

(2024) 05 GAU CK 0071
In the Gauhati High Court
Case No : Writ Appeal No. 35 Of 2024

Dr. Dibyajyoti Mahanta

APPELLANT

Vs

Krishna Kanta Handiqui State Open University And 2 Ors.

RESPONDENT

Date of Decision : 09-05-2024

Acts Referred:

Krishna Kanta Handiqui State Open University Act, 2005 — Section 22, 22(1), 23(1)(d)

Citation : (2024) 05 GAU CK 0071

Hon'ble Judges : Vijay Bishnoi, CJ; Suman Shyam, J

Bench : Division Bench

Advocate : K.K. Mahanta, N. Begum, K.N. Choudhury, P.J. Handique, S. Das

Final Decision : Disposed Of

Judgement

1. This intra-court appeal is directed against the judgment and order dated 19-01-2024 passed by the learned Single Judge in W.P.(C) No. 8310/2022, instituted by the writ appellant, as petitioner, whereby the challenge made to the notice dated 29-11-2022 issued by the Registrar of Krishna Kanta Handiqui State Open University (hereinafter referred to as KKHSOU) i.e. the respondent No. 2, notifying the date of demitting office by the appellant/ writ petitioner on completion of his tenure in the post of Dean (Study Center) of the university was rejected. The facts and circumstances of the case, giving rise to filing of the writ appeal, are briefly narrated here-in-below :-

2. KKHSOU (hereinafter referred to as the "University") was established under the Krishna Kanta Handiqui State Open University Act, 2005 (hereinafter referred to as the Act of 2005) inter-alia with the object to advance and disseminate learning and knowledge by a diversity of means including the use of any communication technology so as to provide opportunities for higher education to a larger section of population and to promote educational well being of the community in general. The Registrar of the University i.e. the respondent No. 2 had earlier issued advertisement notice No. R-2/2015 dated 29-06-2015 inviting applications for filling up a number of vacant posts including one post of Dean

(Study Centre). The appellant, who was working as Assistant Professor in the Nagaon Girls College, Nagaon, at that point of time, had applied for the post of Dean (Study Centre) and was eventually selected. By the appointment order dated 06-10-2015, the appellant was appointed as the Dean of the University for a term of 05 years. Accordingly, the appellant served as Dean (Study Centre) from 03-11-2015 to 02-11-2020.

3. As the tenure of the appellant in the post of Dean (Study Centre) was coming to an end, on 05-09-2020, another advertisement notice, bearing No. R-3/2020, was issued by the University inviting fresh applications for the post of Dean (Study Centre). The said advertisement notice had clearly mentioned that the age of the applicant should not be more than 55 years on the date of application. However, the University reserved the right to relax the upper age limit in case of deserving candidates.

4. Responding to the advertisement dated 05-09-2020 the appellant had applied for the post of Dean (Study Centre) seeking a second term in office. After conclusion of the selection process, the Board of Management of the University, in its meeting held on 19-10-2020, had resolved to issue appointment order to the appellant, thus appointing him in the post of Dean (Study Centre). As per the resolution of the Board, the appointment letter was required to be issued as per the University Rules. Consequently, appointment letter dated 20-10-2020 was issued to the appellant laying down the terms and conditions of his appointment.

5. In the appointment order dated 20-10-2020, in the column "nature of post", it was mentioned that "the term of the office of the Dean (Study Centre) will be of 05 years as per first statute of the University (Section 3 of Chapter V) or till attainment of 60 years, whichever is earlier". In Clause 6 of the appointment order dated 20-10-2020 pertaining to service conditions, it was further mentioned that "on confirmation after the period of probation and subject to satisfactory service thereafter, you will be retained in the services of the University for a term period of 05 (five) years or up-to the age of 60 (sixty) years, whichever is earlier. You will be required to execute a service agreement to this effect".

6. Pursuant to the appointment order dated 20-10-2020, the appellant joined in the post of Dean (Study Centre) on 03-11-2020 so as to serve the probation period. On successful completion of the probation period, the appellant was retained in the post of Dean (Study Centre) so as to complete his tenure.

7. While serving as Dean, the appellant had submitted a representation dated 30-12-2021, addressed to the respondent No. 2, raising objection as to the service conditions mentioned in the appointment order by stating that since it was a tenure post and the appointment was for a period of 05 years, hence, the expression "till attainment of 60 years" was an erroneous inclusion in the order of appointment. According to the appellant, he has a right to continue in the office of Dean of the University for 05 years, i.e. till 02-11-2025. The University,

however, did not take any action on his representation. On the contrary, on 29-11-2022, the Registrar of the University i.e. the respondent No. 2 had issued a notice informing the appellant that his last working day as Dean of the University would fall on 31-12-2022 which was presumably the date on which the appellant would complete the age of 60 years. The appellant was also informed that his representation was placed before the Board of Management and the matter has been forwarded to the Chancellor of the University but response in respect thereof, is still awaited.

8. Aggrieved thereby, the appellant had approached this Court by filing W.P.(C) No. 8310/2022, assailing the notice dated 29-11-2022, inter-alia, praying for a writ of mandamus directing the respondents to withdraw, rescind, revoke, cancel and forbear from giving effect to the notice dated 29-11-2022. On the strength of an interim order dated 22-12-2022 passed in W.P.(C) No. 8310/2022 directing maintenance of status quo with regard to the post of Dean (Study Centre) in KKHSOU, the appellant continued in service during the pendency of the writ petition. Eventually, by the judgment and order dated 19-01-2024, the writ petition was dismissed. Hence, this appeal.

9. By assailing the judgment and order dated 19-01-2024, Mr. K.K. Mahanta, learned Sr. counsel appearing for the appellant has forcefully argued that as per the provisions of the statute, the post of Dean (Study Centre) is a tenure post and an appointee was entitled to hold the post for a term of 05 years. Under the circumstances, inclusion of an additional condition laying down the date of retirement on attaining the age of 60 years in the appointment letter dated 20-10-2022, according to the learned Sr. counsel, was not only wholly uncalled for but was also in contravention of the provisions of the statute and the rules governing the conditions of service of the employees. To drive home his above argument, Mr. Mahanta has placed heavy reliance on Rules 3 and 9 of Chapter V of the First Statute of KKHSOU framed under section 22 of the Act of 2005 to contend that the provisions of the Statute, laying down the retirement age of the officers of the University to be 60 years, would not apply in case of appellant since he was holding a tenure post and as such, the appellant was entitled to continue in office till completion of the entire tenure of five years. Further contending that even in case of contractual appointments, the terms and conditions of service of Government employees would always be governed by the provisions contained in the statute/ rules, Mr. Mahanta has relied upon and referred to the decision of the Supreme Court rendered in the case of UoI & Ors. Vs. Arun Kr. Roy reported in (1986) 1 SCC 675 as well as another decision of the Division Bench of this Court rendered in the case of Tabong Pasar Vs. State of A.P. & Ors. reported in 1999 (3) GLT 90 to contend that where there are specific statutory rules governing the terms of a particular service, the same would have to be scrupulously followed and the Government servant cannot be denied of any benefit accrued to him under the service rules.

10. So as to dispel any doubt on the question of delay on the part of the

appellant in approaching the Court and the plea of waiver and estoppel, Mr. Mahanta has relied upon the decision of the Supreme Court rendered in the case of Somesh Thapliyal & Anr. Vs. VC H.N.B. Garhwal University & Ors. reported in (2021) 10 SCC 116 to submit that at the time of joining the post, the appellant did not have any bargaining power against the University and therefore, he was left with no option but to accept the appointment letter with the terms and conditions mentioned therein. However, in view of the decision of the Supreme Court, it was open for the petitioner to assail the terms and conditions in the appointment letter at any subsequent stage, if the same is found to be contrary to the rules.

11. Resisting the arguments advanced by the appellant's counsel, Mr. K.N. Choudhury, learned Sr. counsel appearing for the University has argued that the post of Dean (Study Centre) is a tenure post and the appointment letter had clearly laid down the tenure of the appellant in office, which he had accepted with open eyes. Having accepted the same, it was not open for the appellant to question the service condition, as mentioned in the appointment order, that too, years after joining in the office. Mr. Choudhury has further argued that the statute/ rules do not permit an employee/ officer of the University to continue in service beyond 60 years unless specifically permitted by the Board of Management. In the present case, no such permission/ approval to continue in service beyond 60 years was granted to the appellant. Under the circumstances, submits Mr. Choudhury the appellant neither has any right that is enforceable in the writ proceeding nor can it be said that the order of appointment dated 20-10-2020 has, in any manner, contravened the provisions of the rules/ statute.

12. In his attempt to distinguish the law laid down by the Supreme Court in the case of Somesh Thapliyal (Supra) relied upon by the appellant's counsel, Mr. K.N. Choudhury has referred to a later decision of the Supreme Court rendered in the case of UoI & Ors. Vs. N. Murugesan & Ors. reported in (2022) 2 SCC 25 to submit that the law laid down in the case of Somesh Thapliyal (Supra) has been explained in the subsequent decision and as per the observations made in N. Murugesan (Supra) the appellant would not be entitled to avail any benefit of the law laid down in the case of Somesh Thapliyal (Supra).

13. We have considered the arguments advanced at the Bar and have also gone through the materials available on record. At the very outset, we wish to point out herein that the writ appellant had evidently attained the age of 60 years during the pendency of the writ petition but, as noted above, in view of the interim order dated 22-12-2022 passed in the writ petition, he had continued to serve in the post of Dean. After the dismissal of the writ petition the appellant has preferred the present appeal wherein also, this Court had passed an interim order dated 01-02-2024 directing that the appellant shall continue as Dean (Study Centre) of the KKHSOU till the returnable dated and the said interim order had been extended from time to time. As such, the appellant is continuing to serve as Dean (Study Centre) of KKHSOU till today on the strength of interim

orders passed by this Court.

14. As has been noticed hereinabove, the core controversy involved in this proceeding is pertaining to the question as to whether, notwithstanding the service conditions laid down in the appointment order dated 20-10-2020 providing that the petitioner would hold office in the post of Dean (Study Centre) for a term of "05 years or till he attains the age of 60 years, whichever is earlier", whether the appellant/ writ petitioner would have any right to continue in office beyond the age of 60 years, i.e. till completion of a fixed tenure of 05 years? In order to answer the aforesaid question, it would be necessary for this Court to examine the various provisions contained in the First Statute as well as the ordinance of the University, which have been relied upon by the appellant's counsel.

15. In exercise of powers conferred under Section 22(1) of the Act of 2005 the Government of Assam had framed the First Statute of KKHSOU, 2009, which was published in the Extra Ordinary Gazette on 30-05-2009. Chapter V of the First Statute deals with the "manner of appointment of Registrar, Finance Officer, Deans and Directors of the University, their emoluments, conditions of service, powers, functions and duties".

16. Clause 3 of Chapter V deals with term of office, which reads as follows:-

"3. Term of Office:

The term of office of the Registrar, the Finance Officer, the Deans and the Directors shall be five years but they may be eligible for re-appointment."

17. Clause 4 of Chapter V lays down the powers, function and duties of the officers coming within the ambit the Chapter, which includes the post of Dean (Study Centre). As per Clause 5, the officers mentioned in the said Chapter shall be subject to such service conditions and conduct rules, which the University may prescribe from time to time.

18. Clause 9 of Chapter V deals with the age of retirement of the officers, which would be relevant for the purpose of this case and therefore, Clause 9 is being extracted here-in-below for ready reference:-

"9. The officers mentioned above shall ordinarily retire at the age of 60, provided that the Board of Management in the interest of the University may re-employ and officer (except the holders of tenure post) beyond 60 years but not exceeding 63 years, if it is satisfied that such re-employment is absolutely necessary for the interest of the university and that the officer is certified to be fit mentally and physically by a Doctor of Medicine of a Medical College of Assam not below the rank of Associate Professor. However, such re-employment shall not be made for more than one year at a time."

19. Apart from the above provisions of the First Statute, Ordinance No. 7, which deals with provisions of appointment on contract basis or fixed tenure contract

basis (under Section 23(1)(d) of the Act of 2005) lays down the tenure of appointment. Clause 2 of the Ordinance No. 7 reads as follows:-

"2. Tenure of Appointments: The tenure of appointment on contract basis shall generally be five years or as may be decided by the Board of Management/ Vice-Chancellor."

20. As has been noted hereinabove, there is no dispute about the fact that the post of Dean (Study Centre), in respect of which the appellant was appointed, is a tenure post. Fundamental Rule 9 (30) defines a tenure post as hereunder:-

" (30A) "Tenure Post", means a permanent post which an individual Government servant may not hold for more than a limited period."

21. A bare reading of the order of appointment dated 20-10-2020 leaves no room for doubt that the appellant/ writ petitioner was not only appointed against the tenure post of Dean but the nature of appointment was also one which can be referred to as tenure appointment. Although the appellant has not brought any contract agreement signed by him on record, yet, from the order of appointment dated 20-10-2020, it is apparent that the appointment of the appellant was contractual and for a fixed tenure.

22. From a careful analysis of the materials available before the Court it is apparent that the post of Dean (Study Centre) is a permanent post. However, the said post was filled up by the University by way of tenure appointment. As such, the procedure of appointment of the appellant to the post of Dean would come within the ambit of Clause 2 of Ordinance No 7.

23. Clause 3 of Chapter V mentions of a fixed tenure of 05 years for different posts including the post of Dean. However, the said Chapter, in our opinion deals with regular appointments in the post of Dean and the other officers named therein and not in respect of a tenure appointment. The aforesaid position is clear from Clause 9 of Chapter V which provides that the age of retirement of officers mentioned in the Chapter would be 60 years. Clause 2 of the Ordinance No. 7, however, does not lay down any rigid or inflexible term of office in case of tenure appointment nor does it prescribe any age of retirement. Rather, as per Clause 2, the term in office in a tenure post would be five years or what is decided by the Board of Management/ Vice-Chancellor, thus permitting the Board to fix the tenure as desired by it.

24. The term of office of the appellant, as laid down in the appointment letter dated 20-10-2020 is "five years or till attainment of the age of 60 years" which in our opinion, lays down a clear and fixed term in office. There is no dispute about the fact that the said term has the approval of the Board of Management/ Vice-Chancellor. As such, the appellant can continue in office for the said term and would be deemed to have vacated the office of Dean on the expiry of the tenure fixed in the order of appointment. If that be so, the question of allowing the appellant to continue in the office of Dean (Study Centre) beyond the fixed

period prescribed in the appointment order would not arise in the eyes of law.

25. In the case of Dr. L.P. Agarwal Vs. UoI & Ors. reported in (1992) 3 SCC 526, the Supreme Court has observed that once a person is appointed to a tenure post his appointment to the said office would begin when he joins and it would come to an end on the completion of the tenure unless curtailed on justifiable ground. Such a person does not superannuate, he only goes out of office on completion of his tenure.

26. In Dr. L.P. Agarwal (Supra) the petitioner was appointed in the post of Director of AIIMS on the basis of direct recruitment. It was also a tenure post and the appointment of the petitioner was with effect from 18-02-1979. The appointment letter had laid down the conditions of service which included the tenure i.e. "a fixed tenure of 5 years or till the petitioner attained the age of 62 years, whichever expired earlier". On completion of the usual probation period the petitioner continued in the post of Director. However, taking note of Regulation 30 of All India Institute of Medical Science Regulations 1958, which inter-alia laid down that the age of superannuation of the employees would be 58 years with the further provision of granting extension of service or re-employment upto maximum of 60 years, in very special circumstances, the Managing Body of the Institute took a decision on 24-11-1980 to send the petitioner on compulsory retirement before completion of his fixed tenure in the office of the Director of All India Institute of Medical Sciences (AIIMS). The Delhi High Court had dismissed the writ petition filed by the petitioner challenging the said decision of the AIIMS authorities and that is how, the matter went upto the Supreme Court. The prayer of the petitioner was allowed by the Hon'ble Supreme Court by holding that since the appointment order gave a clear tenure to the petitioner the concept of superannuation would be alien to such tenure appointment. Accordingly, the impugned resolution of the Board was interfered with. The Apex Court has, however, emphasized that a tenure appointment would have a fixed life span and the concept of age of superannuation would not have any bearing in such cases.

27. From the above decision of the Supreme Court, what follows is that in case of tenure appointment, the term in office is a condition of appointment and therefore, regardless of the age of superannuation prescribed by the Rules/Regulations, the appointee would have a fixed tenure in office, as prescribed by the terms and conditions of appointment.

28. It is no doubt correct that Clause 9 of the First Statute confers power on the Board of Management to extend the service or to re-employ the officers of the University beyond the age of 60 years upon fulfillment of the terms and conditions laid down therein. However, it is to be noted herein that Clause 9 also excludes the holders of "tenure post" from application of the said provision. Therefore, the case of the appellant would not be covered under Clause 9. Being an appointee in a tenure post, the age of superannuation, as prescribed by the Rules also may not be attracted the case of the appellant. To such extent, we

find force in the submission of Mr. Mahanta that the normal age of superannuation, as prescribed by the Statute/ Rules, will not be applicable in case of his client. However, for the reasons stated here-in-above, such arguments of Mr. Mahanta cannot also be extended to hold that the appellant has a right to continue in office beyond the tenure fixed by the order of appointment nor can it be held that the conditions laid down in the appointment order dated 20-10-2020 contravenes the provisions of the Statute/Rules in any manner.

29. What is beyond any controversy in this case is that the appointment letter dated 20-10-2020 did mention a fixed tenure in office for the appellant. On the date of his appointment, the appellant was not only aware of the fact that his appointment was for a fixed tenure but he also had personal knowledge of his age. Therefore, appellant was fully aware of his exact tenure in office. Having accepted the order of appointment with the terms and conditions laid down therein, it would not be open for the appellant to enforce any claim which is contrary to the express terms and conditions of the order of appointment. In view of the above discussions, the decisions relied upon by Mr. Mahanta rendered in the case of Arun Kr. Roy (Supra) and Tabong Pasar (Supra), in our view, would not have any relevance in the facts and circumstances of the present case.

30. Upon a threadbare analysis of the various provisions of the Statute/ Rules, the learned Single Judge has held that the appellant/ writ petitioner was not entitled to any relief in the writ petition. We find ourselves in agreement with the above conclusion drawn by the learned Single Judge. Since we have rejected the appellant's case on merit, it would not be necessary for this court to go into the question of waiver, estoppel or delay in approaching the Court by the appellant, as raised by the learned counsel appearing for the University.

31. For the reason stated above, this writ appeal is found to be devoid of any merit and the same is accordingly dismissed.

Before parting with the record, we deem it appropriate to observe herein that since the appellant has continued in the post of Dean (Study Centre) beyond the age of 60 years, on the strength of an interim order(s) passed by the Court, hence, there would be no recovery of salary and allowances paid to the appellant for serving in the post of Dean (Study Centre), during the above period, i.e. the period during which, the interim order(s) passed by the Court were in force.

With the above observation, this writ appeal stands disposed of.

Parties to bear their own cost.