
(2005) 01 GAU CK 0065
In the Gauhati High Court

Bidyut Bhusan Nath

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 11-01-2005

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2007) 1 GLR 811

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—I have heard Mr. A.S. Choudhury, learned Counsel for the petitioner, and Mr. M. Choudhury, learned Counsel appearing on behalf of the State respondents. I have also heard Mr. U. Bhuyan, learned Counsel, appearing on behalf of the respondent No. 4.

2. By making this application under Article 226 of the Constitution of India, the petitioner has approached this court seeking issuance of writ(s) to get, inter alia, the impugned order, dated 1.11.2002, passed by the respondent No. 2, namely, Director, Secondary Education, Assam, holding the respondent No. 4, namely, Sri Sreekant Goswami, as senior to the petitioner, set aside and for directions to the respondent-authorities concerned to treat the petitioner senior to the respondent No. 4 as Assistant Teacher in Swarna Lakshmi Higher Secondary School, (hereinafter referred to as "SL HS school") and to let the petitioner hold the post of in-charge Principal of the said school.

3. Briefly stated, the facts giving rise to the present writ petition may be set out as follows:

The petitioner was appointed as Assistant Teacher against a substantive post, on 9.8.1971, in Krishna Charan High School, Panibhora, Cachar (hereinafter referred to as "KC High School"). The petitioner was transferred, on 23.8.1989, to Nehru Girls High School, Bekripar, Cachar (hereinafter referred to as "NG High School").

As the petitioner made a representation against the said transfer order, the same was changed vide order, dated 24.4.1989, posting the petitioner to SL HS School. This order of transfer clearly mentioned that the posting of the petitioner and that of Sri Charitra Mohan Nath were on their own requests. Thereafter, the petitioner approached this court by way of a writ petition, which gave rise to WP(C) 1313/2002 expressing his grievances that his seniority had not been fixed and as a result thereof, he had been facing inconvenience for selection to the post of Head Master, though such a post was lying vacant. By order, dated 4.3.2002, the writ petition was disposed of with direction to the respondent No. 2, namely, Director of Secondary Education, Kahilipara, Assam, to consider the petitioner's case for fixing seniority as per the rules and regulations. While the process was on as regards fixation of seniority of the petitioner, an order was passed, on 2.8.2002, by the respondent No. 3, namely, Inspector of Schools, Cachar District Circle, entrusting, inter alia, the respondent No. 4 with the duty to look after the day-to-day work of the Higher Secondary Classes of SL HS School. This order was challenged by the petitioner by way of WP(C) 6270/2002. By order, dated 1.10.2002, passed in WP(C) 6270/2002 aforementioned, the impugned order, dated 2.8.2002, was suspended. Eventually, by order, dated 1.11.2002, respondent No. 2, Director of Secondary Education, Kahilipara, Assam, determined the private respondent No. 4, namely, Sri Sreekanta Goswami as senior to the petitioner in SL HS School, Narasingapur. It is this order, which stands impugned in the present writ petition. By an order, dated 1.11.2002, passed in this writ petition, the order, dated 1.11.2002, aforementioned has been kept under suspension and as per directions of this court, respondent No. 2 has been managing/running the school aforementioned.

4. It is in the above backdrop that I have to consider the case of the petitioner. It is the case of the writ petitioner that he was, initially, transferred, on 28.3.1989, from KC High School to NG High School in order to deprive him of the opportunity to hold the office of the Principal of the said school as its in-charge and that when he objected to the said transfer, he was offered the proposal transferring him to SL HS School and, immediately, after offering the said proposal and, in fact, on the same day, i.e., on 24.4.1989, the order, dated 24.4.1989, transferring the petitioner to SL HS School was made and one Charitra Mohan Nath was posted in his place in KC High School. The petitioner contends that he never requested for his transfer to SL HS School. It is also the petitioner's case that to a query made by the respondent No. 2, respondent No. 3 has clearly stated that nothing had been found in the office with regard to the request made by the petitioner, which, according to the petitioner, supports his case that the said transfer order was not on the request of the petitioner and if the transfer to SL HS School was not on the request of the petitioner, then, the petitioner ought to have been treated as senior to the respondent No. 4, for, the petitioner has been working as an Assistant Teacher long before the respondent No. 4 came to be appointed as a teacher and in such a situation, the petitioner shall be allowed to hold the charge of the office of the Principal of SL HS School

being the senior most teacher in SL HS School.

5. The whole controversy, thus, raised in the present petition is centered round the fact as to whether the petitioner is senior to the respondent No. 4. In this regard, it is important to note that the Assam Secondary Education Service Rules, 2003, makes it abundantly clear that if a person is transferred on his own request to another school, he will not carry, for the purpose of his seniority, the service rendered by him in the school in which he was, initially, posted and in which he had served in the past.

6. What is, now, contended, on behalf of the petitioner, is that at the time, when the Rules of 2003 aforementioned had not come into force, there was no such policy of treating an assistant teacher, transferred on his own request to a school, as a person who would not carry his seniority with him from his previous school. Notwithstanding what the petitioner so contends, it is pertinent to mention that this aspect of the matter has been dealt with clearly in *Raisuddin v. State of Assam* reported in 2002 () GLT 216. In the case of *Raisuddin (supra)*, the question of seniority was considered in the absence of the Rules of 2003 aforementioned, but the Court observed and held as follows:

...The learned Government Advocate, however, submits that a person, transferred on his own request, loses his seniority. I find sufficient force in the above submission and hold that whenever a person is transferred on his own request from one school to another school he lost his seniority of that school. The transferee teacher cannot be allowed to carry his seniority to other school. In that case any person, who is serving as a teacher of a school, may opt to go to other school to become the senior most teacher and thereby become eligible for appointment as headmaster of that school, thereby unsettling the entire process of seniority. The Government of Assam has laid down the procedure for the promotion of headmaster of ME Madrasa vide Notification dated 30th August, 1966 whereby selection process of the post of headmaster in such Madrasa school is to be made strictly on the basis of seniority-cum-efficiency. If the statement made by the respondent No. 4 is accepted, teachers will be on fishing expedition to find out where they can become senior most teacher and thereby earn eligibility for consideration to the post of headmaster.

7. The above view was reiterated in *WP(C) 4406/2001 (Sunil Kumar Bora v. State of Assam)* and the court held, in no uncertain words, that when a teacher leaves his school on his own request and joins another school, he will not carry his seniority and on the date of joining, he would be placed at the bottom of the seniority list of the teachers serving in the school to which the person concerned is transferred. In other words, the date of seniority of a transferee teacher, if the transfer is on his own request, would be considered from the date of joining in the school to which he has been transferred.

8. I see no reason to take a view different from what the court has already taken in *Raisuddin (supra)* and *Sunil Kumar Bora (supra)*. I, therefore, hold that even

before coming into force of the Rules of 2003 aforementioned, a teacher, who had left a school, on his own request, and joined another school on transfer, cannot be held to have carried his seniority in the school in which he had served and must be treated to have been placed at the bottom of the seniority list of the teachers of the school to which he had been transferred.

9. In fact, during the course of hearing, Mr. A.S. Choudhury accedes that there is sufficient logic in holding that a person, who joins a school on his own request, will not carry his seniority from the previous schools in which he had served.

10. What logically follows from the above discussion is that if the petitioner's transfer to SL HS School is held to be on his own interest, the petitioner will not carry his seniority from NG High School, though the petitioner was, admittedly, appointed as Assistant Teacher on 9.8.1971, whereas the respondent No. 4 was appointed as an Assistant Teacher on 20.5.1975.

11. Coming to the question as to whether the petitioner's transfer to SL HS School by order, dated 24.4.1989, was or was not on his own request, it is imperative to note that this is, basically, a question of fact and is a seriously disputed question of fact. Such a disputed question of fact should not be, ordinarily, decided in a proceeding of the present nature and the forum for determination of such disputed question is really the Administrative Tribunal or the Civil Court.

12. Be that as it may, the order, dated 24.4.1989, whereby the petitioner was transferred to SL HS School clearly mentions, as already indicated hereinabove, that the petitioner's transfer to SL HS School was on his own request. The first written representation, which the petitioner is shown to have been made is on 3.11.1989 and this was done after Charitra Mohan Nath was allowed to hold the post of Head Master of NG High School, when the incumbent thereof, namely, Parimal Nath, who was the Head Master, submitted his resignation from the post of the Head Master and prayed for reverting him to his original post of the graduate teacher. The materials give no cogent indication that the petitioner had made any representation or expressed any resentment prior to 3.11.1989.

13. I may pause here to point out that Mr. Choudhury has referred to the decision rendered, on 25.7.2003, in WP(C) 6285/2002 (Hari Charan Medhi v. State of Assam and Ors.) and WP(C) 6520/2002 (Abdul Motin Talukdar v. State of Assam and Ors.), to show that in the absence of any material indicating that the transfer of a teacher has been made on his own request, the teacher concerned cannot be held to have been transferred on his own request. While dealing with the decision in Haricharan Medhi and Abdul Motin Talukdar (supra), which Mr. Choudhury relies upon, what is of immense importance to note is that the question raised in the said writ petitions was whether the transfer of the petitioner was on his own request. Since neither the order of transfer nor the materials on record disclosed that the transfer of the petitioner was on his own request, the court held that it was not possible to interfere that the transfer was

made on the petitioner's request. The case at hand is, however, factually different inasmuch as the very order of transfer, dated 24.4.1989, clearly mentions that the petitioner was transferred to SL HS School on his own request. It was quite possible, in the context of the facts of the present case, that the petitioner had made the request for transfer, because his representation, dated 3.11.1989, aforementioned shows that SL HS School is situated nearer to KC High School than NG High School and it is also quite possible that the petitioner, at that point of time, had not realized that Parimal Nath, who was holding the charge of the office of Principal of KC High School, would, suddenly, express his willingness to continue as Principal-in-charge and request to be reverted to the post of graduate teacher paving the way for Charitra Mohan Nath to be posted in his place as the Principal-in-charge.

14. Regarding the failure, on the part of the official respondents, to trace out any paper(s) relating to the petitioner's making of request for transfer to SL HS School, it is of utmost importance to note that since the order, dated 24.4.1989, clearly states that the transfer of the petitioner was on his own request, the burden rested on the petitioner to prove that the said transfer was not made on his own request; but no material could be produced by the petitioner to show that either he had, promptly after passing of the transfer order, dated 24.4.1989, aforementioned raised any objection thereto or that he had joined the post of the teacher in SL HS School under protest. Since the petitioner has challenged the order, dated 24.4.1989, in the year 2001, i.e., almost after a lapse of 12 years, such a delay, in the facts and circumstances of the present case, cannot be ignored and such a belated plea cannot be accepted in the absence of the failure of the petitioner to produce any material either to show that he had not made any request or that the petitioner had expressed his resentment promptly after passing of the order, dated 24.4.1989, aforementioned or had joined as Assistant Teacher in SL HS School under protest.

15. In support of his contention that since no document could be produced, on behalf of the respondents, to show that the transfer of the petitioner to SL HS School was made on the request of the petitioner himself, the transfer order cannot be treated to have been made on the request of the petitioner, Mr. A.S. Choudhury has also placed reliance on the decision in Krishan Kumar Vs. State of Haryana and Others, To my mind, reference made by Mr. Choudhury to the case of Krishna Kumar (supra) is entirely misplaced. In Krishna Kumar (supra), from the fact that no TA/DA had been allowed to the petitioner concerned, it had been presumed, in the absence of any material on record, that the transfer had been made on the request of the petitioner. This conclusion was held to be not sustainable by the Apex Court inasmuch as no paper or document could be produced to show that the transfer was made pursuant to the request of the petitioner. In the case at hand, however, the very transfer order, dated 1.11.2002, clearly mentions, if I may reiterate, that this transfer was made on the request of the petitioner. Not even an iota of material could be produced by the petitioner to show that the fact, so mentioned in the transfer order, was

incorrect or false. No paper or document could also be produced by the petitioner to show that he had made any representation promptly after being so transferred and/or that he had joined his posting, on transfer, at NG High School under objection.

16. What crystallizes from the above discussion is that the order, dated 24.4.1989, aforementioned transferring the petitioner to SL HS School was on his own request. In other words, the materials on record, as the same stand today, eloquently speak that the said transfer of the petitioner was on his own request and since the petitioner's transfer was on his own request, the period of service, which he had rendered in KC High School and/or in any other schools, could not have been considered and was rightly not considered for the purpose of his seniority. Since the petitioner joined the SL HS School as an Assistant Teacher after 24.4.1989, whereas the respondent No. 4 had been serving there as an Assistant Teacher since 20.5.1975, it is more than abundantly clear that the respondent No. 4 ought to have been treated and was rightly treated by the respondent No. 2 as senior to the petitioner.

17. Because of what have been pointed out above, I find absolutely no merit in the present writ petition and I see no reason to interfere with the order, dated 1.11.2002, passed by the respondent No. 2 holding the respondent No. 4 as senior to the petitioner.

18. For what have been discussed and pointed out above, the impugned order, dated 1.11.2002, aforementioned is maintained and the writ petition is dismissed.

19. However, parties are left to bear their own costs.