
(2009) 02 GAU CK 0022
In the Gauhati High Court
Case No : Writ Appeal No. 219 of 2006

Dipul Talukdar and Others	Vs	APPELLANT
Joynal Abedin and Others		RESPONDENT

Date of Decision : 09-02-2009

Acts Referred:

Assam College Employees (Provincialisation) Act, 2005 — Section 3
Constitution of India, 1950 — Article 30, 309

Citation : (2009) 2 GLD 77 : (2009) 2 GLT 522

Hon'ble Judges : Jasti Chelameswar, C.J.; B.K. Sharma, J

Bench : Division Bench

Advocate : A.S. Choudhury, I. Hussain, A. Maleque and R. Ali, Ad­vs, for the Appellant; N. Dutta and M.K. Choudhury and B. Rahaman, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sarma, J.—The writ petition which has given rise to this appeal, was filed by the two writ petitioners, the respondents herein, questioning the list prepared for adjustment of 81 Lecturers against sanctioned posts of different Govt. aided colleges on the basis of the office memorandum providing for such adjustment applying the related criteria. The learned Single Judge by the impugned judgment and order recording the particular stand of the Govt. that the particular clause in the office memorandum has become redundant in view of enactment of the Act in question and thus cannot be impleaded, has held that the issue in the writ petition has become infructuous. However, opportunity has been granted to the aggrieved parties to make independent challenge to the above stand of the Govt.

2. It is in the aforesaid backdrop, the present writ appeal has been filed by 59 appellants who were party respondents (got impleaded in the writ petition). In fact, their names were included in the list of 81 candidates which had the due approval of the Govt. in the concerned department. As stated above, in the writ petition, the claim of the two writ petitioners was that the list was not prepared

maintaining the seniority which deprived them of getting their services adjusted against the sanctioned posts.

3. It will be appropriate, at this stage, to look into the office memorandum and the particular provision in the Act which according to the counter affidavit filed by the under Secretary to the Govt. of Assam in the Education (Higher) Department, has rendered the particular clause in the office memorandum redundant.

GOVERNMENT OF ASSAM EDUCATION (HIGHER) DEPARTMENT: DISPUR

No. B(2)H 97/2003/96 dated Dispur the 17th July, 2004.

OFFICE MEMORANDUM

Sub : Allocation of vacant sanctioned posts of Lecturers to the department of deficit grants-in-aid college where teachers are working without sanctioned posts by way of re-adjustment.

1. There are more than 300 college teachers found to be serving in different degree colleges deficit-grants-in-aid College of Assam since 1989 serving for 5 to 14 years without any valid sanctioned post hereinafter referred to as "non-sanctioned post." These teachers have been serving in colleges in a consolidated pay allowed by the respective college authorities from their own fund. These teachers were appointed by the respective Governing Body of the Colleges in the need basis as per UGC guidelines. The Govt. have also accorded concurrence to the subjects against which they were appointed. These teachers have also been performing similar responsibilities like those teachers who have been working against sanctioned posts in the colleges.

2. The Government could not sanction any additional post to the deficit grants-in-aid colleges since 1992. 52 Nos. of colleges were brought under deficit system of Grants -in-aid by the Govt. since 1992. But the Govt. have not sanctioned any additional post of lecturers since then over and above originally allocated sanctioned post. As a result, the college authorities appointed lecturers without valid sanctioned posts and have to bear the additional financial burden.

3. 140 college teachers serving in different colleges without sanctioned posts, filed suits and the Hon'ble Gauhati High Court in their verdict dated 11th Feb/2003 in writ petition No. 626/02 and order dated 25.7.2003 in writ petition No. 2368/2002 directed to consider the matter for sanction of posts to the college teachers serving without any sanctioned posts.

4. The State Govt. is not in a position to sanction any new post for the colleges to accommodate the aforementioned college teachers serving without sanctioned posts. In view of the same and in pursuance to the approval of the cabinet dated 9.6.2004. The following procedure/modalities are hereby prescribed for adjustment of services of college teachers working without sanctioned posts as mentioned above.

(a) Vacant posts in a particular deptt. lying in a grants-in-aid college of Assam may be allowed in order of seniority to accommodate teachers in the same college who is working in some other deptt. without a valid sanctioned post provided that such teachers was appointed by respective G.B. observing due process, i.e. advertisement selection and having UGC norms required and if need be for such a post is justified by enrolment in the deptt. of the college etc. provided further, the post is not be considered essential for the deptt. against which it was organically sanctioned.

(b) In case of any future vacancies of sanctioned posts. In a particular college teacher working without valid sanctioned post but appointed as per procedure stated at (a) above are to be adjusted in reference to fresh teachers.

(c) To accommodate the teachers working without a sanctioned post in a college where there is no vacant sanctioned posts of where the number of vacant sanction posts is less than the number of teachers proposed to be adjusted in conformity with this O.M., the Director, Higher Education is authorised to withdraw vacant posts from a deficit grants-in-aid colleges where student enrolment or other norms do not justify to the total number of sanctioned posts in that colleges.

The Director, Higher Education will prepare a list of such vacant withdrawn posts from different colleges giving necessary details. Thereafter he will consider the cases of all those teachers working without sanctioned posts and appointed as per procedure as mentioned at para 4(a) above in order of their seniority of services for adjustment and send such proposal to Govt. for approval. However, if a vacant sanctioned post is available in a particular college for adjustment such post against any eligible teachers working without a sanctioned post in that college, no additional allotment of post will be made to such colleges.

(d) The teachers working under non-sanctioned post who will be adjusted against vacant sanctioned posts will be required to qualify in NET/SLET within 2(two) years if they do not poses the same already otherwise their services would be discontinued and till then they will be entitled to basic pay only from the date of approval by Director of Higher Education, Assam.

Sd/- Secretary to the Govt. of Assam Education Deptt.

THE ASSAM GAZETTEE EXTRAORDINARY PUBLISHED BY THE AUTHORITY
GOVERNMENT OF ASSAM ORDERS BY THE GOVERNOR LEGISLATIVE
DEPARTMENT : LEGISLATIVE BRANCH NOTIFICATION The 22nd December, 2005

No. LGL. 112/2005/158: The following Act of the Assam Legislative Assembly which received the assent of the Governor is hereby published for general information.

ASSAM ACT No. XLVI OF 2005 (Received the assent of the Governor on 19th December, 2005) THE ASSAM COLLEGE EMPLOYEES (PROVINCIALISATION) ACT, 2005. AN ACT

to provide for provincialisation of the services of employees of the Non Government Colleges in receipt of deficit grants-in-aid in the State of Assam

Whereas it is expedient to provincialise the services of employees of the Non-Government Colleges in receipt of deficit grants-in-aid from the Government of Assam.

It is hereby enacted in the Fifty Sixth year of the republic of India as follows:

1. (1) this Act may be called the Assam College Employees (provincialisation) Act, 2005.

(2) It extends to the whole of Assam except the Autonomous Council areas under the Sixth Schedule to the Constitution of India;

Provided that the State Government may, in consultation with the said Autonomous Councils, extend this Act to the Autonomous Council areas by notification published in the Official Gazette.

(3) It shall be deemed to have come into force on and from the 1st day of December, 2005.

2. In this Act, unless the context otherwise requires,

(a) "College" means any Non-Government College in Assam in receipt of deficit grants-in-aid from the Government and imparting general education in Arts, Commerce or Science stream in Graduate level:

(b) "employee" means an employee of a College both teaching or non-teaching appointed substantively against a sanctioned post;

(c) "Existing employee" means an employee of a college both teaching and non-teaching appointed substantively against a sanctioned post and who is or has been in service on or after the 1st day of January, 2005;

(d) "Government body" means the body constituted by the Government in accordance with the provision of the Assam Non- Government College Management Rules, 2004;

(e) "Government" means the Government of Assam;

(f) "Provincialisation" means taking the liabilities for payment of salaries including clearness allowance, medical allowance and such other allowances as admissible to the government employees of similar category and gratuity, pension, leave encashment, etc. as admissible under the exiting rules, to the employees of the State Government serving under the Government of Assam;

(g) "Prescribed" means prescribed by rules made under this Act.

(h) "retired employee" means an employee who has retired on attaining the age of superannuation or otherwise.

3. Subject to the provisions of Article 30 and 309 of the Constitution of India, all employees of the Colleges, save and except the employees who exercise option to continue in the existing terms and conditions of service under Clause (d) below, shall be deemed to have become the employees of the Government on and from the date on which the colleges have been brought under the deficit system of grants-in-aid, on the following terms and conditions, namely:

(a) all rules including the rules of conduct and discipline, which are applicable to the Government servants of corresponding grade similarly situated shall be applicable:

(b) the existing employees will continue to receive their respective existing scales of pay and other allowances etc. as admissible to them under relevant rules and orders of the Government;

(c) The posts in each provincialised College shall constitute an independent cadre for each category of employees. No intercadre transfer from one college to another including mutual transfer shall be allowed.

(d) the existing employees who want to continue in the existing terms and conditions of service shall give an option in writing to the Director, Higher Education, Assam within a period of three months from the date of coming into force of this Act.

Provided that the option once exercised by an existing employees is final and cannot be changed afterwards;

(e) any existing employee who does not exercise option under Clause (d) shall be deemed to have opted for provincialisation under the provisions of this Act.

(f) the employees of the College provincialised after coming into force of this Act shall have no right of option under Clause (d); and

(g) all existing employees who do not exercise option under Clause (d) shall have to refund the State Government's share of the Contributory Provident Fund with interest within six months from the date of coming into force of this Act;

Provided that if any existing employee who fails to refund the State Government's share of Contributory Provident Fund with interest within the said stipulated period such employee shall be deemed to have been opted to remain under the existing terms and conditions of service applicable to them before provincialisation.

4. After coming into force of this Act the Colleges provincialised under this Act shall be known as the Assam Provincialised Colleges are distinct from the Government colleges in Assam.

5. The services of all the employees, who do not exercise the option within the stipulated period under Clause (d) of Section 3, shall vest with the Government with effect from the respective date of provincialisation of the Colleges.

6. Appointments of both teaching and non-teaching posts in the Colleges shall be made by the Director of Higher Education, Assam on the basis of selection and recommendation of the Governing Body of the respective College in accordance with the Rules and Procedure of the Government in force.

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(Provision of the O.M. and the Act is in issue underlined)

4. We have heard Mr. A.S. Choudhury, learned Sr. counsel assisted by Mr. I. Hussain, learned Counsel for the appellants as well as Mr. B. Rahman, learned Counsel representing the respondents No. 1 and 2/writ petitioners. We have also heard Mr. V.M. Thomas, learned Standing counsel, Educational Department. We have also considered the materials on record in its entirety and have given our anxious consideration to the same.

5. The aforesaid office memorandum dated 17.7.2004 was issued by the Govt. of Assam in the Education Department pursuant to the Cabinet memorandum dated 25.3.2004 (Annexure-D), which was duly approved by the Cabinet after due process. When the Cabinet memorandum was placed before the Finance Department, it was observed thus:

Your endorsement above,

In respect of the proposed issues to be placed before the Cabinet, Finance Department has no specific comments to make but suggest that the details of posts within names of the Colleges may be incorporated in the Cabinet Memorandum in the form of an annexure. A copy of the order/sanction issue on the basis of the Cabinet decision may be marked to Finance (BC. III) Department.

Finance Department further observed that the present problem has cropped up due to engagement of teaching staff by the Managing Committee of the Colleges without posts. It is happening in all categories of institutions in the Education Department. In such cases very often, legal complication arises affecting State Exchequer. To avoid it, Education Department must formulate rules prohibiting such engagement.

6. With the aforesaid endorsement of the Finance Department, the Cabinet memorandum was finalised and approved. Thereafter, the office memorandum dated 17.7.2004 was issued. Same was issued as a device to accommodate the teachers of the deficit grants-in-aid colleges working against non-sanctioned

posts, but were appointed by the respective managing Committees/Governing Bodies of the colleges observing due procedure required to be followed in case of regular appointment. While clause 4(a) and (b) of the office memorandum provide for accommodating such teachers against the unutilised vacancy(s) in the colleges maintaining seniority of such non-sanctioned posts teachers, clause (c) provides for withdrawal of vacant posts from the colleges where the student enrolment and other norms do not justify the total number of sanctioned posts in that college so as to accommodate the teachers working without a sanctioned post in a college where there is no sanctioned vacant post or whether the number of vacant sanctioned post is less than the number of teachers proposed to be adjusted in conformity with the office memorandum.

7. The Under Secretary to the Govt. of Assam in the Education Department by his affidavit dated 9.5.2006 apprised the Court that in view of Section 3(c) of the aforesaid Act, Clause 4(c) of the office memorandum had become redundant and that the Government intends to accommodate the teachers working against non-sanctioned post in sanctioned posts only in terms of clause 4(a) and (b) of the office memorandum dated 17.7.2004. It was on that basis, the learned Single Judge disposed of the writ petition recording the aforesaid stand of the Govt. with liberty to the affecting parties to challenge such stand of the Govt. by way of instituting fresh writ proceeding.

8. Learned Counsel for the parties, i.e. the appellants as well as the respondents/writ petitioners made their submissions defending the office memorandum in its entirety and for that matter clause 4(c) of the office memorandum. While the learned Counsel for the respondents/writ petitioners argued that in the writ petition clause 4(c) of the office memorandum not being under challenge, learned Single Judge ought not have raised the issue and disposed of the writ petition solely on the basis of the counter affidavit filed by the Under Secretary. Learned Counsel for the appellants submitted that apart from the fact that the issue raised and decided being altogether a non-issue, there being no conflict between clause 4(c) of the office memorandum and Section 3(c) of the Act, learned Single Judge committed manifest error of law in disposing the writ petition on the basis of the particular stand of the Under Secretary.

9. Section 3(c) of the Act prohibits inter cadre transfer from one college to another including the mutual transfer. It further provides that posts in provincialised colleges shall constitute independent cadre. Thus, what is provided is that, there cannot be any transfer from one college to another and that the posts in each provincialised college shall constitute an independent cadre for each category of employees. As noted above, Section 3(c) also provides that there would be no inter cadre transfer from one college to another including mutual transfer. Neither Section 3(c) nor any other provisions in the Act restrain the authority or has put any embargo towards transfer of posts from one college to another on need basis as per the stipulation made in clause 4(c) of the office memorandum.

10. As discussed above, clause 4(c) of the office memorandum authorises the Director of Higher Education to withdraw the vacant post from deficit grants-in-aid college where the students enrolment or other norms do not justify to the total number of sanctioned posts in that college. Such a course of action is open for the Director to accommodate the teachers working without a sanctioned post in a college where there is no vacant sanctioned posts or where the number of vacant sanctioned post is less than the number of the teachers proposed to be adjusted in conformity with the office memorandum. Thus, what is provided is, the authority to the Director for withdrawal of post lying idle in a college on where the enrolment or other norms do not justify retention of the post(s) in the particular college. Needless to say that such an authority vested with the Director cannot be arbitrary. Before withdrawal of a post from one college so as to adjust a non-sanctioned post teacher in another college, the Director will have to justify such withdrawal in consultation with the authority of the college from which the post is said to be withdrawn. In this regard, detailed procedure has been laid down in the office memorandum.

11. Withdrawal of post from one college so as to accommodate non-sanctioned post teacher in another college does not mean transfer of a provincialised college teacher. It is not a case of withdrawal of post alongwith the incumbent. Clause 4 (c) of the office memorandum permits to withdraw the post(s) under the circumstances mentioned in Clause (c) with further stipulation that other criteria mentioned in the office memorandum will have to be followed. On the other hand, Section 3(c) of 2005 Act only prohibits transfer of the employees from one college to another even to extent of mutual transfer. Merely because it provides that the post in each provincialised college shall constitute an independent cadre in each category of employee, same does not mean that the post(s) in a particular cadre even if lying idle or its/their retention in the particular cadre is not justified, cannot be withdrawn so as to allocate the same to another college to accommodate/adjust the non-sanctioned post teachers. Such a process does not involve any transfer of any incumbent from one college to another. Thus, the basic foundation of the affidavit filed by the Under Secretary projecting that in view of Section 3(c) of 2005 Act, clause 4(c) of 2004 of the office memorandum has become redundant is fallacious.

12. In the affidavit filed by the Under Secretary, it is not a case that the office memorandum dated 17.7.2004 has been modified by any cabinet decision. Although in the affidavit, the stand of the Under Secretary is that clause 4 (c) of the office memorandum has become redundant and the Govt. intends to accommodate the teachers working against non-sanctioned post in sanctioned post in terms of clause 4(a) and (b) of the office memorandum dated 17.7.2004 only, but there is no indication in the affidavit that clause 4(c) of the office memorandum has been withdrawn by the Govt.

13. The provisions made in the office memorandum do not find any mention in the Act. Had it been the intention of the legislature, it would have been clearly

spelt out in the Act itself that the office memorandum dated 17.7.2004 or any part thereof would stand repealed with the promulgation of the Act. Rather the Assam Repealing Act, 2005 promulgated vide notification dated 22.12.2005 (Annexure-D) only speaks of repealing of Assam Non-Government (Deficit) Colleges Central Pension and Provident Fund Act, 1997. It is only by way of interpretation of Section 3(c) of 2005 Act, the Under Secretary in his affidavit made the statement that by virtue of Section 3(c), clause 4(c) of the office memorandum has become redundant and that the Govt. would implement only clause 4(a) and (b) of the office memorandum. When there is nothing to show that clause 4(c) of the office memorandum is in conflict with Section 3(c) of the Act, we are of the considered view that the particular stand in the affidavit filed by the Under Secretary was wholly unwarranted and is in direct conflict with the intention of the Cabinet decision. As noted above, the office memorandum dated 17.7.2004 was issued pursuant to the Cabinet Memorandum dated 25.3.2004 which was dully processed and finalised. The office memorandum was issued having regard to the fact that the college teachers were working against non-sanctioned posts for years together. It is in that context the policy decision was adopted to accommodate such teachers applying the test laid down in the office memorandum.

14. As noted above, it is not the case of withdrawal of office memorandum and/or clause 4(c) of the same by any Cabinet decision. Such proposed withdrawal is only through the affidavit filed by the Under Secretary. Nothing is discernible as to whether he was authorised to take the particular stand by the competent authority. It is in this context, learned Counsel for both the parties argued that the office memorandum dated 17.7.2004 could not be modified and/or diluted by filing an affidavit and that too without any indication as to whether there was any approval of the Cabinet towards withdrawal of clause 4(c) of the office memorandum.

15. It was never the stand of the Govt. before that in view of Section 3(c) of 2005 Act, clause 4(c) of the office memorandum has become redundant and inoperative. It was only in the writ proceeding, the Under Secretary by way of filing the affidavit expressed the view that clause 4(c) has become redundant. The Govt. all along having sustained clause 4(c) of the office memorandum could not have taken altogether a different view and that too by filing an affidavit in the writ proceeding. The Apex Court in the case of Commissioner of Police, Bombay Vs. Gordhandas Bhanji, observed thus:

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

16. From the materials on record it appears that the Govt. of Assam in the Education (Higher) Department by its communication dated 4.10.2005 addressed to the Director of Higher Education, Assam conveyed the approval of the Governor of Assam for filling up 67 vacant sanctioned posts of Lecturers in different grants-in-aid colleges of the State by way of withdrawal for adjusting their services in equal numbers of Lecturers working against non-sanctioned posts subject to the condition that the posts so proposed to be filled up vide the list enclosed, invariably be sanctioned posts and the withdrawal and adjustment must be done in accordance with the provisions as laid down under clause 4(c) of the office memorandum dated 17.7.2004. Further, the communication was issued with concurrence of Finance (SIU) Deptt vide their U/O No. FSI 160/05 dated 23.9.2005. The entire process initiated and finalised was set at naught simply by filing the affidavit in question based on which the learned Single Judge passed the impugned order. Ignoring all the above developments, the Under Secretary simply by filing an affidavit rendered clause 4(c) of the office memorandum redundant without any material to show that the Govt. in fact has interpreted the same to be so in view of Section 3(c) of the Act. However, this aspect of the matter need not detain us in view of our clear finding that there is no conflict between clause 4(c) of the office memorandum and Section 3(c) of 2005 Act.

17. This now leads us to the grievance of the writ petitioners that the list was not prepared maintaining the seniority of the college teachers. The office memorandum envisages preparation of the list for adjustment of non-sanctioned post teachers against sanctioned posts maintaining their service seniority. Since the learned Single Judge has not answered that question, it is hereby provided that the authority before passing the final order towards adjustment of the non-sanctioned post teachers shall take into account the grievance of the writ petitioners that, although they are seniors to many of the teachers who are sought to be adjusted against sanctioned posts are being deprived of such adjustments. After examining the case of two writ petitioners, if need be, after hearing of the parties involved, the authority may pass appropriate order.

18. With the above observations, the writ appeal is allowed by setting aside and quashing the impugned judgment and order dated 6.6.2006 passed by the learned Single Judge in W.P. (C) No. 7290/05 alongwith other writ petitions. There shall be no order as to costs.