

(2017) 12 GAU CK 0041
In the Gauhati High Court
Case No : 6843 of 2017

ASSAM STATE PRIMARY TEACHERS ASSOCIATION	APPELLANT
Vs	
STATE OF ASSAM & ORS.	RESPONDENT

Date of Decision : 11-12-2017

Acts Referred:

Constitution of India, Article 309 -
Recruitment and conditions of service of persons serving the Union or a State

Citation : (2017) 12 GAU CK 0041

Hon'ble Judges : Manash Ranjan Pathak

Bench : SINGLE BENCH

Advocate : A.D CHOUDHURY, D. SAIKIA, P. NAYAK

Judgement

1. Heard Mr. Arun Dev Choudhury, learned counsel for the petitioners in WP(C) No. 6843/2017, Mr. Nilayananda Dutta, learned senior counsel assisted by Mr. Shantanu Borthakur, learned counsel for the petitioners in WP(C) No. 6914/2017 and Mr. N. Unni Krishnan Nair, learned senior counsel assisted by Mr. Hrishikesh Das, learned counsel for the petitioners in WP(C) No. 7068/2017, Mr. Idrish Choudhury, learned counsel for the petitioners in WP(C) No. 7109/2017, Dr. Burhan Uddin Ahmed for the petitioner in WP(C) Nos. 7132/2017 and 7263/2017, Mr. Ronendra Prasad Kakati, learned senior counsel assisted by Mr. Bishwajyoti Purkayastha for the petitioners in WP(C) No. 7227/2017 and Mr. Santanu Bora, learned counsel for the petitioner of WP(C) No. 7289/2017.

2. Also heard Mr. Devajit Saikia, learned Additional Advocate General, Assam assisted by Mr. P. Nayak, learned Standing Counsel for the Finance for the respondents.

3. The petitioners in all these writ petitions are graduates by their academic qualifications and they are serving as Assistant Teachers in provincialised elementary schools of the state, mostly in lower primary schools and some are in upper primary schools. Some of them have already obtained Basic Training and/or Diploma in Elementary Education and/or the Degree of Bachelor of Education

(B.Ed.).

4. After the 7th Assam Pay and Productivity Pay Commission's (7th APPPC, in short) recommendation, the State Government in the Finance (Pay Research Unit) Department by Notification No. FPC.1/2017/pt/2 dated 17.03.2017 brought into force the Assam Services (Revision of Pay) Rules 2017 [Assam Service (ROP) Rules 2017, in short], a statutory Rule under the proviso to the Article 309 of the Constitution of India, which have come in to effect from the 1st day of April, 2016. It is stated that accordingly, the State Government had paid its employees their arrears of salaries w.e.f. 01.10.2016.

5. As per the provisions of said Assam Service (Revision of Pay) Rules 2017 of the State of Assam that has been given effect from 1st April, 2016, the petitioners who had been serving as Assistant Teacher in the Provincialised Upper Primary Schools have been placed in the Assam Lower Schools Services (Teaching and Inspection) ME/MV/Senior Basics Schools wherein their pay have been revised in the Pay Band 2 in the Scale of Pay of Rs. 14,000 - Rs. 49,000 with Grade Pay of Rs. 8,700 from the existing Pay Scale of Graduate Teacher which were under the Pay Band 2 in the scale of pay of Rs. 5,200 - Rs. 20,200 with the Grade Pay of Rs. 2,700; whereas the Scale of Pay of Junior Teachers (under Graduate, Teacher of ME/MV/ Senior Basics Schools) have been revised in the Pay Band 2 in the Scale of Pay of Rs. 14,000 - Rs. 49,000 with grade pay of Rs. 6,200 from the existing Pay Scale of Junior Teachers (under Graduate) which were under the Pay Band 2 in the scale of pay of Rs. 5,200 - Rs. 20,200 with Grade Pay of Rs. 2,500.

6. Again as per the said Assam State ROP Rules, 2017, the Graduate Teacher of Lower Primary/Junior Basic/Pre Primary Schools, who had been serving under the Pay Band 2 in the Scale of Pay of Rs. 5,200 - Rs. 20,200 with Grade Pay of Rs. 2,700, their pay structures have been revised under Pay Band 2 in the Scale of Pay of Rs. 14,000 - Rs. 49,000 with grade pay of Rs. 8700. Similarly the under Graduate teachers of such L.P./Jr. Basic/Pre Primary Schools who were serving under the Pay Band 2 in the Pay Scale of Rs. 5200 - Rs. 20,200 with Grade Pay of Rs. 2500, their pay structures have been revised under the Pay Band 2 in the Scale of Pay of Rs. 14,000 - Rs. 49,000 with the Grade Pay of Rs. 6,200. Similarly for Craft Teachers (Matriculate) of such L.P./Jr. Basic/Pre Primary Schools serving under the Pay Band 2 in the Scale of Pay of Rs. 5200 - Rs. 20,200 with Grade Pay of Rs. 2,400, their pay structures have been revised under the Pay Band 2 in the Scale of Pay of Rs. 14,000 - Rs. 49,000 with Grade Pay of Rs. 6,200 and for those Craft Teachers (non-Matriculate) who were serving in the Pay Band 2 in the Scale of Pay of Rs. 5,200 - Rs. 20,200 with Grade Pay of Rs. 2,200, their pay structures have been revised under the Pay Band 2 in the Scale of Pay of Rs. 14,000 - Rs. 49,000 with Grade Pay of Rs. 5,600.

7. It is to be stated herein that after the decision of the Anomaly Committee with regard to the payment of Grade Pay of Rs. 2,300 per month to the Trained and

Graduate Assistant Teachers in Primary Schools (ME/MV/Senior Basic/LP/Junior Basic/Pre-Primary) as per the Assam Services (Revision of Pay) Rules 2010; the State Government in the Finance Department by Notification No. FPC 109/2010/41 dated 19.02.2011 enhanced the said Grade Pay from Rs. 2,300 to Rs. 2,700 for them.

8. Since it was learnt that some Graduate Teachers who are serving in the Intermediate Posts have drawn Graduate Scale of Pay with the Grade Pay of Rs. 8,700, pre revised at Rs. 3,300; as such the Finance Department of the State by the W.T. Message dated 21.09.2017 informed all the Deputy Commissioners, the Sub-Divisional Officers of all the Sub-Divisions and all the Treasury Officers of the State to stop passing of bills to said teachers until the decision of the Anomaly Committee on the matter and by the same those authorities were further requested to submit the lists of such Graduate Teachers serving in Intermediate Posts, who have already drawn the revised Graduate Pay along with the lists of Drawing and Disbursing Officers who have approved and submitted such bills to the concerned Treasury. Thereafter, referring its earlier W.T. Message dated 21.09.2017, the Finance Department of the State by another W.T. Message dated 25.09.2017 informed all the Deputy Commissioners, the Sub-Divisional Officers of all the Sub-Divisions and all the Treasury Officers of the State, clarifying that for Graduate Teachers who are serving in Intermediate Posts, their revised pay in the Graduate Pay Scale to those under Graduate Teachers is to be stopped and further clarified that these teachers will continue to draw the revised pay on the pay scale as recommended by the 7th Assam Pay and Productivity Pay Commission for under Graduate Teacher till further orders, with the observation that the same has been issued to convenience drawal of pay of Graduate Teachers who are serving in Intermediate Posts till the Anomaly Committee takes a decision in the matter.

9. Thereafter, the Finance Department of the State on 26.09.2017 issued the 3rd WT Message informing all the Deputy Commissioners, the Sub-Divisional Officers of all the Sub-Divisions and all the Treasury Officers of the State clarifying that the revised pay of the Graduate Teachers who are serving in the Intermediate Posts in the Graduate Pay Scale to them is to be stopped and that those teachers will continue to draw the revised pay scale as recommended by the 7th Assam Pay and Productivity Commission for under Graduate Teachers till further order observing that the same has been issued to convenience drawal of pay of Graduate Teachers who are serving in the Intermediate Posts, till the Anomaly Committee takes a decision in the matter.

10. Subsequently, the Finance Department of the State again issued a WT Message dated 03.11.2017 to all the Deputy Commissioners, the Sub-Divisional Officer of all the Sub-Divisions and all the Treasury Officers of the State informing them that the 7th Assam Pay and Productivity Pay Commission had recommended the drawal of Grade Pay of Rs. 6,800 to all the official in general, who were drawing Grade Pay of Rs. 2,700 as per the recommendation of the 6th

Pay Commission and that the Government has decided to allow the Grade Pay of Rs. 6,800 to all Elementary Teacher who were drawing Grade Pay of Rs. 2,700 as per the recommendation of the 6th Pay Commission. As far as the demand of the Teachers Association for higher Grade Pay is concerned, by the said WT Message dated 03.11.2017, the respondent Finance Department intimated the authorities that the same is being examined by the Anomaly Committee and its report is awaited and that as and when the report of the Anomaly Committee is accepted, necessary clarification, if required, will be issued.

11. Being aggrieved by such actions of the State respondents in the Finance Department in stopping their Grade Pay by issuing the aforesaid four impugned WT Messages and by those impugned WT Messages also fixing their Grade Pay at Rs. 6,800 till the decision of the Anomaly Committee, the petitioners have filed these writ petitions stating that once the State Government in the Finance Department by a statutory Rule under the Article 309 of the Constitution of India, have brought into force the Assam Services ROP Rules 2017 giving its effect from 01.01. 2016, now the respondents State Government in the Finance Department by mere issuing the impugned WT Messages cannot take away their right to receive Grade Pay of Rs. 8,700.

12. The respondents Finance Department have filed affidavit in the matter. Mr. D. Saikia, learned Addl. Advocate General appearing on behalf of the respondents both in the Finance as well as in the Education Department placed before the Court that prior to the coming into the force of the Assam Service (Revision of Pay) Rules 2010, as per the provisions of the Assam Service (Revision of Pay) Rules 2010 under the category of the Assam Lower Schools Service (Teaching and Inspection) ME/MV/Senior Basic Schools, in addition to the posts of Headmaster of such Upper Primary Schools, it had also three separate groups of teachers in such schools, which are (i) Graduate Teacher (Science) under the Pay Band 2 in the pay structure of Rs. 5,200 - Rs. 20,200 with Grade Pay of Rs. 2,800, (ii) Trained and Graduate Teacher under the Pay Band 2 in the pay structure of Rs. 5,200 - Rs. 20,200 with Grade Pay of Rs. 2,300 and (iii) Junior (under Graduate, Teacher of ME/MV/ Senior Basics Schools) under the Pay Band 2 in the pay structure of Rs. 5,200 - Rs. 22,000 with Grade Pay of Rs. 2,200. Mr. Saikia submits that later as per Notification dated 19.02.2011 of the Finance Department, Grade Pay of Rs. 2,300 per month that was payable to the Trained and Graduate Teachers of ME/MV/Senior Basic/LP/Junior Basic/Pre-Primary was enhanced to Rs. 2,700 per month.

13. Mr. Saikia, also submitted that after the Assam Service ROP Rules 2017 came into force, under the same category of the said Assam Lower Schools Service (Teaching and Inspection) ME/MV/Senior Basic Schools, leaving aside the post of Headmaster, now there are only 2 (two) categories of teachers in such upper primary schools, (i) Graduate Teacher under Pay Band 2 in the revised pay structure of Rs. 14,000 - Rs. 49,000/- with Grade Pay of Rs. 8,700 and (ii) Junior (Under Graduate) Teacher of ME/MV/Senior Basic Schools under Pay Band 2 in

the revised pay structure of Rs. 14,000 - Rs. 49,000/- with Grade Pay of Rs. 6,200.

14. Mr. Saikia also submitted that during the force of the Assam Service ROP Rules 2010, under the category of the Assam Lower Schools Service (Teaching and Inspection) LP/Junior Basic/Pre-Primary Schools, it had five categories of teachers in Lower Primary Schools, which were (i) Trained Graduate Teachers under Pay Band 2 in the revised pay structure of Rs. 5,200 - Rs. 20,200 with Grade Pay of Rs. 2,300, (ii) Trained and PU/HSLC Passed Teachers under Pay Band 2 in the pay structure of Rs. 5,200 - Rs. 20,200 with Grade Pay of Rs. 2,200, (iii) Untrained Teachers under Pay Band 2 in the pay structure of Rs. 5,200 - Rs. 20,200 with Grade Pay of Rs. 2,200, (iv) Craft Teacher (Matriculate) under Pay Band 2 in the pay structure of Rs. 5,200 - Rs. 20,200 with Grade Pay of Rs. 2,100 and (v) Craft Teacher (Non Matriculate) under Pay Band 2 in the pay structure of Rs. 5,200 - Rs. 20,200 with Grade Pay of Rs. 2,000.

15. Mr. Saikia further submitted that after the Assam Service ROP Rules 2017 came into force, under the same category of the said Assam Lower Schools Service (Teaching and Inspection) LP/Junior Basic/Pre-Primary Schools, leaving aside the post of Headmasters, now there are only 4 (four) categories of teachers in such Lower Primary Schools, (i) Graduate Teachers under Pay Band 2 in the revised pay structure of Rs. 14,000 - Rs. 49,000 with Grade Pay of Rs. 8,700, (ii) Under Graduate Teacher under Pay Band 2 in the revised pay structure of Rs. 14,000 - Rs. 49,000 with Grade Pay of Rs. 6,200, (iii) Craft Teachers (Matriculate) under Pay Band 2 in the revised pay structure of Rs. 14,000 - Rs. 49,000 with Grade Pay of Rs. 6,200 and (iv) Craft Teacher (Non-Matriculate) under Pay Band 2 in the revised pay structure of Rs. 14,000 - Rs. 49,000 with Grade Pay of Rs. 5,600.

16. Mr. Saikia, further submitted that as per the discussion with the representative of one Asom Rajjyik Prathmik Sikshak Sanmilani and the Finance Department of the State held on 27.10.2017 it was decided that all the teachers of elementary Schools who were drawing Grade Pay of Rs. 2,700 corresponding of Grade Pay of Rs. 8,700 shall draw Grade Pay of Rs. 6,800 instead of Rs. 8,700 as an interim measure till submission of report of Pay Anomaly Committee and the same was accordingly clarified in the impugned WT Message dated 03.11.2017.

17. Mr. Saikia, has brought to the notice of the Court that the State Government by Notification No. FPC.11/2017/3 dated 18.05.2017 have already constituted the Anomaly committee to examine the anomalies, if any, as per the recommendation of the 7th APPPC and the Government decision thereon and as such, if the anomaly Committee gives its decision in favour of the petitioners for their Grade Pay of Rs. 8,700, the same would be paid to them by the State in arrears and till then they shall be paid Grade Pay of Rs. 6,800 instead of Rs. 8,700.

18. Mr. Saikia on behalf of the State respondents, as such submitted that though the petitioners are claiming that their salaries have been stopped by the impugned WT Messages, but in fact it is not correct, since by the WT Message dated 03.11.2017 the State Government in the Finance Department clarified that the 7th APPPC recommended grade pay of Rs. 6,800 to all the officials in general who were drawing Grade Pay of Rs. 2,700 as per recommendation of the 6th Pay Commission and therefore, by the Said WT Message dated 03.11.2017 the concerned authorities were informed that as the matter relating to the demand of the teachers associations for higher grade pay is being examined by the Anomaly Committee, the report of which is awaited and till such report of Anomaly Committee is accepted, all the officials in general drawing Grade Pay of Rs. 2,700 as per the recommendation of the 6th Pay Commission to be allowed to draw Grade pay of Rs. 6,800 and it is the petitioners who are not drawing their salaries.

19. From the above it is clear that the State Government in the Finance (Pay Research Unit) Department by Notification dated 17.03.2017 brought into force the Assam Services (Revision of Pay) Rules 2017, a statutory Rule under the provisions to the Article 309 of the Constitution of India, giving its effect from the 1st day of April, 2016. However by the impugned WT Messages dated 21.09.2017, 25.09.2017, 26.09.2017 and 03.11.2017 the Finance Department of the State stopped the revised scale of Graduate Teachers who are serving in Intermediate Posts observing that said teachers shall draw the revised pay on the Pay Scale as recommended by the 7th APPPC for Under Graduate Teachers i.e. pay scale under Pay Band 2 with pay of Rs. 14,000 - Rs. 49,000 and Grade Pay of Rs. 6,200, till further orders i.e. till the decision of the Anomaly Committee; though such Graduate Teachers in Lower Primary/Junior Basic/Pre-Primary Schools of the State under the said 2017 statutory Rules have been placed at Pay Band 2 in the Pay Scale of Rs. 14,000 - 49,000 with Grade Pay of Rs. 8,700.

20. As such the issue involved in these sets of writ petitions is whether the State Government by issuing such WT Messages can stop the higher Scale of Pay and alter and/or revise the same for a Grade Pay payable to under Graduate Teachers on the ground that the incumbents though Graduate but serving in Intermediate Posts, in spite of the fact that such Grade Pay have been provided to such Graduate incumbents by the Assam Services (Revision of Pay) Rules 2017, a statutory Rule under the provisions to the Article 309 of the Constitution of India.

21. Referring the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of B. N. Nagarajan v. State of Mysore, reported in AIR 1966 SC 1942, another Constitution Bench of the Hon'ble Supreme Court in the case of Sant Ram Sharma v. State of Rajasthan and Others, reported in AIR 1967 SC 1910 have held that - "While Government cannot amend or supersede statutory rules by administrative instructions, if rules are silent on any particular point, Government can fill up the gaps and supplement the rules and issue instructions

not inconsistent with the rules already framed and, there is nothing in the terms of Art.309 which abridges the power of the executive to act under Art. 162 without a law."

22. In the case of *C. Sankaranarayanan v. State of Kerala*, reported in (1971) 2 SCC 361 the Hon"ble Supreme Court have settled that - "The Government has the power of under Article 309 of the Constitution to make rules regulating the conditions of service of Government employees and the conditions of service incorporated in such rules could be indisputably changed in exercise of the powers contained in Article 309 of the Constitution only."

23. In the case of *State of Haryana v. Shamsher Jang Bahadur*, (1972) 2 SCC 188, a three Judges Bench of the Hon"ble Supreme Court have held that - "The Government is not competent to alter the rules framed under Article 309 by means of administrative instructions, but only to fill up the gap in the rules."

24. The Hon"ble Supreme Court in the case of *S.L. Sachdev v. Union of India*, reported in (1980) 4 SCC 562 have held that - "Any directive which goes beyond it and superimposes a new criterion on the Rules will be bad as lacking in jurisdiction. No one can issue a direction which, in substance and effect, amounts to an amendment of the Rules made by the President under Article 309. That is elementary."

25. Another three Judges Bench of the Hon"ble Supreme Court in the case of *A.K. Bhatnagar v. Union of India*, reported in (1991) 1 SCC 544 have observe that - "On more than one occasion this Court has indicated to the Union and the State Governments that once they frame rules, their action in respect of matters covered by rules should be regulated by the rules. The rules framed in exercise of powers conferred under the proviso to Article 309 of the Constitution are solemn rules having binding effect. Acting in a manner contrary to the rules does create problem and dislocation. Very often government themselves get trapped on account of their own mistakes or actions in excess of what is provided in the rules. We take serious view of these lapses and hope and trust that the government both at the Centre and in the States would take note of this position and refrain from acting in a manner not contemplated by their own rules."

26. Another three Judges Bench of the Hon"ble Supreme Court in the case of *K. Kuppusamy v. State of T.N.*, reported in (1998) 8 SCC 469 have held that - "The relevant rules, it is admitted, were framed under the proviso to Article 309 of the Constitution. They are statutory rules. Statutory rules cannot be overridden by executive orders or executive practice."

27. In the case of *Sandhya Jain (Dr) v. Subhash Garg (Dr)*, reported in (1999) 8 SCC 449, with regard to a case of recommendations made by the Medical Council of India, the Hon"ble Supreme Court have observed that - "the recommendations made by the Medical Council of India or the regulations framed by it are only recommendatory and not mandatory and right to be considered for promotion is a condition of service and it can only be regulated by a rule framed under the

proviso to Article 309 and the recommendation of the Medical Council could not override a rule framed under Article 309."

28. With regard to reduction of pay of the employee on promotion belonging to the Orissa Service Code that has been framed under Article 309 of the Constitution of India by issuing some circulars, the Hon"ble Supreme Court in the case of *Ajaya Kumar Das v. State of Orissa*, reported in (2011) 11 SCC 136 have held that - "Neither the Circular dated 18-6-1982 nor the subsequent Circular dated 19-3-1983 modifying the earlier Circular dated 18-6-1982 can override the statutory provision contained in Rule 74(b) of the Code if it results in reduction of pay of the employee on promotion. That the Orissa Service Code has been framed under Article 309 of the Constitution of India is not in dispute. It is well settled that the statutory rules framed under Article 309 of the Constitution can be amended only by a rule or notification duly made under Article 309 and not otherwise. Whatever be the efficacy of the executive orders or circulars or instructions, statutory rules cannot be altered or amended by such executive orders or circulars or instructions nor can they replace the statutory rules. The Rules made under Article 309 of the Constitution cannot be tinkered by the administrative instructions or circulars."

29. In the present case the benefit of the Grade Pay of Rs. 8,700 has been conferred upon the Graduate Teachers of the Primary Schools (ME/MV/Senior Basic/LP/Junior Basic/Pre-Primary) of the State by the Assam Services (Revision of Pay) Rules 2017, a statutory Rule under the provisions to the Article 309 of the Constitution of India and by the impugned WT Messages dated 21.09.2017, 25.09.2017, 26.09.2017 and 03.11.2017, the Finance Department of the State have stopped the revised Graduate Scale of Pay for the Graduate Teachers who are serving in Intermediate Posts in those Primary Schools of the State observing that said teachers shall draw the revised pay on the Pay Scale as recommended by the 7th Assam Pay and Productivity Pay Commission for Under Graduate Teachers till the decision of the Anomaly Committee.

30. It is not the case of the State respondents that by way of the impugned WT Messages, the Government had merely filled up the gap in the said 2017 statutory Rules, involved in the present case. It is also not the case of the State respondents that by way of instructions issued through those impugned WT Messages, it has supplement the said 2017 statutory Rules.

31. In the present set of cases, the impugned WT Messages issued by the Finance Department of the State on 21.09.2017, 25.09.2017, 26.09.2017 and 03.11.2017 being not supplemental to the said 2017 Rules, a Rule already framed under the proviso to Article 309 of the Constitution, this Court is of the view that those instructions issued by the State respondents through the WT Messages, are nothing but administrative orders and instructions, which have altered the said 2017 Rules, being inconsistent with the same.

32. As such this Court is of the view that the impugned WT Messages issued by

the Finance Department of the State on 21.09.2017, 25.09.2017, 26.09.2017 and 03.11.2017 being administrative orders and instructions and being issued in violation of the law established, as noted above; therefore, those instructions issued by the State respondents through the impugned WT Messages, cannot be allowed to override, amend and supersede the Assam Services (Revision of Pay) Rules 2017, a statutory Rule framed under the proviso to Article 309 of the Constitution of India.

33. For the reasons above, the impugned WT Message under Memo Nos. (i) FPC.18/2013/72 dated 21.09.2017, (ii) FPC.18/2013/74 dated 25.09.2017, (iii) FPC.18/2013/75 dated 26.09.2017 and (iv) FPC.18/2013/PT/12 dated 03.11.2017, all issued by the State Government in the Finance (Pay Research Unit) Department are hereby set aside and quashed.

34. However, considering the fact that the State respondents have already constituted the "Pay Anomaly Committee" and placed the matter before it regarding drawal of Graduate Scale of Pay under Pay Band 2 in the revised Pay Scale of Rs. 14,000 - 49,000 with Grade Pay of Rs. 8,700 by the Graduate incumbents serving in the Intermediate Posts in such Elementary Schools of the State as per the provisions of the Assam Services (Revision of Pay) Rules 2017, a statutory Rules framed under the proviso to Article 309 of the Constitution of India; it is up to the State respondents to act on such report of said "Anomaly Committee" and if at all the State respondents wants to bring any change thereafter, needless to say they can bring it only by way of due amendment of said 2017 statutory Rules.

35. Accordingly, these writ petitions stands allowed.