

(2021) 11 GAU CK 0024

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 3585 Of 2018

Dilip Kalita

APPELLANT

Vs

State Of Assam And 6 Ors.

RESPONDENT

Date of Decision : 02-11-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Assam Secretariat Subordinate Rules, 1963 — Rule 16

Assam Public Services (Preferential Appointment) Rules, 1986 — Rule 2(a), 4

Citation : (2021) 11 GAU CK 0024

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : K N Choudhury

Final Decision : Dismissed

Judgement

1. The extraordinary jurisdiction of this Court is sought to be invoked by filing this application under Article 226 of the Constitution of India whereby the petitioner has put to challenge a decision of the Cabinet dated 27.12.2017 and the consequential order dated 14.02.2018. The petitioner is also prayed for setting aside the gradation list dated 23.12.2002 and for a direction to grant regularization of the ad hoc services of the petitioner and to take into account such services while calculating the inter se seniority.

2. To appreciate the issue involved, it would be convenient to put on record the basic facts of the case.

3. The present writ petition is the fourth round of litigation. In the year, 1986 the State Government had promulgated a set of Rules known as Assam Public Services (Preferential Appointment) Rules, 1986 (hereinafter called, Rules of 1986). The object and purpose of the Rules was to give preference to victims of atrocities during the Assam Agitation mainly in the period from 1979 to 1985. The petitioner who claims to be eligible under the said Rules applied for appointment and vide order dated 29.01.1990, he was appointed on ad hoc basis

as Lower Division Assistant (LDA) in the Assam Secretariat, the said appointment was under Rule 16 of the Assam Secretariat Subordinate Rules, 1963. Subsequently, on 25.02.1992, the service of the petitioner was regularized.

4. It is the case of the petitioner that under the relevant statutes, there was no provision for appointment on ad hoc basis or even for regularization. A draft gradation list of the LDA was published on 23.08.2002 in which the petitioner was placed against Serial No. 429. Being aggrieved, the petitioner had submitted a representation for revision of the draft gradation list which was however rejected. Consequently, a final gradation list was published on 23.12.2002 wherein the petitioner was placed against Serial No. 418.

5. The said gradation list dated 23.12.2002 was the subject matter of challenge in WP(C)/4139/2003 in which this Court vide order dated 29.05.2012 disposed of the writ petition by directing the petitioner to make representation before the concerned authority. The petitioner has projected that the persons against Sl. Nos. 84 to 92, who were appointed by relaxation of the Rules as being retrenched employees of the Brahmaputra Board were given the benefits of their initial period of appointments from 10.04.1990, which however was not given to the petitioner though he was appointed prior to the aforesaid incumbents. It is the further case of the petitioner that in the meantime, the services of nine incumbents, who were appointed in the similar manner and in the same year, were regularized.

6. As the grievance of the petitioner was yet to be redressed, he had filed another writ petition being WP(C)/3086/2015 praying for a direction to grant seniority, promotion and other consequential service benefits. The same was disposed of on 17.02.2016 by directing the Chief Secretary, Govt. of Assam to place the letter dated 02.02.2015 of the Personnel Department along with the letter dated 25.08.2015 of the Secretariat Administration Department and other connected documents before the Cabinet for its perusal and consideration / decision in its next meeting.

7. It is the case of the petitioner that while placing the relevant materials before the Cabinet, the letter dated 02.02.2015 of the Personnel Department was not placed. Subsequently, in the Cabinet in its meeting dated 27.12.2017 the matter was discussed followed by issuance of an order dated 14.02.2018 whereby the existing seniority of the petitioner which was fixed in the gradation list dated 23.12.2002 and maintain in the subsequent gradation list would continue. It is the case of the petitioner that the decision of the Cabinet was based upon irrelevant factors and the relevant factors were wholly overlooked. Accordingly, the present writ petition has been filed.

8. I have heard Shri K.N. Choudhury, learned Senior Counsel assisted by Shri D.J. Das, learned counsel for the petitioner. I have also heard Shri B. Gogoi, learned Standing Counsel, Secretariat Administration Department and Shri J. Handique, learned Government Advocate, Assam. Shri Gogoi has also placed

before this Court the original records of the case, which have been carefully examined along with all materials connected with the pleadings.

9. Shri Choudhury, the Senior Counsel for the petitioner by drawing the attention of this Court to the impugned Cabinet Memorandum submits that the views of the Personnel Department which were recorded would show that though two letters dated 02.02.2015 & 25.08.2015 were liable to be taken into consideration, those were not placed. Vide the letter dated 02.02.2015, the Personnel (B) Department while examining the case of the petitioner had stated that the initial appointment made on ad hoc basis was an error which as per the observation of the learned Advocate General was "may be due to in-experience". Vide the subsequent order dated 25.08.2015, the SAD Department had rejected the case of the petitioner that the period of ad hoc basis cannot be counted for seniority.

10. The learned Senior Counsel for the petitioner submits that the Cabinet Note required by the SAD was done in such a manner that actual facts were not placed before the Authorities. The observation regarding the initial appointment being one ad hoc basis which was an error have been wholly overlooked. It is contended that the seniority is to be reckoned from the date of initial appointment and without even disturbing the other incumbents by creating a supernumerary post. It is submitted that the Rules do not contemplate appointment on ad hoc basis and therefore the ad hoc appointment of the petitioner has to be construed to be regular appointment and consequently his seniority should be reckoned from the date of such appointment.

11. In support of his submission, the petitioner has relied upon the following decisions:

(i). (1990) 2 SCC 715 (Direct recruit Class II Engineering Officers' Association Vs. State of Maharashtra & Ors.)

(ii). (1993) 3 SCC 384 {Kamlabai (smt) Vs. Commissioner of Police, Nagpur & Ors.}

(iii). (2003) 5 SCC 511 (Santosh Kumar Vs. State of A.P. & Ors.)

12. Per contra, Shri B. Gogoi, learned Standing Counsel, SAD submits that the notification dated 04.01.1990 issued by the Personnel Department contemplates that each Department will fill up a certain number of vacancies with the persons eligible for preferential appointment under the said Rules and for filling up of backlog vacancies under of SC / ST candidates, separate recruitment can also be conducted. Countering the argument made on behalf of the petitioner, Shri Gogoi, learned counsel has submitted that the aforesaid notification dated 04.01.1990 itself provides for ad hoc appointment pending appointment through the separate recruitment procedure. Coming to the Rules of 1986 the Department Counsel submits that under Rule 4, preference for appointment has been contemplated for eligible candidates who fall within the definition of

"affected candidates" as defined in Rule 2 (a). It is submitted that the said Rules do not contemplate a separate recruitment but only gives the preference to the affected candidates who would participate in any recruitment process. Making a categorical submission that the petitioner was appointed without undergoing any recruitment process, he was given the benefit of regularization on 25.02.1992. Shri Gogoi further submits that the present subject matter of dispute was the same subject matter in the writ petition instituted by the petitioner in the year, 1999 i.e. whether service rendered on ad hoc basis should be taken into consideration while calculating the seniority. The said writ petition numbered as WP(C)/1756/1999 was dismissed vide order dated 18.03.2002 and the said order was not put to further challenge by the petitioner and had rather allowed the same to attain finality. As regards the subsequent order dated 25.09.2012 passed by this Court in WP(C)/4139/2003, a liberty was simply granted to the petitioner to submit the representation and there was no other direction as such.

13. Reverting back to the initial order of this Court dated 18.03.2002 passed in WP(C)/1756/1999, Shri Gogoi submits that the findings made by this Court was categorical in nature and would have a material bearing in the adjudication of the present case. It is submitted that the issue was exactly similar and this Court had held that the petitioners (including the present petitioner) would not be entitled to the benefit of the ad hoc period of service and the seniority is to be reckoned with from the date of regular appointment i.e. w.e.f. 25.02.1992.

14. By referring to the affidavit-in-opposition filed in this case by the respondent No. 2 on 26.11.2018, Shri Gogoi has further submitted that the petitioner cannot take the cue from the subsequent orders passed by this Court to reopen the issue which has already attained the finality. He submits that along with the petitioner, in total 26 nos. of persons were given the benefit of the Act and not a single one have been given the benefit of seniority for the ad hoc period of service rendered and therefore there is no case of any discrimination or violation of Article 14 of the Constitution of India. As regards the private respondents, some of them already expired and some have retired and therefore there is otherwise no live cause of action to be adjudicated.

15. In support of his submission, the learned Departmental Counsel has relied upon the decision of the Hon'ble Supreme Court reported in (1996) 10 SCC 444 (Y.H. Pawar Vs. State of Karnataka & Ors.) wherein it has been laid down that seniority has to be calculated from the date of appointment on regular basis and the period of ad hoc appointment cannot be taken into consideration.

16. In his rejoinder, Shri Choudhury, the Senior Counsel for the petitioner relied upon the order dated 17.02.2016 passed in WP(C)/3086/2015 and has contended that by the subsequent order, the earlier order dated 18.03.2002 got obliterated as the parties had consented to a fresh reconsideration. Meeting the averment that the petitioner did not undergo any recruitment process, the Senior Counsel has submitted that in fact none of the beneficiaries had undergone any recruitment process and that is not the issue to be decided.

17. To appreciate the rival contentions, first let us deal with the case laws relied upon by the parties.

18. In the case of Direct Recruit (Supra) in paragraph 47 the finding of the Court are recorded of which for the present case, findings A & B which are relevant are extracted hereinbelow-

"47. To sum up, we hold that:

(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.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post of uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted."

19. The aforesaid position of law has been explained by the subsequent decision of Y.H. Pawar (Supra) and in paragraph 5 the following has been laid down. The petitioner has also relied on the case of Aghornath De (Supra) wherein after detail discussions of the Direct Recruit (Supra) case has explained the position. The relevant paragraph being paragraph 5 is extracted herienbelow-

"5. It is contended by the learned counsel for the appellant that in view of the judgment of the Constitution Bench of this Court in Direct Recruit Class II Engineering Officer's Association v. State of Maharashtra (1990) 2 SCC 715 : (AIR 1990 SC 1607) where appointment was made on regular basis, the seniority was required to be determined with effect from the initial date of appointment. We find no force in the contentions. As seen, the appointments are made on ad hoc basis without conducting any competitive examination. As and when vacancy had arisen local candidates were called from Employment Exchange and were appointed. Therefore, the appointments cannot be considered to have been made on regular basis. When the Rules came to be made, all the appointments are sought to be regularised. The sanction given by the Government for such an appointment is only to enable the candidates to continue till the statutory Rules are made to regularise the services."

20. In the subsequent decision of Santosh Kumar (Supra) the Hon'ble Supreme Court again had the occasion to deal with a situation of similar nature and in paragraph 6 of the Judgment, the following has been laid down.

"6. We have carefully considered the submissions made on either side. Before the Tribunal it was conceded that the Government have power to relax rules under R. 47 of the General Rules, but, however, it was contended that the basic

rules of recruitment i.e. A.P. Police Subordinate Service Rules (for short 'Service Rules') could not be relaxed in exercise of the power under the said Rule. Having regard to the facts of the case on hand, relevant Rules and law laid down by this Court the Tribunal concluded that there was no relaxation of basic qualifications but there was only relaxation of the conditions of service in the case of the respondent in regularising the services with retrospective effect as Sub-Inspector. In paragraph 21 of the judgment the Tribunal stated that it is well settled law that the Government in exercise of powers conferred on them under R. 47 of the General Rules can relax the rules of appointment and such relaxation could be with retrospective effect. Reference was also made to the case of this Court in *M. Venkateshwarlu and others v. Government of A.P. and others* ((1996) 5 SCC 167) holding that R. 47 ex facie does not contemplate any notice being given in case of relaxation of eligibility of a single individual for promotion to the post of Deputy Tehsildar; it was not necessary to issue a notice to all affected parties in such a case. However, the Tribunal held that as the appointment of the respondent and others as OSSIs was not in accordance with the Rules and their appointments were not made after considering the case of other eligible persons as per Service Rules, their services could not be taken into consideration while determining the seniority in the cadre of Sub-Inspector. Finally, the Tribunal concluded that the unofficial respondents in the O.As. could claim to be regularly appointed as Sub-Inspectors only from the dates on which the Government have issued orders relaxing the service rules; any notional dates of relaxation given to them affecting the seniority of regularly appointed Sub-Inspectors prior to the date of relaxation of Rules could not be held valid. In other words, the Tribunal held that the Government have power to relax the Rules with retrospective effect for the purpose of appointment and promotion but the seniority could not be assigned to them prior to the date of regularisation of services affecting the seniority of others, who are regularly appointed prior to date of their regularisation. In our view, the Tribunal was not right in saying that any notional date of relaxation was given to the respondent affecting the seniority of the appellant. In fact, service of the respondent was regularised from the actual date on which he was temporarily promoted as OSSSI which was permissible in terms of para 47(B) of the Constitution Bench judgment of this Court in *Recruit Class II Engineering Officers' Association v. State of Maharashtra and others* ((1990) 2 SCC 715). Moreover, the promotion given to the respondent was in promotee quota which did not affect the appellant who was recruited later as a direct recruit. It may be mentioned that there was no direct recruitment in the year 1983-84 to the post of Sub-Inspector when services of the respondent and others were regularised. The appellant was recruited in the year 1985 i.e. subsequent to the date on which the respondent started working actually as OSSSI though temporarily. In this view, the question of affecting the seniority of the appellant without notice did not arise."

21. What transpires from the reading of the aforesaid judgment is that until and unless the initial appointment is made on regular basis, the seniority cannot be

reckoned for the period of rendered of services on ad hoc basis. This Court is also unable to accept the submission of the petitioner that the Rules does not contemplate for ad hoc appointment and therefore, the initial appointment made on 29.01.1990 has to be construed to be a regular appointment. This Court finds force in the argument of the learned State Counsel that the notification dated 04.01.1990 itself provides for appointment on ad hoc basis.

22. The other relevant facts which this Court has taken into consideration is that along with the petitioners 26 appointments were made and none were given the benefit of regularization from the date of initial appointment i.e. 29.01.1990 as the same was made on ad hoc basis and regularized subsequently on 25.02.1992. What is also relevant for the purpose of the adjudication of this case is that the very same issue was the subject matter of adjudication in WP(C)/1756/1999 and this Court vide Judgment & Order dated 18.03.2002 had dismissed the claim of the writ petitioner. The further fact remains that the petitioner had chosen not to challenge the same decision in any higher forum and accordingly the same has attained the finality. Though, this Court is not holding the petitioner guilty of suppressing the said fact as mention of the earlier petition has been made in paragraph 8 of the writ petition, the petitioner, for the sake of transparency and fairness ought to have annexed a copy of the judgment. In any case, the copy of the said judgment dated 18.03.2002 has been annexed in the affidavit-in-opposition and in paragraph 5, it has been clearly held that the petitioners (including the present petitioner) would not be entitled to the benefit of the ad hoc period of service while reckoning of his seniority. For ready reference, paragraph 5 of the Judgment & Order dated 18.03.2002 passed in W(C)/1756/1999 is extracted hereinbelow-

"5. In the instant case, at no stage i.e. either at the stage of ad hoc appointment or at the time of regularization, the petitioners have been tested by a competitive examination. In the process, the ad hoc appointment of the petitioners continued for nearly 2 years. It was neither possible for the State Authority to hold a special requirement for the petitioner under the Rules of 1963 nor was it possible for the authority to put the clock back and ask the petitioners to qualify themselves with others who may have already been selected under the Rules of 1963. The State Government also considered it inequitable to do away with the services of the petitioners who were admittedly victim of events, which entitled than to the benefit of the Rules of 1985. Faced with such a situation, the State Govt. considering the facts narrated above though it appropriate to invoke the power of relaxation as contained in the Rules of 1963. Consequently, the order dated 25.2.92 was passed regularizing the services of the petitioners from the said date. The period of ad hoc service rendered by the petitioners from 29.1.90 was treated as contrary to the Rules of 1986 and for reasons which can not be faulted with. Consequently, as the aforesaid period of ad hoc services of the petitioners was de hors the Rules, the petitioners would not be entitled to the benefit of the said period of service. The claims made in the instant writ petition, therefore, are without any merit or substance. The seniority of the petitioners is

to be reckoned with from the date of regular appointment i.e. with effect from 25.2.92."

23. This Court is of the opinion that after such conclusive determination of the same issue which the petitioner had allowed to attain finality, the petitioner is not entitled to reopen the same only on the basis of the a liberty granted subsequently by the Court to submit a representation. The fact that none of the similarly situated 26 other incumbents have been given the benefit of seniority would go to show that no case for discrimination has been made out.

24. Under the aforesaid facts and circumstances, the present writ petition is dismissed.

25. No order, as to cost.