
(2011) 09 GAU CK 0066
In the Gauhati High Court

Case No : Writ Appeal No.254 of 2011 and WP(C) No.3764 of 2011

Binuly Saikia Patowary

APPELLANT

Vs

State of Assam and ors.

RESPONDENT

Date of Decision : 06-09-2011

Acts Referred:

Citation : (2012) 3 GLR 425

Hon'ble Judges : Amitava Roy, J and U.B.Saha, J

Bench : Division Bench

Advocate : Mr. N. Dutta , Mr. J. Roy for the appellant.??Mr. A. Deka , Mr. S.K. Medhi for the respondents., Advocates appearing for Parties

Judgement

1. The aforementioned appeal witnesses a challenge to the order dated 24.8.2011 passed in Misc. Case No. 2423/2011 registered on an application filed by the respondent No. 5 herein in WP(C) No. 37647 2011 instituted by the present appellant. The learned counsel for the parties in course of the hearing of the appeal having also argued on the issues involved in the writ proceeding, this adjudication would address the rival contentions therein as well. Consequently, the writ petition as well as the present appeal stands disposed by the present decision.

2. We have heard Mr. N. Dutta, senior advocate assisted by Mr. J. Roy, Advocate for the appellant/writ petitioner; Mr. A. Deka, learned Standing Counsel, Education Department, Government of Assam for the official respondents and Mr. S.K. Medhi, Advocate for the respondent No. 5. This respondent had been oriented identically in the writ proceeding.

3. Abrief account of the pleaded facts would be essential. The appellant/writ petitioner has been serving as a Subject Teacher in the Sonapur Higher Secondary School ("the School") in the district of Kamrup with effect from 1.12.1978. The respondent No.5 was transferred from the Hamidabad Higher Secondary School, Dhubri to the Sonapur Higher Secondary School on his

request vide order dated 13.10.1998 passed by the Director of Secondary Education, Assam. Admittedly, this order stipulated that the respondent No.5 would not claim seniority over the existing staff of the Sonapur Higher Secondary School and that no T.A. and D.A. would also be admissible for his transition thereto. According to the appellant/writ petitioner, she at the relevant point of time, i.e., 30.7.2011 was the seniormost Subject Teacher of the School and, therefore, nursed a legitimate expectation of being allowed to hold the charge of the office of the Principal thereof on the impending superannuation of its incumbent Sri Abdul Hassan. It was at that stage that by the order dated 21.7.2011 of the Inspector of Schools, Kamrup District Circle, Guwahati, the respondent No.5 was allowed to hold the charge of the Principal of the School due to the suspension of the aforementioned Abdul Hassan. Faced with this unexpected setback in her career, the appellant/writ petitioner approached this court on 25.7.2011 by means of WP(C) 3764/2011 seeking its intervention in exercise of its powers under article 226 of the Constitution of India. The writ petition was listed for "Motion" hearing on 29.7.2011 but could not be taken up. It is the case of the appellant/writ petitioner that on 30.7.2011 Sri Abdul Hassan was reinstated and he resultantly took over charge of the office of the Principal of the School from the respondent No. 5 and eventually retired on 31.7.2011 on reaching the age of superannuation.

4. The appellant/writ petitioner thereafter filed an interim application registered as M.C. No. 2215/2011 in the pending writ petition in which by order dated 1.8.2011 this court restrained the official respondents from appointing the respondent No. 5 as the incharge Principal of the School. Liberty was granted to the Inspector of Schools, Kamrup District Circle, Guwahati to take over charge of the said office. In deference to this order, the Director of Secondary Education, Assam by his order dated 11.8.2011 directed the Inspector of Schools, Kamrup District Circle, Guwahati to hold the charge of the said office superceding any earlier arrangement whereunder the respondent No. 5 had been permitted to hold the same.

5. The respondent No. 5 on his turn filed another application registered as M.C. No. 2423/2011 seeking modification/alteration/cancellation of the order dated 1.8.2011 contending principally that prior to the passing of the interim order dated 1.8.2011 he had already taken over charge of the office of the Principal of the School. An affidavit in opposition was filed by the appellant/writ petitioner resisting the prayer of the respondent No. 5, whereafter, by the order impugned in the instant appeal the interim restraint was vacated.

6. The respondent No. 5 in his affidavit in opposition in the writ proceeding, however, admitted to have been transferred to the Sonapur Higher Secondary School by the order dated 13.10.1998 of the Director of Secondary Education, Assam on his own request. In his additional affidavit he, however, has denounced the order dated 13.10.1998 to be mechanical to the extent of imposing the condition of loss of seniority and denial of T.A and D.A, he not having conceded

to the same. According to him, the inter se seniority of the parties has to be on the basis of their initial dates of joining in their respective schools.

7. Mr. Dutta has argued that it being apparent on the face of the order dated 13.10.1998 that the respondent No.5's transfer to the Sonapur Higher Secondary School had been on his own request and subject to the condition inter alia that he would not claim seniority over the existing staff of the said institution, the order dated 21.7.2011 of the Inspector of Schools, Kamrup District Circle, Guwahati allowing him to hold the charge of the Principal thereof is per se arbitrary, unauthorized and unsustainable in law. As the respondent No. 5 has admitted to have taken transfer to the Sonapur Higher Secondary School on his own request and had accepted the order dated 13.10.1998 to that effect embodying the stipulations as contained therein as a whole, he is estopped from questioning the validity thereof, he urged. According to the learned senior counsel, the order dated 13.10.1998 having been passed by the Director of Secondary Education, Assam, the Inspector of Schools, Kamrup District Circle, Guwahati being an officer subordinate in rank, the order dated 21.7.2011 in any view of the matter is to be adjudged non est in law and on facts. The learned senior counsel pleaded that though the issue with regard to the loss of seniority of a teacher in a Secondary School of the State upon transfer on his request in the context of the Assam Secondary Education (Provincialisation) Service Rules, 2003 (for short, hereinafter referred to as "the Rules") is presently subjudice before a Pull Bench of this court, even on the basis of the restricted view in this regard as discernible in the decision rendered in Jiten Thakuria v. State of Assam and Ors., (2009) 5 GLR 540, in the facts of the present case, the respondent No. 5's claim of superior seniority over the appellant/writ petitioner is wholly misconceived.

8. Mr. Deka, learned Standing Counsel, Education Department, Government of Assam refrained from making any comment on the controversy and produced the relevant records pertaining to the transfer of the respondent No. 5 for the perusal of the court.

9. Mr. Medhi, on the other hand, has contended that as meanwhile the order dated 21.7.2011 of the Inspector of Schools, Kamrup District Circle, Guwahati has been rendered non est by the one dated 30.7.2011 of the same authority, the writ petition has become infructuous and so is the instant appeal. According to him, the interim order dated 1.8.2011 had been rightly vacated as the same was obtained by suppressing the material fact that by then the respondent No. 5 had already assumed the charge of the office of the Principal of the School. He contended that as the issue with regard to loss of seniority of a teacher on interschool transfer on his/her request is presently under scrutiny by a Full Bench of this court, no interference in the instant appeal or the writ proceeding is warranted. Mr. Medhi urged that in any view of the matter, the reliefs prayed for in the writ petition do not survive as on date for further consideration.

10. We have extended our due consideration to the pleadings available and the

arguments advanced. That the respondent No. 5 was transferred from the Hamidabad Higher Secondary School to the Sonapur Higher Secondary School on his own request is a matter of record. The order dated 13.10.1998 passed by the Director of Secondary Education, Assam clearly mentions that his said transfer was on his own request and that he would not claim seniority over the existing staff of the Sonapur Higher Secondary School. Thereby T.A and D.A. was also declared to be inadmissible for the purpose of transfer. There is nothing on record to suggest that the conditions on which the respondent No. 5 had been transferred as above had been withdrawn or modified to his benefit. This order per se was passed by an authority higher in rank than the Inspector of Schools, Kamrup District Circle, Guwahati who by the order dated 21.7.2011 had permitted the respondent No. 5 to hold the charge of the office of the Principal of the School due to the suspension of the earlier incumbent Sri Abdul Hassan. It is not the case of the respondent No. 5 that he had at any point of time assailed the conditions subject to which his request for transfer was allowed vide order dated 13.10.1998. His plea at this belated stage that he did not submit to the said stipulations in his application requesting transfer lacks persuasion. This respondent was transferred from the Hamidabad Higher Secondary School, Dhubri to the Sonapur Higher Secondary School on the condition inter alia that he would not claim seniority over the existing staff of the Sonapur Higher Secondary School including the appellant/writ petitioner. As noticed hereinabove, the appellant/writ petitioner had been continuing as a Subject Teacher in the School with effect from 1.12.1978. Neither the respondent No. 5 nor the official respondents has pleaded her ineligibility under the Rules to hold the post of Principal of the Sonapur Higher Secondary School.

11. This court in Jiten Thakuria (supra) while dwelling upon the issue of seniority of such interschool transfer prior to the enforcement of the Rules held, thus:

"13. There is another most vital aspect of the matter, Even assuming that as per the Rules of 1982, seniority was to be determined school wise, can be it said that in all cases of request transfer, the incumbent would forego his past service in the earlier school. The answer will be in the negative. There is nothing wrong in making a request for transfer by a school teacher. There may be very many grounds for such request, but unless one undertakes to forego his past service and/or his such request is accepted with the condition of forfeiture of the past service with the specific stipulation that, he would be entitled to count his seniority in the new school from the date of joining only, later on, he cannot be deprived of his past service towards seniority, lest it is argued that had been made known to him, he would not have accepted such conditional transfer."

12. The above extract would demonstrate that this court in the background of the Assam Secondary Education (Provincialisation) Service Rules, 1982 had addressed itself to the aspect of seniority on request transfer of an incumbent. The text of the above excerpt evidently deals with a fact situation before the arrival of the 2003 Rules. It is obvious from this quote that while a request for

transfer of a school teacher can be validly made, if the same is accepted with the condition of forfeiture of past service with a specific stipulation to that effect, he would stand deprived of his past service towards seniority. It is logically unacceptable that the respondent No. 5 was unaware of the conditions under which his request for transfer had been allowed by the order dated 13.10.1998. His turn around at this distant point of time cannot be countenanced. In the above view of the matter, the respondent No. 5's plea of being senior over the appellant/writ petitioner in the School does not commend for acceptance.

13. Though going by the intervening developments as would be testified by the communications dated 30.7.2011 and 1.8.2011 involving the Inspector of Schools, Kamrup District Circle, Guwahati and the respondent No.5, it would transpire that he (respondent No. 5) meanwhile had taken over charge of the office of the Principal of the Sonapur Higher Secondary School, he was detruded therefrom vide order dated 11.8.2011 of the Director of Secondary Education, Assam passed in compliance of the order dated 1.8.2011 of this court rendered in M.C. No. 2215/2011. The official records do not disclose any reason to prefer the respondent No. 5 over the appellant/writ petitioner for the post of Principal, though on incharge basis. In view of the clear and unambiguous stipulations contained in the order dated 13.10.1998 of the Director of Secondary Education, Assam, the respondent No. 5 could not have been accorded seniority over the appellant/writ petitioner in the Sonapur Higher Secondary School. In absence of any material on record to disqualify the appellant/writ petitioner to be the incharge Principal of the School, the orders to the contrary having regard to the framework of the writ petition as well as the reliefs sought for cannot receive judicial imprimatur. The plea that the writ petition has become infructuous in the face of the above determination also is unacceptable. The plea raised in clause (c) of the prayer portion of the writ petition has to be construed visavis the issue of incharge Principalship of the Sbnapur Higher Secondary School.

14. In the result, the appeal as well as the writ petition succeed. The order dated 24.8.2011 passed in M.C. No. 2423/2011 is interfered with. The order dated 21.7.2011 of the Inspector of Schools, Kamrup District Circle, Guwahati and the other communications/orders consequential thereto permitting the respondent No. 5 to be the incharge Principal of the Sonapur Higher Secondary School are hereby quashed. The official respondents would take necessary consequential steps in accordance with law forthwith. No costs.