

(2008) 04 GAU CK 0068

In the Gauhati High Court

Case No : W.A. No's. 447, 482, 499, 558 and 560 of 2003 and 18, 19, 20, 38, 46, 64, 68, 84, 85, 89, 127, 148, 154, 155 and 188 of 2004 and W.P. (C) No's. 3407 of 2000, 3292 of 2001, 1072, 1144, 1191, 1258, 1365, 1530, 1604, 1671, 1752, 1848, 1898, 1908, 1910, 215

Babul Deka and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 25-04-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309, 311

Citation : (2009) 2 GLT 9

Hon'ble Judges : Jasti Chelameswar, C.J.; Iqbal Ahmed Ansari, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Jasti Chelameswar, C.J.—Batch of writ petitions came to be disposed of by a common order, dated 14.8.2003. Aggrieved by the same, the present batch of appeals are preferred by the writ Petitioners, who are successful only in part. During the pendency of the writ appeals, it was brought to the notice of this Court that some of the writ petitions, which are identical, are pending adjudication. Therefore, those writ petitions were also tagged with the present batch of appeals.

2. The factual background of this litigation is as follows:

Some time in the year 1997, the State of Assam issued an advertisement inviting applications from eligible candidates for the posts of L.P. School Teachers. Though it is not very clear from the record, it appears that a large number of posts were filled up pursuant to the said advertisement. The writ Petitioners, who filed writ petitions and out of which, the present writ appeals arise, also applied pursuant to such advertisement and they were found suitable for appointment. It appears from the record that when these various writ Petitioners were appointed on a stipend of Rs. 900/- per month, it was subsequently raised to Rs. 1,800/-

per month. It also appears from the record that when these appointments were made, it was indicated in the appointment orders that the stipendiary teachers would be put on a "regular scale of pay" on condition that they undergo a basic training course.

3. Some of such teachers were subsequently paid "regular scale of pay" for some time, but later, the Government decided to recall the benefit of "regular scale of pay". Therefore, they approached this Court by way of writ petitions.

4. The second category of the writ Petitioners are those, who claimed that they are always willing to undergo the basic training course, but the State Government is not making any arrangement for imparting the basic training and consequent thereupon, they are not being given the "regular scale of pay". Hence, they seek a mandamus directing the State to pay them in accordance with "regular scale of pay".

5. The Petitioners, in support of their submissions, argued that the recruitment is governed by the provisions of Assam Elementary Education (Provincialization) Rules, 1977 read with the Assam Elementary Education (Provincialization) Service and Conduct: Rules, 1981.

6. The stand of the State is summarized by the learned Judge in the judgment under appeal as follows:

The stand projected in the fresh affidavit filed by the Secretary is that the posts on which the Petitioners had been appointed as Stipendiary Teachers are all plan posts either retained from the previous 5 Year-Plan or created during the current 5 Year-Plan. All of such posts have a fixed life span, the continuance of which would require periodic retention which in turn depends on availability of funds. Such posts cannot be equated with the posts on a regular scale of pay which are referred to as non-plan posts. It is such non-plan posts which are covered by the provisions of Rules and the posts carrying stipend created under the plan heads are altogether distinct and different and the incumbents of such posts are destined to remain as Stipendiary Teachers till they complete their basic training course and thereafter, are adjusted and/or appointed against non-plan posts carrying a regular pay scale. In the affidavit filed, it has been recited that the practice of creating additional posts to accommodate holders of Stipendiary posts against regular vacancies had to be discontinued due to financial stringencies faced by the State and that at present, the only process available is to accommodate and adjust the Petitioners against non-plan vacancies caused by retirement, death and such other reasons. The projections and calculations of the State have gone haywire primarily, on account of the financial difficulties and what would have been normally a smooth transition has become a tardy process. The actions of the district level officers in appointing some of the Petitioners against non-plan posts and granting them a regular scale of pay without such Petitioners completing their basic training course have been labelled as gross aberrations which would not bind the State.

7. In the background of the abovementioned pleadings, the learned Judge formulated the issue - whether... "...the Petitioners are entitled, on their appointment, to the time scale of pay by virtue of the provisions to the Rules. It is, therefore, to this aspect of the case, the Court must now turn."

8. The distinction between plan posts and non-plan posts is discussed at paragraph 11 of the judgment under appeal. The relevant portion of which reads as follows:

The theoretical formulations as well as the mechanisms of actual working of the 5-Year-Plans of the country, broadly speaking, are well known. The plan money is allocated under different heads to the different States and the State is to judge and decide as to how the money is to be disbursed and spent so as to confer maximum benefits to the citizens. How much of the plan fund allotted to education should be utilized for maintenance and development of infrastructure and how much of such funds is to be applied for maintaining and increasing the existing level of employment are questions which the Executive arm of the State to decide. How many additional hands are required in the schools during a particular period of a 5-Year Plan and what should be the emoluments offered to such additional hands, keeping in mind the limited resources available, are again questions that the State has to decide. It is not difficult to visualize a situation where jobs have to be created within limited resources available and the State takes a decision, both from the standpoint of generating employment and increasing additional educational avenues, to recruit teachers on a fixed pay. This appears to be what has precisely happened in the present case. Such posts retained or created out of the plan funds are loosely called as plan posts which are clearly distinguishable and different from the regular/i.e. non-plan posts that are funded by the State out of its own budgetary resources.

9. After taking note of the distinction between plan posts and non-plan posts, the learned Judge concluded that the provisions of the Rules relied upon by the writ Petitioners would cover the non-plan posts, but not plan posts. The learned Judge, in this regard, held as follows:

The provisions of the provincialisation Rules, on which reliance has been placed, would cover the non-plan posts i.e. regular posts and the fixed duration posts retained or created under the different 5 Year Plans, which are not covered by the budgetary allocations of the State for a year cannot come under the purview of the Rules.

10. The learned Judge, therefore, concluded that the writ Petitioners are not entitled to regular time scale of pay. However, the learned Judge, by the judgment under appeal, directed that the State must endeavour to train up the stipendiary teachers, as such the writ Petitioners, by deputing them for training in accordance with their seniority and, thereafter, to absorb them in the regular cadre by earmarking reasonable percentage of vacancies in non-plan posts, which naturally occur or the State may be able to create in the near future.

11. The distinction between stipendiary teacher posts and the posts of teachers, who were appointed under the Rules, referred to earlier, is true and real. The nomenclature adopted by the Respondents to describe the abovementioned posts i.e., "plan posts" and "non-plan posts", in our view, is simply an administrative jargon. The legal distinction between such plan posts and non-plan posts is this:

12. Part-XIV of the Constitution of India specifically deals with the matters relating to the employment under the States i.e. both under Union of India as well as various States comprised in the Union of India. Article 309 of the Constitution authorises both the Parliament and the Legislatures of the various States as the case may be to regulate the employment thereunder. The said Article mandates that until an appropriate law is made, in that behalf, the President of India or the Governor of a State, as the case may be, can regulate the terms of employment by Rules.

13. Coming to the employment under the State, it is for the State to make an assessment of the total number of employees required for carrying out the various functions and discharge its obligations mandated by the various laws. There are numerous obligations, which the State is required to discharge under the various laws made either by the concerned Legislatures or the Parliament. Naturally, these obligations are to be discharged through human agencies. It is for this purpose the State employs a large number of persons. For the sake of administrative convenience, the various functions of the State are distributed between the various departments of the State. Generally, persons employed for the discharge of the functions or obligations of a particular department for the State are subjected to a definite set of rules or laws made pursuant to Article 309 of the Constitution of India. It is also possible that some times within the same department there may be more than one set of rules/laws depending upon the nature of the duties performed by various wings of the same department.

14. In employing persons, the State, in its various departments, normally, makes an assessment of the number of persons required to be employed against each of the categories of posts. The determination of such number is not static; it may vary from time to time. The determination, in turn, itself, is based on various factors - like, volume of work that is required to be performed, the financial ability of the State to employ sufficient number of employees to cope up with the works, the time frame within which the work is required to be completed or whether the work is perennial in nature. These are all matters, which are required to be decided on the basis of empirical data and the priorities of the State and would fall within the domain of policy making activity of the State. Courts, normally, do not enter into this zone, unless it is established that the policy itself is contrary to some definite provisions of the Constitution of India.

15. Normally, the law/rules made under Article 309 of the Constitution either specify the number of posts with reference to each of the categories governed by such law/rules or in the alternative, such law/rules delegate the authority to the Executive Government to determine the number of posts to be created and filled

up by the Executive Government.

16. When the number of posts is so determined and the recruitment is made to fill up those posts and the persons recruited against such a post are governed by the conditions stipulated by such law/rules regarding the various facets of the establishment like, pay, discipline, age of superannuation etc.

17. The employment, be it under the State or private employer, is, essentially, a matter of contract. But, when it comes to the creation of a contracted employment, the State is restricted in its freedom of contract by the provisions under Articles 14 and 16 of the Constitution of India, which prohibit the State from arbitrary and discriminatory action on the ground of race, sex, language, religion etc. etc.

18. Apart from that once a person is appointed against one of the posts created by law/rules referred to earlier, the discontinuance of such persons from service can be effected only in accordance with the provisions of such law/rules. The Article 311 of the Constitution further stipulates that if any such person is sought to be removed or dismissed from service on the ground of misconduct in service, such a person shall be given reasonable opportunity of rebutting the allegation of misconduct.

19. In the absence of any law/rules made under Article 309 of the Constitution, the State can still employ people and such employment becomes purely contractual in nature and the terms of the employment are only regulated by the terms of the contract. The persons appointed by virtue of such a contract are entitled only to compensation, if such persons are required to vacate the post otherwise, other than the reasons connected with for misconduct.

20. The posts occupied by the various writ Petitioners in the present litigation are held to be the posts not created by any law/rules made under Article 309 of the Constitution of India. Nothing is brought to our notice to establish that these posts are governed by such law/rules made under Article 309 of the Constitution. On the other hand, it is the case of the State of Assam that these posts are created pursuant to a Scheme framed by the Union of India, which provided for fixed remuneration for the occupants of each one of the posts. Further, the Union of India agreed to make available necessary funds to meet the expenditure involved in making the payment of the remuneration of various persons such as the writ Petitioners herein to be employed pursuant to the terms of the Scheme only for a limited period.

21. It is, therefore, for the State of Assam to either continue or discontinue the employment of the writ Petitioners or other similarly situated persons after the financial assistance from the Union of India comes to an end. Such a decision is to be taken by the State of Assam on a consideration of various relevant factors, such as, the financial resources, the need to continue such posts etc.

22. It is not the case of the State of Assam that the need to continue the various

posts created under the Scheme propounded by the Union of India ceased, but it is the case of the State of Assam that having regard to their priorities, they are not in a position to earmark sufficient amount of funds to continue the employment of the writ Petitioners and other persons similarly situated.

23. In the abovementioned background, as the posts such as the one occupied by the writ Petitioners are not the posts created by any law/rules made under Article 309 of the Constitution, they are not part of any cadre regulated by law made under Article 309 of the Constitution and, therefore, they cannot seek anything more than what is offered to them under the contract of employment.

24. No doubt, in the orders of appointment it was indicated that the writ Petitioners and others would be put against a regular scale after completion of the training, but such a statement in the appointment orders is without any basis in law. The Legislature never authorized such an action on the part of the Executive. Therefore, it is plainly beyond the jurisdiction or the authority of law conferred upon the appointing authority. It, therefore, does not create any legally enforceable rights in favour of the writ Petitioners.

25. The learned Judge by the judgment under appeal took note of the fact that some of the persons, employed pursuant to the Scheme, referred to earlier, were, in fact, subsequently, appointed against the post governed by the law made under Article 309 of the Constitution by the State of Assam i.e. under the provisions of Assam Elementary Education (Provincialisation) Rules, 1977 read with Assam Elementary Education (Provincialisation) Service and Conduct Rules, 1981.

26. Nothing prevents the State from absorbing some or all the persons employed under the abovementioned Scheme, if possible, against the posts, which are created under the law made under Article 309 of the Constitution, but while making such absorption, the State cannot arbitrarily pick and choose the persons, otherwise, forming a distinct class like the Petitioners and others, who were employed pursuant to the Scheme of the Union of India. Such absorption must be on the basis on some rational principles. It is, in recognition of such principles of law that the learned Judge by the judgment under appeal directed the State to earmark a reasonable percentage of vacancies in the so-called non-plan posts i.e. the posts created pursuant to the abovementioned Article 309 of the Constitution.

27. In the result, we do not see any reason to interfere with the judgment under appeal. Appeals are, therefore, dismissed, but, in the circumstances, without costs.

28. Consequentially, for the same reasons assigned for dismissing the appeals, the writ petitions are also disposed of in terms of the judgment and order dated 14.08.2003, which is the subject matter of the present batch of appeals.