

(2024) 03 GAU CK 0033

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 7024 Of 2021

Dr. Dipika Kalita

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 15-03-2024

Acts Referred:

Citation : (2024) 03 GAU CK 0033

Hon'ble Judges : Kardak Ete, J

Bench : Single Bench

Advocate : I. Choudhury, R.M. Deka, S. Das

Final Decision : Allowed

Judgement

1. Heard Mr. I. Choudhury, learned Senior Counsel assisted by Mr. R.M. Deka, learned counsel for the petitioner. Also heard Mr. S. Das, learned Standing Counsel, Higher Education Department for the respondents No. 1 and 2. None appears for the respondents no. 3 and 4.

2. By filing this writ petition, the petitioner has challenged the impugned order No. DHE/CE/UGE/646/2020/63 dated 19.10.2021 passed by the Director of Higher Education, Assam, whereby, the date of regularization of service of the petitioner w.e.f. 14.06.2023 is withdrawn and treated as 08.04.2008 i.e. from the date of regular vacancy after expiry of lien of one Dr. R.N. Das.

3. The case, of the petitioner, in nutshell, is that she was appointed as a Lecturer in Zoology at Bajali college, Pathsala Barpeta (now Bhattadev University, Bajali) against non-sanctioned post vide order dated 22.12.1997, pursuant to a selection process. The petitioner is a holder of M.Phil in Zoology and Ph.D. from the Gauhati University. The initial appointment of the petitioner as a lecturer in Zoology vide order dated 22.12.1997 was pursuant to the advertisement dated 31.07.1997 and she has joined on 23.12.1997.

4. The Governing Body of the Bajali college in its meeting held on 17.07.2000

has recommended for appointment of the petitioner as a lecturer against the lien vacancy of Dr. R.N. Das, which was approved by the Director of Higher Education, Assam, on 16.08.2000 in the scale of pay 8000-275-13500/- PM plus other allowances. Accordingly, she was appointed against the said lien vacancy.

5. It is contended that lien period of Dr. R.N. Das was about to expire w.e.f. 14.06.2003 as Dr. R.N. Das did not return back to rejoin the college till 14.06.2003. On expiry of his lien period on 14.06.2003, the first regular vacancy of lecturer in the department of Zoology became available. Since, Dr. R.N. Das did not return back to join the Bajali college, the Governing Body in its meeting dated 10.08.2003 vide resolution No. 8 had resolved to terminate the service of Dr. R.N. Das, as a lecturer of Zoology Department, on the expiry of three years lien period and further resolved to regularised the service of the petitioner in the post of Dr. R.N. Das, as the petitioner had served in the lien vacancy of Dr. R.N. Das, between 17.08.2000 to 14.06.2003, after she was appointed pursuant to the advertisement dated 31.07.1997 and allowed to serve in the lien vacancy. In the meantime, one Dr. Pradip Kumar Sarma challenged the resolution dated 10.08.2003 by filing the writ petition being WP (C) No. 6430 of 2003. The petitioner had also filed two writ petitions i.e., WP(C) Nos. 3599/2005 and WP(C) No. 1161 of 2009. In the WP(C) No. 3599/2005, the petitioner had prayed for a direction for payment of her regular salary, whereas, in WP(C) No. 1161/2009, the petitioner had prayed for a direction for implementation of the Governing Body's resolution dated 10.08.2003. This Hon'ble Court vide Judgment and order dated 27.08.2009 dispose of all the writ petitions by directing the respondents to take necessary steps to consider regularisation of service of 3 non-sanctioned Lecturers to the three regular vacancies occurred on 14.06.2003, 28.07.2003 and 31.08.2007 respectively on the basis of seniority keeping in mind the requirement of prescribed norms.

6. The Governing Body of the college after the above judgment and order dated 27.08.2009 passed by this Court, in its meeting dated 21.09.2009, had resolved to regularise the service of the petitioner against the permanent vacancy that occurred on 14.06.2003 i.e., the date of expiry of lien of Dr. R.N. Das, Ex-Lecturer of the Department of Zoology.

7. The Principal of the College vide letter dated 24.09.2009, requested the respondent no. 2 to approve the aforesaid resolution of the Governing Body for regularisation of the services of the petitioner against the permanent vacancy that occurred on 14.06.2003. Thereafter, the respondent no. 2 vide letter dated had approved the resolution dated 21.09.2009 for regularisation of the services of the petitioner w.e.f. 08.04.2008 as the petitioner completed her M.Phil back then on 08.04.2008.

8. Grieved of the fixation of date of regularisation as 08.04.2008, the petitioner had filed an appeal before the Government of Assam in the Higher Education Department on 04.04.2011 with a prayer to grant the benefit of regularization to the petitioner w.e.f. 14.06.2003. The Director of Higher Education, Assam, vide

order dated 04.04.2013 allowed the seniority of the petitioner w.e.f. the date of her acquiring full U.G.C Norms i.e., 08.04.2008 as per Government order dated 26.12.2012 and further had approved the resolution of the Governing Body dated 21.09.2009, whereby, it was resolved to regularise the service of the petitioner w.e.f 14.06.2003 and allowed the same.

9. It is contended that the respondent no. 2, although had approved the date of regularization of the petitioner w.e.f 14.06.2003, vide notification dated 21.06.2014 had promoted the petitioner from Stage-I to Stage-II w.e.f 08.04.2013. At the time of promoting the petitioner from Stage-I to Stage-II, the respondent no. 2 had considered her date of regularisation as 08.04.2008 instead of 14.06.2003. The petitioner applied for fixation of her salary in terms of the Govt. Notification dated 05.06.2020. Vide corrigendum dated 13.04.2021, the respondent No. 2 has fixed the date of effect for placement of the petitioner in Senior Scale as 08.04.2014 instead of 08.04.2013. The date of effect for placement of the petitioner in selection grand scale of pay i.e. 08.04.2018 has been modified as 08.04.2019 purportedly considering the date of joining of the petitioner in service as 08.04.2008.

10. While the application of the petitioner for pay fixation was pending the respondent no. 2 has issued the impugned order dated 19.10.2021 withdrawing the order dated 04.04.2013, whereby, the date of regulation of the petitioner was approved allowed as 14.06.2003 and the fixed the date of regularization of the petitioner w.e.f. 08.04.2008 instead of 14.06.2003.

11. It is the contention of the petitioner that the reason for fixation of date of regularization of the petitioner as 08.04.2008 is assigned on the ground that the regular vacancy after expiry of lien of Dr. R.N. Das occurred on 08.04.2008 under reference is made to the order dated 13.05.2010. It is the contention of the petitioner that respondent no. 2 vide letter dated 13.05.2010 had approved the regularization of the service of the petitioner w.e.f. 08.04.2008 but failed to consider that the respondent No. 2 on appeal by the petitioner against the order dated 13.05.2010 had issued the order dated 04.04.2013 approving the date of regularisation of service of the petitioner as 14.06.2003. The petitioner has filed a representation against the order dated 19.10.2021 on 26.10.2021. However, it has failed to evoke any response from the respondents. Hence, this present writ petition.

12. Mr. I. Choudhury, learned Senior Counsel for the petitioner submits that by recording that the lien of Dr. R. N. Das expired only on 08.04.2008 in the impugned order dated 19.10.2021, the respondent No.2 has committed a wilful and deliberate violation of the Judgment and Order dated 27.08.2009 passed by this Hon'ble Court. This Hon'ble Court in a very clear and categorical term was pleased to observe that the lien of Dr. R. N. Das had expired on 14.06.2003 and as Dr. R. N. Das did not re-join the College the first regular vacancy in the Zoology Department became available. As such, the impugned finding of the respondent No.2 that on 08.04.2008 first regular vacancy occurred is an

incorrect rendition of fact and contrary to the observation made by this Hon'ble Court. He submits that on this count alone the impugned order dated 19.10.2021 is liable to be set aside and quashed.

13. Mr. I. Choudhury, learned Senior Counsel, submits that the petitioner has filed a representation on 26.10.2021 before the respondent No.2 with a request to withdraw the impugned order dated 19.10.2021. The said representation dated 26.10.2021 till date has failed to evoke any response from the respondents. The inaction on the part of the respondent No.2 in considering the representation dated 26.10.2021 would go to show that the respondent No.2 has issued the impugned order dated 19.10.2021 without any reasonable basis or justification.

14. Mr. I. Choudhury, learned Senior Counsel, submits that the respondent No.2 has issued the impugned order dated 19.10.2021 in gross violation of the principles of natural justice. The respondent No.2 ought to have provided an opportunity to the petitioner for defending her case before modifying her date of regularization from 14.06.2003 to 08.04.2008. He submits that the petitioner has been receiving all the service benefits by considering her date of regularization as 14.06.2003. The office of the Accountant General (A & E), Assam vide order dated 29.01.2014 had allotted the GPF Account Number in favour of the petitioner by considering her date of joining in regular service as 14.06.2003. He submits that in view of the impugned order the petitioner now has to be shifted from old pension scheme to NPS. The impugned order dated 19.10.2021 has gravely affected the interest of the petitioner. Therefore, the petitioner should have been afforded with an opportunity of hearing before passing of the impugned order dated 19.10.2021. However, the respondent No.2 in spite of being well aware about the serious consequences, which has to be faced by the petitioner, has issued the impugned order dated 19.10.2021.

15. Mr. I. Choudhury, learned Senior Counsel, submits that the by fixing the date of regularization of the petitioner as 08.04.2008, the respondents have brought the petitioner down below in the seniority list of Assistant Professors. Due to the impugned order dated 19.10.2021 the other junior Assistant Professors of the petitioner would now become senior to her. However, surprisingly, the respondent No.2 while issuing the impugned order dated 19.10.2021 had failed to appreciate the said adverse conditions that the petitioner would now have to face, that too for no fault on her part. He submits that such an impugned exercise on the part of the respondents long after regularization of service of the petitioner would amount to unsettling the settled position. The impugned order dated 19.10.2021 does not reveal any compelling circumstances on the part of the respondents for resorting to the impugned action of modifying the date of regularization of the petitioner.

16. Mr. I. Choudhury, learned Senior Counsel, submits that the manner in which the impugned order dated 19.11.2021 has been issued would go to show that the same has the effect of punishing the petitioner without following the due

procedure of law. A bare perusal of the impugned order would reveal that the same is punitive in nature. The impugned action has been taken by the respondents only to harass the petitioner without any valid and cogent reason. It is an admitted fact that the post became vacant on 14.06.2003. The respondents till date have not assigned any valid reason for issuing the impugned order dated 19.10.2021 which fact is fortified from the impugned action of the respondents in not considering the representation dated 27.10.2021. The respondents are till date sitting over the matter and have not assigned any reason for not considering the same. As such, the Impugned action of the respondents is liable to be interfered with.

17. Mr. S. Das, learned Standing Counsel, Higher Education Department, on the other hand, submits that the petitioner was appointed as a Lecturer of Zoology Department against the lien vacancy of Dr. R.N. Das with a condition that the petitioner will have to be released as soon as Sri R.N. Das assumes his duties on expiry of his lien period.

18. Mr. Das, learned counsel, submits that the Governing Body of the College in its meeting dated 10.08.2003 resolved to regularize the service of the petitioner in the lien vacancy post of Dr. R.N. Das. The said resolution was put to challenged by one Dr. Pradip Kumar Sarma before this Court vide WP(C)/6430/2003. Petitioner of the present writ petition also preferred WP(C)/1161/2009 with a prayer for a direction for implementation of the Governing Body's resolution dated 10.08.2003. The Hon'ble Court vide Judgment and Order dated 27.08.2009 passed in WP(C)/6430/2003 declared that the said resolution dated 10.08.2003 is legally unsustainable and further directed to take necessary steps to consider regularization of service of the 3 non-sanctioned lecturers of the Zoology Department of Bajali College to the 3 regular vacancies which occurred on 14.06.2003, 28.07.2003 and 31.08.2007 respectively on the basis of seniority.

19. Mr. S. Das, learned counsel, submits that pursuant to the order dated 27.08.2009 passed in WP(C) 6430/2003 and other connected writ petitions vide order dated 03.05.2010, the service of the petitioner as a lecturer in the Department of Zoology was regularized with effect from 08.04.2008 with certain terms and conditions.

20. Mr. S. Das, learned Standing Counsel further submits that vide order dated 04.04.2013, the respondent No. 2 had approved the date of joining of the petitioner with effect from 14.06.2003 as per the Governing Body resolution. Further, vide impugned order dated 19.10.2021, the Higher Education Department withdrawn the date of effect of regularization of service w.e.f 14.06.2023 and fixed the date of effect of regularization of service with effect from 08.04.2008 i.e. from the date of regular vacancy after expiry of lien of Dr. R.N. Das which was issued by the Director of Higher Education, Assam vide order dated 13.05.2010. He further submits that the petitioner's service was regularized vide order dated 13.05.2010 w.e.f. from 08.04.2008 from the date of

regular vacancy. Therefore, the date of regularization of the petitioner shall be w.e.f. from 08.04.2008. As such, there is no infirmity in the impugned order dated 19.10.2021 and the present writ petition is liable to be dismissed.

21. Due consideration has been extended to the rival submissions of the learned counsel for the parties and I have also carefully considered the materials available on record.

22. The petitioner was appointed as lecturer in Zoology Department at Bajali College pursuant to the advertisement dated 31.07.1997 against the non-sanctioned post vide order dated 22.12.1997 and she had joined on 23.12.1997. While serving as a lecturer in the Zoology Department, pursuant to the Governing Body of the college resolution, the petitioner was appointed as Lecturer against the lien vacancy of one Dr. R.N. Das. Vide order dated 30.08.2000, the respondent no. 2 has approved the resolution of the Governing Body. Thereafter, the petitioner was appointed as Lecturer in the Zoology Department with certain terms and conditions including that the petitioner will have to be released as soon as Sri R.N. Das assumes his duties on expiry of his lien.

22. The Governing Body of the college vide its meeting dated 10.08.2003 recommended the name of the petitioner for appointment as a lecturer in Zoology against the lien vacancy of Dr. R.N. Das and her service to be regularized against the said lien vacancy of Dr. R.N. Das, whose services has been terminated on completion of 3 years of lien. It is to be noted that the resolution of Governing Body dated 10.08.2003 was put to challenge by one Pradip Kumar Sharma, on the ground that the seniority of the writ petition in that writ petition was ignored. The petitioner has also filed two writ petitions. The three writ petitions were disposed of by this Court on 27.08.2009, whereby, this Court has held that the resolution dated 10.08.2003 had ignored the seniority as well as the education qualification of Dr. Pradip Kumar Sharma, whereas, two non-sanctioned lecturers without possession of the required norms was preferred for regularization and accordingly, the resolution dated 10.08.2003 was held to be unsustainable. However, the respondents were directed to take the necessary steps to consider the regularization of services of the three non-sanctioned lecturers of the Zoology Department of Bajali College to the three regular vacancies which occurred on 14.06.2003, 28.07.2003 and 31.08.2007 respectively on the basis of seniority of the serving lecturers of the Bajali college in non-sanctioned post keeping in mind the requirement of the prescribed norms.

23. Pursuant to the direction passed by this Court dated 27.08.2009, the Governing Body vide resolution dated 21.09.2009 recommended the name of the petitioner, who has been serving as lecturer against non-sanctioned post since 23.12.1997 and also serving against the lien vacancy of Dr. R.N. Das for regularisation w.e.f 14.06.2003 against the permanent vacancy which occurred on 14.06.2003 owing to the expiry of Dr. R.N. Das. Thereafter, the respondent no. 2 vide order dated 13.05.2010 in pursuant to the order of this Court passed

in Writ petitions (supra) and the Governing Body resolution dated 21.09.2009 approved the regularization of service of the petitioner as a lecturer in the department of Zoology vice Dr. R.N. Das, lecturer after expiry of his lien period w.e.f. 08.04.2008. Thereafter, vide order dated 04.04.2013, the respondent no. 2 has allowed the service seniority in respect of the petitioner w.e.f. the date of her acquiring full UGC norms i.e. M.Phil w.e.f. 04.04.2008 as per Government order dated 26.12.2012. Further the resolution dated 21.09.2009 adopted by the Governing Body from the date of joining of the petitioner be treated with w.e.f. 14.06.2003 has also been approved. It is also to be noted that vide notification dated 21.06.2014 issued by the respondent no. 2, whereby, 846 nos. of Assistant Professor(s)/Librarian(s) of the provincialised colleges of Assam for placement in the next higher senior Scale of pay w.e.f the date as mentioned in the respective names with next date of increment as per Rule were notified, wherein, the name of the petitioner appears at serial No. 166.

24. The Government of Assam issued an office Memorandum No. AHE.502/2014/131 dated 24.05.2018, whereby, the counting of service period from the date of appointment/regularization in sanctioned post of the college teachers and librarians subject to clearance of NET/SLET/M.Phil/Ph.D is provided. It is apposite to reproduce the same which is as under:-

GOVERNMENT OF ASSAM

HIGHER EDUCATION DEPARTMENT

DISPUR: GUWAHATI-6

No. AHE.502/2014/131 dated 24.05.2018

OFFICE MEMORANDUM

Sub-Counting of service period for seniority from the date of appointment regularisation in sanctioned posts for college teachers/librarians appointed regularised subject to clearing of NET/SLET/M.Phil/Ph.d

It has been observed that, Govt. of Assam in Higher Education Department had issued two notifications prescribing UGC norms of in The OM No. B(2) H.155/2004/5 dated 24-06-2004 and counting of service period of college teachers, the be eligible for UGC scale but that the seniority will be counted from the date of initial appointment and the period of probation will be counted for promotion. The other notification No.AHE. 165/2010/15 dated 16-12-2010 also mentions that college teachers having UCC, norms and appointed against sanctioned posts were entitled for seniority from the date of their initial appointment.

On the strength of these two notifications, a section of college teachers who cleared NET/SLET/M.Phil/Ph.D, as fixed by the Govt. from time to time, after their appointment/regularisation against sanctioned posts were given the benefit of counting of service time, after their period from the initial date of appointment/

regularisation and accordingly seniority was fixed. However, by the Govt. OM No. AHE. 502/2014/38 dated 08-07-2015, a section of similarly placed teachers were denied the benefit of counting of period of service and thus seniority from the date of their initial appointment/regularisation, as these teachers were now made eligible for UGC scale, seniority and promotion only from the date of acquiring NET/SLET/Ph.D, as the case may be.

Since these teachers were appointed/regularised with qualifications as advertised and on the recommendation of duly constituted Selection Committees and since they subsequently acquired NET/SLET/M.Phil/Ph.D and are continuing in the post without break, therefore denying them the benefit of earlier service period will be against natural justice and the principle of pay parity.

In view of the above, the Govt. OM No.AHE.502/2014/38 dated 08-07-2015 is hereby modified to give the benefit to counting of service period for seniority and CAS promotions only without any financial benefits of arrear claims from the date of initial appointment/regularisation to all those college teachers/librarians whose appointments were made prior to issue of Govt. OM No.B(2)H.155/2004/5 dated 24-06-2004 in sanctioned posts and non-sanctioned posts regularised/adjusted subsequently against sanctioned posts.

Sd/-(A. Tewari, IAS)

Principal Secretary to the Govt. of Assam,

Higher Education Department

25. On the bare reading of the above office memorandum, it is seen that as per the Government Memorandum dated 08.07.2015, a section of similarly placed teachers were denied the benefit of counting of service and thus seniority from the date of their initial appointment/regularization, as these teacher were now made eligible for UGC scale, seniority and promotion only from the date of acquiring NET/SLET/Ph.D. Since these teachers were appointed/regularised with qualifications as advertised and on the recommendation of duly constituted Selection Committees and since they subsequently acquired NET/SLET/M.Phil/Ph.D and are continuing in the post without break, therefore denying them the benefit of earlier service period will be against natural justice and the principle of pay parity, has been modified to give the benefit of counting of service period for seniority and CAS promotions only without any financial benefits of arrear claims from the date of initial appointment/regularisation to all those college teachers/librarians whose appointments were made prior to issue of Govt. OM No.B(2)H.155/2004/5 dated 24-06-2004 in sanctioned posts and non-sanctioned posts regularised/adjusted subsequently against sanctioned posts.

26. Vide notification dated 05.06.2020, on the recommendation of the Screening Committee for CAS promotion of college teacher, the Higher Education Department has allowed CAS promotion of 127 nos. of Assistant Professor(s)/ Librarian(s) of Provincialised college of Assam including the petitioner, wherein, it

is clearly shown that the date of joining as 14.06.2003 and the last date of promotion is Stage-I to Stage-II as 14.06.2009 due for CAS promotion is Stage-II to Stage-III on 14.06.2014 also recommended and approved and her name appeared at serial No. 102 of the said list.

27. Uncontrovertibly, the authority had regularised the service of the petitioner w.e.f. 14.06.2003 as Assistant Professor in the Department of Zoology of Bajali College, Pathsala, Barpeta (now Bhattadev University, Bajali) as she was appointed to the sanctioned vacancy on being vacated by the Dr. R.N. Das, who did not return to the duty even after expiry of lien period, wherein, the petitioner was appointed after being regularly appointed in the year 1997. Therefore, the impugned order dated 19.10.2021 whereby the date of regularization of her service w.e.f. 08.04.2008 i.e. purportedly from the date of regular vacancy after expiry of lien period of Dr. R.N. Das is factually incorrect.

28. The record reveals that the regular vacancy occurred w.e.f. 14.06.2003 when the lien period of Dr. R.N. Das was expired w.e.f. 14.06.2003. Thus, the impugned order treating the date of regularization of the petitioner w.e.f. 08.04.2008 i.e. from the date of regular vacancy after expiry of lien of Dr. R.N. Das is factually incorrect. However, one cannot lose sight of the fact that the petitioner has acquired her M.Phil degree on 08.04.2008, from which date she became eligible for the post of Lecturer/Assistant Professor as per the norms. Since the petitioner was appointed initially in the year 1997 and was subsequently appointed in the lien vacancy and regularized in the regular vacancy from the date of regular vacancy i.e. on 14.06.2003, her regularization cannot be treated w.e.f. 08.4.2008, though she might have acquired M.Phil degree later in view of the Govt. office Memorandum Dated 24.05.2018 which clearly provided to give the benefit to continue of service period for seniority from the date of initial appointment/regularization to all those college teachers, which appointments were made prior to the issue of Govt. order dated 24.06.2004 in sanctioned post and non-sanctioned post regularized adjusted subsequently against sanctioned post.

29. Undisputedly, the petitioner was appointed in the year 1997 as a lecturer pursuant to the advertisement dated 31.07.1997 in the non-sanctioned post and she was appointed as lecturer in Zoology Department in Bajali College on the regular vacancy occurred after expiry of lien vacancy of one Dr. R.N. Das. The service of petitioner was regularized w.e.f. 14.06.2003, which is in consonance with the office Memorandum Dated 24.05.2018 that being the position, the impugned order dated 19.10.2021 cannot be sustained, as the same has been issued without consideration of the office memorandum dated 24.05.2018 and on factually incorrect ground.

30. In view of the discussions made herein above and the conclusion thereof, in my considered opinion, the impugned order dated 19.10.2021 passed by the Director of Higher Education, Assam, respondent no. 2 cannot be sustained. Accordingly, the same is hereby set aside and quashed.

31. The respondent no. 2 is directed to pass appropriate orders treating the date of regularization of service of the petitioner w.e.f 14.06.2003 instead of 08.04.2008 as the regular vacancy after expiry of lien period of Dr. R.N. Das occurred w.e.f. 14.06.2003, which is permissible as per the office memorandum dated 24.05.2018.

32. The writ petition stands allowed and disposed of in terms of the above observation and directions. No Order as to costs.