
(2018) 01 GAU CK 0044
In the Gauhati High Court
Case No : 864 of 2017

BILU BORAH SAIKIA

APPELLANT

Vs

THE STATE OF ASSAM & ORS.

RESPONDENT

Date of Decision : 09-01-2018

Acts Referred:

Citation : (2018) 01 GAU CK 0044

Hon'ble Judges : Achintya Malla Bujor Barua

Bench : Single Bench

Advocate : K. N. Choudhury, I.H. Saikia, D. Borgohain, N. Sarma

Final Decision : Disposed

Judgement

1. Heard Mr. K. N. Choudhury, learned senior counsel for the petitioner, Mr. I.H. Saikia, learned counsel for the respondent No.6, Ms. D.

Borgohain, learned counsel appearing for the respondent No.7 and Mr. N. Sarma, learned Standing Counsel for the Elementary Education Department.

2. The petitioner was appointed as an Assistant Teacher in the scale of pay of Rs.1186 to 2396/- in the Duliagan Ucha Vidyalaya ME School.

Such appointment was made as per the order of 27.10.1993 of the District Elementary Education Officer, Dibrugarh and on being approved by

the Sub Divisional Advisory Board as required under the Rules. The concerned school was provincialised in the year 1980 and subsequent

thereof, all appointments to the school are governed by the Assam Elementary Education (Provincialisation) Rules, 1977.

3. The respondent No.6 on the other hand was appointed by the School Management Committee of the school on 26.02.1990 as a Hindi

Teacher. The admitted fact is that although the respondent No.6 was so appointed, but there was no sanctioned post of Hindi Teacher in the

concerned school and secondly, the appointment of the respondent No.6 by the School Management Committee was de-hors the rules inasmuch

as, in a provincialised school, no authority is vested on the School Management Committee to make any such appointment on honorary basis.

4. By a letter of 10.10.1994, the District Elementary Education Officer, Dibrugarh had requested the Director of Elementary Education, Assam to

sanction a post of Hindi Teacher for the school in question in order to accommodate the respondent No.6. The respondent No.6 made a

representation dated 27.10.1994 before the Chief Minister of Assam requesting that a post of Hindi Teacher be approved in the Duliajan Ucha

Vidyalaya ME School and further to appoint the respondent No.6 in the school. The Chief Minister, accordingly, made an endorsement in the

vernacular version of the said application by stating that ""Kindly sanction a post of Hindi Teacher and make necessary action for appointment in the

post as prayed."" From the aforesaid representation of the petitioner as well as the endorsement of the Chief Minister, one aspect is apparent that

till 1994, the respondent No.6 was not duly appointed in the school and accordingly request had been made for such appointment by approving a

post, as endorsed by the Chief Minister.

5. The Service Book of the respondent No.6 as annexed in the affidavit in opposition shows an endorsement dated 03.11.1998 of the Block

Elementary Education Officer, which is as follows:-

As per Govt Letter No.EPG/567/41/106 dtd 16.11.1997 and DEES No.EPD/P/78/93/62 dtd 16.2.1996. The service of Miss Manju Prava

Gogoi, Hindi Teacher of Duliajan Ucha vidyalaya has ben regularized with effect from 16.11.1991 vide DEEO's letter No.6287 dtd Dib. the

15.3.1997.

A further entry is found in the Service Book of the respondent No.6, which is apparently subsequent and is as follows:-

In pursuance of Director of Elementary Education, Assam's letter No.EPD/P/108/97/36 dtd 31.3.99 and Govt. letter No.DMA-17/98/9 dtd

22.3.99, the service of Miss Manju Prova Gogoi working Hindi Teacher of Duliajan Ucha ME School is hereby regularized with effect 1.11.98 in

the scale of pay Rs.3130- 60-3490-90-4030-EB-90-4490-120-5200-175-6600/- P.M plus all other allowances as admissible under rules vide

memo no.1101-96 dtd.23/5/2000.

6. Based upon such prior entry, it is the claim of the respondent No.6 that she had been regularized in her service w.e.f. 16.11.1991. To this

aspect, the respondent No.6 also refers to an order dated 15.03.1997 of the District Elementary Education Officer, Dibrugarh, which is annexed

as Annexure-A2 to the affidavit in opposition of the respondent No.6, which interalia, states that pursuant to a letter of the Director dated

16.02.1996 and Government letter dated 16.11.1991, the services of the respondent No.6 is regularized in the Duliajan Uccha Vidyalaya ME

School in the pay scale of Rs.1185-2395/-. It is noticed that the order of 15.03.1997 merely speaks that the services of the respondent No.6 had

been regularized but it does not mention that it has been regularized with any retrospective effect. However, by a subsequent communication from

the District Elementary Education Officer to the Block Elementary Education Officer dated 20.07.1997, it had been informed that the services of

the respondent No.6 had been regularized w.e.f. 16.11.1991. It is further noticed that the communication of 20.07.1997 does not state in any

manner as to on what basis it had been stated that the services of the respondent No.6 was regularized w.e.f. 16.11.1991 when on fact and as

indicated above, the order of regularization dated 15.03.1997 does not so indicate.

7. In between there was a dispute between the present respondent No.7, who is another teacher in the concerned school and the respondent No.6

resulting in WP(C) No.5605/2014 and WP(C) No.3802/2014. In WP(C) No.3802/2014, the respondent No.7 had assailed the seniority of the

respondent No.6, whereas in WP(C) No.5605/2014, an order of promotion given to the respondent No.6 had been assailed. The said writ

petitions were disposed of by the order dated 16.11.2016. In the order of 16.11.2016, this Court in paragraph-18 had referred to an earlier order

dated 21.05.2014 in WP(C) No.938/2013 between the respondent No.6 and respondent No.7, wherein an earlier order allowing the respondent

No.6 to be the in-charge Headmaster of the school was assailed by the respondent No.7, where an observation was recorded that the

retrospective regularization given to the respondent No.6 could be for the purpose of other than determination of seniority such as for computation of pensionary benefits etc. However, in WP(C) No.5605/2014 and WP(C) No.3802/2014, this Court had not decided the issue between the parties inasmuch as, it was noticed that although the respondent No.6 was promoted as the Headmaster of Duliajan Uccha Vidyalaya ME School, but the respondent No.7, who was the petitioner therein, was also promoted as the Headmaster of another school namely Rohmaria Girls ME School. An observation was also made that the order dated 15.03.1997, by which the respondent No.6 was regularized, was also not questioned by the respondent No.7 before any other forum. In the aforesaid background, the present writ petition has been preferred wherein the order dated 28.07.2014, amongst others, has been assailed.

8. Although the order of regularization of the respondent No.6 dated 15.03.1997 along with some other orders have also been assailed, but substantially in course of the hearing, the learned senior counsel for the petitioner confines his submission to the order of 28.07.2014 and accordingly, the legality and validity of the said order is being examined in this writ petition.

9. Mr. K.N. Choudhury, learned senior counsel for the petitioner has assailed the order of 28.07.2014 on the ground that firstly when the petitioner was appointed on 27.10.1993, the respondent No.6 was not even borne in the service inasmuch as, she was not duly appointed as an Assistant Teacher at that relevant point of time and therefore, it cannot be held that the respondent No.6 is senior to the petitioner. To that extent, the learned senior counsel for the petitioner relies upon the provisions of the Hon'ble Supreme Court rendered in paragraph-45 of its pronouncement made in Pawan Pratap Singh and others -vs- Reevan Singh and others, reported in (2011) 3 SCC 267, wherein it has been provided that the seniority cannot be counted from the date of occurrence of the vacancy and cannot be given retrospectively unless it so expressly provided by the relevant service rule and that the seniority cannot be given on retrospective basis when an employee was not even been borne in the cadre and by doing so, it may adversely affect the employees, who have already been appointed in a valid manner in the meantime.

10. Mr. K.N. Choudhury, learned senior counsel for the petitioner by further refers to the decision of the Hon"ble Supreme Court rendered in

Direct Recruit Class-II Engineering Officers Association -vs- State of Maharastra and others, reported in (1990) 2 SCC 715, to submit that the

respondent No.6 is not entitled to have her seniority from the date of her initial appointment.

11. Accordingly, it is the submission of the learned senior counsel for the petitioner that in the instant case, even if the order dated 15.03.1997 is

taken to be the order of regularization of the service of the respondent No.6, but as the initial appointment of the respondent No.6 on 26.02.1990

was not made as per the rules, inasmuch as, the said appointment was an honorary appointment in a provincialised school, which is not permissible

under the rules, therefore, the respondent No.6 is not entitled to have her seniority from 20.02.1990. Accordingly, it is the submission of the

learned senior counsel that the petitioner having been regularly appointed on 27.10.1993 is senior to the respondent No.6. Mr. Choudhury,

learned senior counsel also relies upon an entry in the Service Book of the respondent No.6, wherein there is an order of the Headmaster, which

states that the respondent No.6 has been regularized w.e.f. 01.11.1998.

12. Per-contra, Mr. I.H. Saikia, learned counsel for the respondent No.6 submits that the order dated 28.07.2014 was subjected to a judicial

scrutiny in WP(C) No.5605/2014 and the said order having survived the judicial scrutiny in the said writ petition, therefore, it cannot again be

assailed by the writ petitioner in this writ petition. Mr. Saikia, learned counsel for the respondent No.6 also submits that the seniority of the

respondent No.6 was fixed by the order dated 15.03.1997 and the petitioner having not assailed the same on any prior occasion, any challenge to

the same in the present writ petition is hit by delay and laches. Mr. Saikia, learned counsel also submits that in the Writ Appeals being WA

No.409/2016 and WA No.410/2016, which were preferred by the present respondent No.7 against the order dated 16.11.2016 in WP(C)

No.5605/2014, the present petitioner had got herself impleaded as the respondent No.7 and therefore, any such decision in the earlier writ petition

is binding upon her.

13. Considered the rival submission of the parties. The admitted facts of the

dispute involved are that the respondent No.6 was appointed as a Hindi Teacher in a circumstance, where there was no sanctioned post for Hindi Teacher and the school was a provincialised school at the relevant point of time. Further, the respondent No.6 was appointed as an honorary teacher by the Management Committee of the school. The law as regards appointment of an honorary teacher in a provincialised school is settled to the effect that in such schools, it is impermissible for the Managing Committee to make any honorary appointment. Accordingly, the appointment of the respondent No.6 on 26.02.1990 as a Hindi Teacher on an honorary basis against a non existing post by the Managing Committee has to be termed to be an appointment made de-hors the rules in force. In the aforesaid circumstance, the petitioner having been appointed on a regular basis by following the procedure prescribed under the rules on 27.10.1993 has to be construed to be senior to that of the respondent No.6 in terms of their respective appointments.

14. But at the same time, the respondent No.6 had made an application dated 27.10.1994 before the Chief Minister of Assam requesting for an approval of a post of Hindi Teacher in the school concerned and also to appoint her against such post. Consequent thereof, there is an endorsement by the Chief Minister requiring the sanction of a post of Hindi Teacher in the school and to take necessary action for appointment of the respondent No.6. In view of the said factual situation, the order dated 15.03.1997 has to be understood to be an order, which was made pursuant to the aforesaid process as indicated. But at the same time when the order of 15.03.1997 is examined, it is noticed that by the said order, it is reflected that the services of the respondent No.6 was regularized in the scale of Rs.1185 to 2395/- and it does not mention anything about an appointment.

15. Be that as it may, as the said order has remained un-assailed for over a period, this Court is taking it into consideration that by the order of 15.03.1997, the services of the petitioner was regularized. It is further noticed that the order of 15.03.1997 merely provides that the services of the petitioner was thereby regularized in the Duliajan Uccha Vidyalaya ME School in the scale of pay and it does not mention anything as to from which period such regularization has been given effect. In the absence of any

such provision, it is to be construed that the regularization was prospective in nature from the order dated 15.03.1997. However, as indicated by Mr. Saikia, learned counsel for the respondent No.6, there is a subsequent communication dated 20.07.1997 from the District Elementary Education Officer, Dibrugarh to the Block Elementary Education Officer, Tengakhat, wherein it is indicated that as per the Government letter dated 16.11.1991 and Director of Elementary Education's letter dated 16.02.1996, the services of the respondent No.6 had been regularized w.e.f. 16.11.1991. The letter of 20.07.1997 being merely a communication from the District Elementary Education Officer, Dibrugarh to Block Elementary Education Officer, Tengakhat, the same cannot be construed to be the basis to arrive at a conclusion that the services of the respondent No.6 was regularized with retrospective effect from 16.11.1991 and the same also cannot be construed to be an order modifying the earlier order of 15.03.1997.

16. In such view of the matter, this Court is of the view that the services of the respondent No.6 was regularized with prospective effect by the order dated 15.03.1997. In the backdrop of the aforesaid conclusion, when the order dated 28.07.2014 is examined, it is noticed that by the said order, the respondent No.6 was allowed to be the in-charge Headmistress of the Duliajan Ucca Vidyalaya ME School with immediate effect and it is further noticed that as per the said order, the services of the respondent No.6 was counted from the date of retrospective regularization of service i.e. from 16.11.1991. The aforesaid conclusion in the order of 28.07.2017 appears to be incorrect inasmuch as, by the order dated 15.03.1997, the respondent NO.6 was regularized in service with prospective effect without there being any mention that it was regularized from 16.11.1991. In such view of the matter, the factual basis on which the order of 28.07.2014 was issued appears to be incorrect. But, at the same time, as submitted by Mr. Saikia, learned counsel for the respondent No.6, this Court in the present writ petition is not required to go into correctness of the order dated 28.07.2014 inasmuch said the said order had survived a judicial scrutiny of this Court in an earlier writ petition being WP(C) No.5605/2014 and WP(C) No.3802/2014, wherein a final consideration was given by the order dated 16.11.2016.

17. On a perusal of the order dated 16.11.2016 of this Court, it is noticed that the correctness of the order dated 28.07.2014 was not adjudicated

upon by this Court on a factual premises that subsequent to such order, both the writ petitioner therein as well as the present respondent No.6

between whom the dispute arose, were both promoted on a regular basis to the post of Headmaster and therefore, this Court was of the view that

the correctness of the order of 28.07.2014 need not be gone into.

18. In such view of the matter, the submission of the learned counsel for the respondent No.6 that the order dated 28.07.2014 had survived a

judicial scrutiny of this Court in the order dated 16.11.2016 is found to be unacceptable. The correctness of the said order was not adjudicated on

the premises that both the contesting parties were subsequently promoted as Headmasters which otherwise would have been the consequential

benefits that the parties would have derived from an adjudication of the order of 28.07.2014.

19. With regard to the other contention of Mr. Saikia, learned counsel for the respondent No.6 that the present petitioner had got himself

impleaded as the respondent No.7 in a resultant writ appeal being WA No.409/2016 and WA No.410/2016 against the said order dated

16.11.2016, it is further noticed that the said two writ appeals were disposed of by the order dated 24.08.2017. The order of 24.08.2017

indicates that due to certain personal inconvenience, the present respondent No.7, who was the appellant therein, did not further pursue with the

writ appeal and he was agreeable to forego his claim against the present respondent No.6 by stating that he would be happy if he is allowed to

continue as an Assistant Teacher in the original school, where he was serving. In view of the closure of the writ appeal in the aforesaid

circumstance, it also cannot be concluded that the validity and correctness of the order dated 28.07.2014 was adjudicated by the writ appellate

Court and that the present writ petitioner was a party to such adjudication.

20. In the aforesaid premises, the conclusion that can be arrived at is that the grievance of the petitioner against the order dated 24.08.2017 had

not been adequately addressed in any judicial proceeding and neither its validity and correctness was judicially determined in the earlier writ

proceeding as well as in the writ appellate proceeding. As regards the statement

of Mr. Saikia, learned counsel for the respondent No.6 that the seniority of the respondent No.6 was determined by the order of 15.03.1997 and the same having not been assailed by the present writ petitioner on any earlier occasion and as such, this writ petition is not maintainable for delay and laches, also cannot be a reason for not entertaining the writ petition. Firstly, although a prayer has been made in the writ petition assailing the order of 15.03.1997 by stating that the same had determined the regularization of the respondent No.6 with retrospective effect from 16.11.1991, but as indicated above, a perusal of the order of 15.03.1997 would indicate that there is no such indication in the said order that the services of the respondent No.6 was regularized with retrospective effect from 16.11.1991. As such, as the said observation is made in a clarificatory nature, upon perusal of the order and as no adjudication has been made on the validity of the order of 15.03.1997, therefore, the submission of the learned counsel for the respondent No.6 that this writ petition is hit by delay and laches is also found to be unacceptable.

21. In the aforesaid premises, the question that remains to be answered is whether under 10/12 the law, the respondent No.6 could have been given a retrospective regularization w.e.f. 16.11.1991.

22. As indicated above, the respondent No.6 was appointed as an honorary teacher against the non-existent post in a provincialised school, which is per se contrary to the provisions of the Assam Elementary Education (Provincialisation) Rules, 1977. The law as to whether an incumbent whose initial appointment was not made as per rule is entitled to seniority from the date of initial appointment has been settled by the Hon'ble Supreme Court in Direct Recruit Class-II Engineering Officers Association (Supra), wherein in paragraph-47 sub clause-A, it has been held that if the initial appointment is only on ad-hoc basis and not according to the rules, the officiation of such post cannot be taken into account for considering the seniority. Paragraph-47 sub clause-A of the said judgment is as follows:-

47.(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement,

the officiation in such post cannot be taken into account for considering the seniority.

23. Again in Pawan Pratap Singh and others (Supra), it has been held that the seniority cannot be given on retrospective basis when an employee was

not even borne in the cadre and by doing so, it may adversely affect the employees who have already been appointed in a valid manner.

Paragraph-45 of Pawan Pratap Singh and others (Supra), is as follows:-

45. From the above, the legal position with regard to determination of seniority in service can be summarised as follows:

(i) The effective date of selection has to be understood in the context of the service rules under which the appointment is made. It may mean the

date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.

(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of

substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the

other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with

the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the backdate and if it is done, it must be based on objective considerations and on a

valid classification and must be traceable to the statutory rules.

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly

provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne

in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.

24. Therefore, obvious conclusion is that as the initial appointment of the petitioner on 26.02.1990 was de-hors the rules and therefore, by

applying the principles of law laid down by the Hon"ble Supreme Court in paragraph-47A of the Direct Recruit Class-II Engineering Officers

Association (Supra) as well as paragraph-45 of Pawan Pratap Singh and others (Supra) as indicated above, the seniority of the petitioner cannot

be construed from his date of initial appointment. Further, as noticed above, the order of regularization of 15.03.1997, does not indicate that the

respondent No.6 was regularized with retrospective effect from 16.11.1991 and therefore, from the said point of view also, it cannot be construed

that the seniority of the petitioner has to be construed from the date of her initial appointment or from 16.11.1991.

25. In view of such conclusion, the factual basis on which the order dated 28.07.2014 was issued that the service of the respondent No.6 was

regularized w.e.f. 16.11.1991 is found to be incorrect. Further, by following the law laid down by the Hon'ble Supreme Court in the Direct

Recruit Class-II Engineering Officers Association (Supra) and Pawan Pratap Singh and others (Supra) even otherwise, if the services of the

respondent No.6 was regularized with retrospective effect from 16.11.1991 still the respondent No.6 would only be entitled to all other service

benefits of such regularization from a retrospective date, but she cannot be given the benefit of seniority over others on the basis of such

retrospective regularization.

26. In view of the above, the Director of Elementary Education, Assam is directed to revisit the order dated 28.07.2014 and pass appropriate

order by giving a due consideration to the conclusions made hereinabove by giving an opportunity of hearing to both the petitioner as well as to the

respondent No.6.

27. If the consequence of any such order goes in favour of the present writ petitioner, the petitioner would be at liberty to approach the authorities

with appropriate application for any further consequential benefit that may accrue to the petitioner. On the other hand, if the result of the order goes

in favour of the respondent No.6, similarly the appropriate consequence shall also be vested on the respondent No.6. While considering the mater,

if any further material is brought on record by the respective parties, the Director shall also take into consideration the same.

28. The aforesaid exercise be carried out within a period of four months from the date of receipt of a certified copy of this judgment and order. In

terms of the above, the writ petition stands disposed of.