only made a challenge to Condition No. 3 of the order

dated 22.01.2015. He submits that Condition No. 3 of the order dated 22.01.2015 is only a consequential order to the O.M dated 17.07.2004, on the basis of which the order dated 22.01.2015 has been issued. As the petitioners have not made a challenge to the initial/basic O.M dated 17.07.2004, the petitioners cannot be allowed to make a challenge to the consequential order.

7. He also submits that this Court had upheld the validity of the O.M dated 17.07.2004 and accordingly, no challenge can be made by the petitioners with regard to the Condition No. 3 of the order dated 22.01.2015, requiring the petitioners to attain/acquire NET/SLET. He also submits that the

Assistant Professors who have been regularized to various provincialized colleges as per the order dated 20.01.2014 etc., have been provincialized in

terms of Section 4(1) of the Assam Venture Educational Institutions (Provincialization of Services) Act, 2011 as amended in 2012, herein after

referred to as the 2011 Act. He submits that as per the 2011 Act which has been declared ultravires by the Division Bench of the Court and as per

the New Assam Educational (Provincialisation of Services of Teachers and Re-organization of Educational Institutions) Act, 2017, herein after

referred to as the 2017 Act, the teachers of educational institutions, who do not have the prescribed UGC qualification of NET/SLET for appointment

to such post, are required to acquire the prescribed qualification within a period of 5 years. Accordingly, those persons who have been appointed as

Assistant Professors vide order dated 20.01.2014 etc, (Annexure â?" 9 of the writ petition) would also need to acquire the NET/SLET qualifications

as per 2011 and 2017 Act, within the time period prescribed therein. He also submits that the petitioners can be given additional time to acquire

NET/SLET, as per the time period given to those persons who have been appointed as Assistant Professors vide order dated 20.01.2014 etc.

8. Mr. K. Gogoi, learned counsel for the respondent Nos. 1 & 2 also submits that as per the O.M dated 17.07.2004, until the petitioners acquire

NET/SLET, they would only be entitled to basic pay as per Clause-4(d) of the O.M dated 17.07.2004. He further submits that the initial appointment

of the petitioners had been made by the Governing Body and that the salary of

the petitioners, prior to their regularization order dated 22.01.2015, had always been paid by the college and not by the Government.

9. Mr. A. Chamuah, learned standing counsel for the UGC submits that a reading of the letter dated 26.08.2011, issued by the UGC, whereby

exemption from acquiring NET had been granted to various teachers in the various Universities in the State of Maharashtra, who had been appointed

between 19.09.1991 and 03.04.2000, indicates that NET was an essential qualification required under the 1991 UGC Regulations. He further submits

that a reading of Clause-3.3.0 of the 1998 UGC Regulations shows that NET was an essential qualification required in the 1991 UGC Regulations. He

further submits that exemption given to the teachers in the State of Maharashtra, from acquiring the qualification of NET, was based on the earlier

exemption given by the University at the time of their selection and appointment. He also submits that with respect to the exemption given to the

teachers in the State of Maharashtra, exemption applications had been made by the teachers therein, which had been allowed by the University and

forwarded to the UGC, who subsequently approved the same. In the present case, the petitioners have not submitted any application for exempting

them from acquiring the NET qualification. He accordingly submits that as no exemption had been given to the petitioners at the time of their selection

and appointment to the post of Assistant Professors, there is no question of giving them exemption at this stage.

10. I have heard the learned counsels for the parties.

11. The facts of the case is that the petitioners have been appointed against Deficit Grant-in-Aid colleges by the governing body of the respective

colleges against non-sanctioned post. They had been given their salary by the colleges and not by the respondent Government. As the lecturers

serving against non-sanctioned post were unable to have their service regularized, the petitioners approached this Court, whereby a direction was

issued to consider accommodation of the petitioners, who were working in non-sanctioned posts. In pursuance to this Court's order, the

Government issued Office Memorandum issued O.M dated 17.07.2004, to accommodate teachers, including the petitioners, who were working against

non-sanctioned posts.

12. The issue of adjustment/regularization of the petitioners who were working

against non-sanctioned posts under the Government has been explained by the Full Bench of this Court in the case of Mizanur Rahman & Others v. State of Assam & Others, reported in 2012 1 GLT 520, Para 5 & 6 of the said judgment is quoted below:

5. In 1952, the Assam Government brought 52 colleges under the deficit grants-in-aid system and thereafter the State stopped sanctioning new posts of Lecturers in the State's colleges. Consequently the Lecturers serving against non-sanctioned posts were unable to have their service regularized and aggrieved Lecturers then approached the High Court. In those writ petitions, direction was issued to consider sanctioning of posts, for accommodation of Lecturers working without sanctioned posts.

6. Pursuant to the Court's order, since the Government was not in a position to sanction any new post, a Cabinet Memorandum was prepared on

25.3.2004, to deal with the issue. In this Memorandum, the Government noted that about 395 college teachers were serving (from 5 to 14 years)

against non-sanctioned posts in different Degree Colleges of Assam since 1989. These Lecturers were serving on inadequate pay, ranging from Rs.

300/- to Rs. 1500/- provided by the respective college authorities. Such appointments were made on need basis as per UGC guideline and the

Lecturers in non-sanctioned posts perform the same duty as regular lecturers. Because the Government hadn't sanctioned new posts in deficit

colleges since 1952, the colleges had to appoint persons against non-sanctioned posts and bear their salary burden. 6.2. The Directorate of Higher

Education had prepared a list of 325 teachers working without sanctioned post and a decision was taken by the Government, to sort out the issue on

the basis of actual requirement. 6.3. Thereafter proposal was mooted in the Cabinet Memorandum for redressal of the grievances of the serving

lecturers grievances, in the following manner :

(a) Vacant posts lying in different Grants-in-aid colleges of Assam should be allotted in order of seniority to non-sanctioned teachers in the same

college provided that the non-sanctioned teachers were appointed by respective Governing Body after observing due procedures i.e. advertisement,

selection and having UGS norms required and if the need for such a post is justified by enrolment etc.

(b) In case of any future vacancies of sanctioned posts, college teachers Working

against non-sanctioned post appointed as per procedure stated at

(a) above are to be adjusted in preference to fresh teachers.

(c) To accommodate the non-sanctioned teaches in the college where there is no vacant sanctioned post, the Director of Higher Education may be

authorized to withdraw vacant posts from one deficit college where enrolment or other norms does not justify the total number of sanctioned posts in

that college and allot to another college where there is non-sanctioned posts justified as per UGC and other norms.

(d) The teachers working under non-sanctioned posts who will be adjusted against vacant sanctioned posts will be required to qualify in NET/SLET

within 2 (two) years if they do not possess the same already otherwise their services would be discontinued and till then they will be entitled to basic

pay only from the date of approval by Directorate of Higher Education, Assam.â??

6.5. As can be seen from the above, ban on appointment without sanction post was recommended by the Finance Department.â??

13. Thereafter, the O.M dated 17.07.2004 was issued by the State Government, whereby lecturers, including the petitioners, were to be

regularized/adjusted against vacant sanctioned posts.

Clause 4 (c) and (d) of the O.M dated 17.07.2004 states as follows:

â??(c) To accommodate the teachers working without a sanctioned post in a College where there is no vacant sanctioned posts or where the number

of vacant sanction post is less than the number of teachers proposed to be adjusted in conformity with this O.M. the Director, Higher Education is

authorized to withdraw vacant posts from a deficit-grants-in-aid Colleges where student enrollment or other norms do not justify to the total number of

sanctioned posts in that College.

The Director, Higher Education will prepare a list of such vacant withdrawn posts from different colleges giving necessary details. Thereafter, he will

consider the cases of all those teachers working without sanctioned posts and appointed as per procedure as mentioned at para 4(a) above in order of

their seniority of services for adjustment and send such proposal to Govt. for approval. However, if a vacant sanctioned post is available in a particular

College for adjusting such post against any eligible teacher working without a sanctioned post in that College, no additional allotment of post will be

made to such Colleges.â??

(d) The teachers working under non sanctioned post who will be adjusted against vacant sanctioned posts will be required to qualify in NET/SLET

within 2 (two) years if they do not possess the same already otherwise their services would be discontinued and till then they will be entitled to basic

pay only from the date of approval by Director of Higher Education, Assam.â??

14. The petitioners were thereafter regularized against vacant sanctioned posts vide order dated 22.01.2015, whereby a condition was inserted that the

petitioners were to qualify in NET/SLET within 2 (two) years of their regularization as per the O.M dated 17.07.2004, failing which their service would be discontinued.

15. One of the questions to be decided is whether the petitioners were required to qualify for NET/SLET as they had been appointed as lecturers

before the promulgation of the 1998 UGC Regulations. Thus, the question is whether a person could have been appointed as a lecturer, under the 1991

UGC Regulations, without having the qualification of NET/SLET.

Clause 3 (a) of the University Grant Commission (Qualification required of a person to be appointed to the teaching staff of the University and

Institution affiliated to it) Regulations, 1991, herein after referred to as the â?? 1991 UGC Regulationsâ?? states as follows:

â??(3) A

â?¢ Arts, Sciences, Social Sciences, Commerce, Education, Physical Education, Foreign Language and Law.

Good academic record with atleast 55% marks or an equivalent grade at Masterâ??s degree level in the relevant subject from an Indian University

or an equivalent degree from a foreign University. Candidates besides fulfilling the above qualifications should have cleared the eligibility test for

lecturers conducted by UGC, CSIR or similar test accredited by the UGC.â??

Clause 3.3.0, 4.4.0 and 4.4.1 of the UGC Notification On Revision Of Pay Scales, Minimum Qualifications For Appointment Of Teachers In

Universities & Colleges And Other Measures For The Maintenance of Standards, 1998, herein after referred to as the â??1998 UGC Regulations

statesâ?? as follows:

â??3.3.0 The minimum requirements of a good academic record, 55% of the

marks at the master's level and qualifying in the National Eligibility

Test, or an accredited test, shall remain for the appointment of Lecturers. It would be optional for the University to exempt Ph. D holders from NET

or to require NET, in their case, either as a desirable or essential qualification for appointment as Lecturers in the University Departments and

Colleges. The minimum requirement of 55% should not be insisted upon for Professors, Readers, Registrars, Deputy Registrars, Librarian, Deputy

Librarians, Director of Physical Education, Deputy Directors of Physical Education for the existing incumbents who are already in the University

system. However, these marks should be insisted upon for those entering the system from outside and those at the entry point of Lecturers, Assistant

Registrars, Assistant Librarians, Assistant Director of Physical Education.

4.4.0 LECTURER

4.4.1 Humanities, Social Sciences, Sciences, Commerce, Education, Physical Education, Foreign Languages and Law, Good academic record with at

least 55% of the marks or, an equivalent grade of B in the 7 point scale with latter grades O, A, B, C, D, E & F at the Master's degree level, in

the relevant subject from an Indian University, or, an equivalent degree from a foreign University. Besides fulfilling the above qualifications,

candidates should have cleared the eligibility test (NET) for lecturers conducted by the UGC, CSIR or similar test accredited by the UGC.

16. A reading of the 1991 UGC Regulations does not stipulate that a person should have NET/SLET as a qualification for being appointed as a

teaching staff of the University or an Institution affiliated to it. The 1998 UGC Regulation however requires a person to have NET for being appointed

as lecturer of a University, though a Ph.D holder could be exempted for not having NET. Though the advertisement calling for applications from

candidates for filling up the post of lecturers in various deficit colleges in 1990s, basically states that the applicants having UGC norms can apply for

the post of lecturers, there is nothing specifically stipulated, which requires a lecturer to have NET/SLET as per the advertisements of 1990s or the

1991 UGC Regulation. However, in the present case, Condition No. 3 of the order dated 22.01.2015, by which the petitioners were

adjusted/regularized in sanctioned posts, states as follows:

3. The teachers working under Non-sanctioned posts who have already

acquired NET/SLET/Ph. D degree or M. Phil on or before 10.07.2009

will be entitled to get UGC's scale of pay as admissible from the date of their approval by the Director of Higher Education, Assam. But, who

have not acquired full UGC norms will be required to qualify in NET/SLET within 2 (two) years as per the provisions of clause 4(d) as laid down

under O.M No. B(2)H.97/2003/98 dated 17.07.2004 otherwise their services will be discontinued and till then they will be entitled to get fixed (basic) pay

as admissible only from the date of approval by the Director of Higher Education, Assam. The Director of Higher Education, Assam must ensure it

that the incumbents acquire the required qualification within the limit fixed by the O.M dated 17.07.2004.

Though the petitioners have made a challenge to Condition No. 3 of the order dated 22.01.2015, the petitioners have not made a challenge to the O.M

dated 17.07.2004, which requires a person who is regularised to acquire NET/SLET. Thus, the petitioners cannot be allowed to make a challenge

secondary/consequential order dated 22.01.2015, as no challenge was made to the basic O.M dt. 17.07.2004. Further, subsequent to the judgment of

the full bench of this Court in Mizanur Rahman & Others (Supra), this Court vide its judgment & order dated 29.08.2017, passed in Dr. Raja Shri

Singh v. State of Assam & Others, WP(C) No. 1967 of 2012, has held at para 42 as follows:

42. On a conjoint reading of the aforesaid judgments and orders of this Court, it is apparently clear that while undertaking the procedure for

conversion of a post, the procedure prescribed in the Office Memorandum dated 17.07.2004 is mandatorily required to be followed. In other words, in

the event, any authority undertakes the process of conversion, by following a procedure other than the procedure prescribed in the Office

Memorandum dated 17.07.2004, such procedure would be ultra-virus and unsustainable in the eye of law.

17. The present petitioners had been appointed between the year 1992 and 1996 against different deficit grant-in-aid colleges, against non-sanctioned

posts by the governing body of the various colleges. Till the time of their regularization, i.e., vide order dated 22.01.2015, the petitioners had been paid

their monthly salary by the concerned colleges themselves and not by the Government. The petitioners were regularized/appointed against vacant

sanctioned posts on the basis of the O.M dated 17.07.2004, and became Government servants only from the order dated 22.01.2015.

18. A perusal of the above judgments made by the Full Bench of this Court in Mizanur Rahman & Others (Supra) and in WP(C) No. 1967/2012,

makes it clear that the O.M dated 17.07.2004 has to be followed strictly and any deviation from the same would be unsustainable in the eyes of the

law. The adjustment /regularization of the petitioners against vacant sanctioned posts being conditional to their acquiring NET/SLET, the petitioners

have to obtain NET/SLET.

In the case of M.P. Palanisamy And Others v. A. Krishnan And Others, reported in 2009 6 SCC 428, the Apex Court has held at Para 30 as follows:

30. It cannot be forgotten that this regularization was all along accepted by the present appellants. Once they chose to accept the regularization

which was conditional, then it would have to be borne in mind that they have accepted the conditions also.

19. In view of the above and the fact that the petitioners have not made a challenge to the O.M dated 17.07.2004, the petitioners cannot claim

exemption from not acquiring the qualification of NET/SLET. Accordingly, this Court is of the view that the prayer of the petitioner for setting aside

Condition No. 3 of the order dated 22.01.2015 cannot be granted and accordingly the said prayer is rejected. However, this Court finds that while

Condition No. 3 of the order dated 22.01.2015 has given only a 2 year time period to the petitioners to obtain NET/SLET qualification, the persons

who were provincialized as Assistant Professors vide the orders dated 20.01.2014 etc, have been given 5 years time to obtain NET/SLET from the

date of their regularization order in pursuance to the provisions of the 2011 Act. The State should give equal treatment to its employees and as the

petitioners herein and those persons who have been provincialised as Assistant Professors vide the orders dated 20.01.2014 etc, are in the same grade

and having the same set responsibilities and duties, the petitioners herein should have also been given a 5 year time period for acquiring NET/SLET.

Accordingly, in the interest of justice and equity, this Court directs that the State respondents to grant the petitioners herein, another 3 years beyond

the 2 years period given under Condition No. 3 of the order dated 22.01.2015, for acquiring NET/SLET. Consequently, in so far as the O.M dated

17.07.2004 and condition No. 3 of the order dated 22.01.2015 does not provide for a period beyond two years for acquiring NET/SLET, a corrigendum

or new notification should be issued by the State respondents extending the time period of 2 years given for acquiring NET/SLET to five years.

20. The above being said, the further question that remains is whether the State Government can give unequal/discriminatory treatment in the payment

of salary to Assistant Professors, who do not have NET/SLET. It is not the case of the parties that the petitioners herein are not doing similar duties

or having different responsibilities than those Assistant Professors, who were provincialized vide the orders dated 20.01.2014 etc (Annexure-9 of the

writ petition). The petitioners counsel has submitted that the petitioners have been given Rs. 8,000/- per month till date. In this respect, Condition No. 3

of the order dated 20.01.2015 is to the effect that until the petitioners acquire the NET/SLET qualification, they will receive (basic) pay as admissible

from the date of approval by the Director of Higher Education Department, Assam. In this respect, Mr. K. Gogoi, learned counsel for the respondent

Nos. 1 & 2 has submitted a letter No. AHE.349/2016/154 dated 02.02.2018 issued by the Joint Secretary to the Govt. of Assam, Higher Education

Department to the Director of Higher Education, which states as follows:-

â??Sub: Regularization of services of college teachers who are working against non-sanctioned posts in different Provincialised Colleges of Assam.

Ref: No.G(B)AC/Post Creation/61/2013/Pt/1083 dated 04.01.2018.

Sir,

With reference to your letter on the subject cited above, I am directed to state that Govt. of Assam in Higher Education Department is pleased to

allow the present UGC Basic Pay of Rs. 15,600/- + Grade Pay Rs. 6000/- = Rs. 21,600/-p.m. to the Assistant Professor of Provincialised Colleges of

Assam whose services has been regularized conditionally as per the Govt. OM No.B(2)H.97/2003/98 dated 17.07.2004 with immediate effect. The

terms and conditions of the OM dated 17.07.2004 will be strictly followed.â??

21. The Government of Assam in the Higher Education Department has been pleased to allow the UGC basic pay of Rs. 15,600 + Grade Pay of Rs.

6000 = Rs. 21,600/- per month to the Assistant Professors of provincialized colleges, whose services were conditionally regularized, as per the

Government O.M dated 17.07.2004, with immediate effect i.e. 02.02.2018. This

in my view would not be in consonance with the judgments of the Apex Court in *Randhir Singh vs- Union of India*, reported in 1982 1 SCC 618 and in the case of *Bhagwan Dass vs- State of Haryana*, reported in 1987 4 SCC 634, wherein it has held that the principle of equal pay for equal work was held to be applicable to cases of unequal scales of pay, based on no classification or irrational classification, though both sets of employees (engaged on temporary and regular basis, respectively) performed identical duties and responsibilities. In the case of *State of Punjab vs- Jagjit Singh*, reported in 2017 (1) SCC 148, the Apex Court has held that it would be fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work cannot be paid less than another who performs the same duty and responsibility. Though, the above cases relate to paying of the minimum pay scale to temporary workers vis-a-vis regular workers, the same analogy can be applied to the petitioners who were regularized on the basis of the OM dated 17.07.2004 and those persons who were provincialised as Assistant Professors vide orders dated 20.01.2014, etc, under the 2011 Act.

22. In the present case, the petitioners have been regularized against sanctioned vacant post as per the O.M dated 17.07.2004. The persons who were appointed as Assistant Professor, vide orders dated 20.01.2004 etc., are similarly placed as the petitioners, though appointed under the 2011 Act. If the persons appointed under the orders dated 20.01.2014 etc., are being given the basic scale of pay prior to acquiring NET/SLET Qualification, the petitioners cannot be denied payment of basic scale of pay as given to Assistant Professors, prior to them acquiring the NET/SLET Qualifications.

Further, the approval given for payment of basic pay vide the letter dated 02.02.2018 will have to relate back to the petitioners regularisation order dated 22.01.2015.

23. In view of the above reasons, the respondents are directed to pay to the petitioners, the basic scale of pay, including the arrears, w.e.f 22.01.2015 within a period of 3 (three) months from the date of receipt of a certified copy of this order. It is needless to add that the fixed pay already given to the petitioners would be adjusted against the basic scale of pay to be given to the petitioners.

24. Writ petition is accordingly disposed off.