

(2021) 09 GAU CK 0010
In the Gauhati High Court

Case No : Writ Petition (Civil) No. 4291 Of 2021

Gajen Ch Swargiary

APPELLANT

Vs

State Of Assam And 6 Ors

RESPONDENT

Date of Decision : 03-09-2021

Acts Referred:

Assam Secondary Education (Provincialised Schools) Service Rules, 2018 — Rule 14(2)

Citation : (2021) 09 GAU CK 0010

Hon'ble Judges : Achintya Malla Bujor Barua, J

Bench : Single Bench

Advocate : B J Ghosh

Final Decision : Allowed

Judgement

1. Heard Mr. D. Das, learned senior counsel for the petitioner, Mr. R Mazumdar, learned counsel for the respondents No. 1, 2 and 3 being the authorities under the Secondary Education Department of the Government of Assam, Mr. S Bora, learned counsel for the respondents No. 4, 5 and 6 being the authorities under the Education Department of the BTC and Mr. R Islam, learned counsel appearing on behalf of the respondent No.7 Sri Jiten Ch Kalita through a caveat.

2. The petitioner Sri Gajen Ch Swargiary was appointed as an Assistant Teacher in the Chinakona High School on 05.05.1998 as per the order of the Director of Education, BTC and he received his graduate scale of pay from 01.10.1998. The respondent No.7 Sri Jiten Ch Kalita was appointed as an Assistant Teacher in the Chinakona ME School on 26.05.1992 and he was paid the graduate scale of pay from 04.06.1992.

3. An advertisement dated 27.05.2015 was issued inviting applications from intending candidates for promotion to the post of Headmaster of Chinakona High School. The writ petitioner Sri Gajen Ch Swargiary was a candidate pursuant to the said advertisement for the post of Headmaster of the school and he had participated in the selection process.

4. The Chinakona ME School and the Chinakona High School stood amalgamated as per an order dated 03.04.2017 of the Director of Secondary Education, Assam. After the amalgamation had taken place on 03.04.2017, the petitioner Sri Gajen Ch Swargiary was promoted as the regular Headmaster of the Chinakona High School by an order dated 16.08.2017 of the Director of Education, BTC in furtherance of the selection process pursuant to the advertisement dated 27.05.2015.

5. Being aggrieved by the promotion of the writ petitioner Sri Gajen Ch Swargiary as the Headmaster of Chinakona High School by the order dated 16.08.2017, the respondent No.7 Sri Jiten Ch Kalita had assailed the same in WP(C) No.4368/2020. The said writ petition was given a consideration by the order dated 17.11.2020 requiring the Commissioner and Secretary to the Government of Assam in the Secondary Education Department to entertain a representation dated 06.12.2019 submitted by the respondent No.7 Sri Jiten Ch Kalita and thereafter to pass a reasoned order. In consideration thereof, the order dated 10.02.2021 was passed by the Commissioner and Secretary to the Government of Assam, in the Secondary Education Department, inter-alia coming to a conclusion that as per the provision of Rule 14(2) of the Assam Secondary Education (Provincialised Schools) Service Rules, 2018, it is the respondent No.7 Sri Jiten Ch Kalita, who would be senior in service as a Graduate Teacher in the amalgamated Chinakona High School and therefore, he would be eligible for promotion as the Headmaster of the amalgamated Chinakona High School. The order dated 10.02.2021 of the Commissioner and Secretary where the conclusion was arrived that it is the respondent No.7 Sri Jiten Ch Kalita who would be eligible to be the Headmaster of the amalgamated Chinakona High School was assailed by the writ petitioner Sri Gajen Ch Swargiary in WP(C) No.1343/2021. WP(C) No.1343/2021 was given a final consideration by the judgment and order dated 03.03.2021. In the judgment dated 03.03.2021, a conclusion was arrived that the process for promotion to the post of Headmaster of Chinakona High School was initiated as per the advertisement dated 27.05.2015 and the amalgamation of the Chinakona High School and the Chinakona ME School having taken place on 03.04.2017 and the respondent No.7 Sri Jiten Ch Kalita being originally a teacher of the erstwhile Chinakona ME School, was not even eligible to be considered for promotion as the regular Headmaster of the school either when the advertisement was issued or when the vacancy had arisen and therefore in the selection process for the promotion which was initiated as per the advertisement dated 27.05.2015, the respondent No.7 Sri Jiten Ch Kalita could not have been considered at all for promotion as the regular Headmaster. Accordingly, the promotion of the respondent No.7 Sri Jiten Ch Kalita by the order dated 10.02.2017 of the Commissioner and Secretary to the Government of Assam in the Secondary Education Department was set aside.

6. But by the judgment dated 03.03.2021 in WP(C) No.1343/2021 another issue was given a consideration i.e. whether the advertisement dated 27.05.2015

could have been further continued for promoting a regular Headmaster in the Chinakona High School in the given circumstance that from 03.04.2017, the Chinakona ME School was amalgamated with the Chinakona High School. In other words, the question raised was whether the nature, character and status of the amalgamated Chinakona High School had changed to an extent from 03.04.2017 so as to render the advertisement dated 27.05.2015, which was issued in respect of the erstwhile un-amalgamated Chinakona High School to be not continued any further. Accordingly, by the judgment dated 03.03.2021 in WP(C) No.1343/2021, the matter stood remanded back to the Commissioner and Secretary for a decision on the aforesaid question as to whether the advertisement dated 27.05.2015 for promotion of a regular Headmaster can still be continued after the Chinakona High School was got amalgamated with Chinakona ME School from 03.04.2017.

7. By the judgment of 03.03.2021, it was provided that the petitioner Sri Gajen Swargiary would continue to be the Headmaster of the school till such decision is taken by the Commissioner and Secretary in an appropriate manner. Consequent thereof, the order impugned dated 10.08.2021 has been passed by the Special Commissioner to the Government of Assam in the Secondary Education Department.

8. We take note of that on the matter being remanded back by the judgment dated 03.03.2021 in WP(C) No.1343/2021, the only issue that remains for the Special Commissioner to the Government of Assam in the Secondary Education Department was whether the advertisement dated 27.05.2015 could have been continued and acted as the Chinakona ME School got amalgamated with the Chinakona High School from 03.04.2017. There was no further issue that was required to be decided or considered by the Special Commissioner to the Government of Assam in the Secondary Education Department to decide upon the matter being remanded.

9. While deciding the question as to whether the advertisement dated 27.05.2015 could have been continued and acted upon after the amalgamation had taken place, the Special Commissioner to the Government of Assam in the Secondary Education Department had expressed a view that the advertisement dated 27.05.2015 was for the post of Headmaster of the Chinakona High School at its pre-amalgamated stage and therefore could not have been continued after the order of amalgamation dated 03.04.2017.

10. Although the said view or conclusion arrived at by the Special Commissioner to the Government of Assam in the Secondary Education Department is preceded by the expression 'therefore', it has been submitted before us by Mr. R Mazumdar, learned counsel for the Department that the Special Commissioner to the Government of Assam in the Secondary Education Department had given his reasons as to why such conclusion was arrived at. To appreciate the said submission, we refer to the entire paragraph in the order impugned dated 10.08.2021, which purportedly, as per the submission of Mr. R Mazumdar,

learned counsel provides with the reasons as to why the Special Commissioner to the Government of Assam in the Secondary Education Department had arrived at such conclusion. For better appreciation, we extract the entire paragraph starting from page 86 of the writ petition, which continues up to page 87:-

"After a close scrutiny of the documents submitted by the parties it is observed that though, Shri Gajen Ch. Swargiary, the writ petitioner in WP(C) No. 1343/2021 participated in the selection process for promotion to the post of H.M. pursuant to advertisement dated 27.05.2015 from Chinakona High School at its pre-amalgamated stage, this Hon'ble High Court vide its interim order dated 07.08.2015 passed in W.P.(C) No. 4514/2015 (Labanya Bhuyan vs. State of Assam) directed that selection process may be continued but finalization of the select list shall not be done till disposal of the batch of writ petitions. From the available records submitted by Shri Gajen Ch. Swargiary during the course of hearing dated 19.04.2021 it has been observed that Director of Education, BTC in total violation of the interim order dated 07.05.2015 passed by the Hon'ble High Court finalized the select list and published it on 27th August 2015 which includes the name of Shri Gajen Ch. Swargiary also from Chinakona High School. The select list prepared by the Director, BTC was also approved by the Joint Secretary, BTC vide letter dated 09.11.2015. The validity of the select list so prepared and approved shall be in force for one year from the date of its approval by the Government. From the said point of view the validity of select list dated 27.08.2015 (approved on 09.11.2015) expired on 09.11.2016 as per the Assam Secondary Education (Provincialisation) Service Rule, 2003. Admittedly, neither Shri Gajen Ch. Swargiary filed any court case seeking extension of the validity of select list dated 27.08.2015 nor Hon'ble Court passed any stay order on 7/8/2015 extending the validity of his select list for promotion to the post of Headmaster of Chinakona High School. It is also seen from the records that the Director of Education, B.T.C. did not obtain any prior permission from the Government of Assam for extending the validity of the select list dated 27/8/2015. Rather from records it is seen that the B.T.C authority while preparing the select list acted in violation of the Hon'ble High Court's order dated 07.08.2015 passed in W.P.(C) No. 4514/2015. Therefore, it is clear that the records that the validity of the select list of Shri Gajen Ch. Swargiary for the promotion to the post of Headmaster of Chinakona High School expired or lapsed much before 03.04.2017 on which date the amalgamation of Chinakona M.E. School with High School came into effect. Admittedly, on the date of amalgamation the post of Headmaster of amalgamated Chinakona High School was lying vacant. Therefore the question of constitution of the advertisement dated 27/05/2015 for the post of Headmaster of Chinakona High School at its pre-amalgamated stage cannot be continued after coming into effect of the amalgamation order dated 03/04/2017 issued by the Director of Secondary Education, Assam, Kahilipara. Admittedly after 03/04/2017, respondent, Shri Jiten Ch. Kalita became eligible for the post of Headmaster amongst the graduate teachers of the amalgamated Chinakona High School being the senior most

graduate teacher. As the continuation of the advertisement dated 27/05/2015 cannot be permitted in the post amalgamated stage of the Chinakona High School, the consequent promotion order of the writ petitioner, Shri Gajen Ch. Swargiary based on such advertisement or select list dated 27/08/2015 which had lapsed before amalgamation, is not acceptable and in this connection the order No. DE/BTC/Apptt/-219/2012/225, dated 16/08/2015 issued by the Director of Education, B.T.C. and all orders by the Secretary, BTC. Inspector of Schools Udalguri relating to promotion to the post of regular Headmaster of Chinakona High School stands cancelled."

11. A reading of the relevant paragraph in the order impugned dated 10.08.2021 goes to show that the Special Commissioner to the Government of Assam in the Secondary Education Department had taken note of an earlier writ petition WP(C) No.4514/2015 between Labanya Bhuyan -vs- State of Assam and others. Thereafter the Special Commissioner takes note of that in WP(C) No.4514/2015, there was an interim order dated 07.08.2015 requiring the respondent authorities not to finalize the select list. But in violation thereof, the select list was published on 27.08.2015 wherein the name of the petitioner Sri Gajen Ch Swargiary finds place for promotion to the post of Headmaster of Chinakona High School. It was further taken note of that the select list dated 27.08.2015 was approved by the Joint Secretary in the Education Department of BTC on 09.11.2015. It being so, the validity of the select list which was for a period of one year came to an end on 09.11.2016. As neither the petitioner Sri Gajen Ch Swargiary nor the Court in its order dated 07.08.2015 had extended the validity of the select list, therefore, the select list dated 27.08.2015 based upon which the petitioner Sri Gajen Swargiary was promoted had already expired before the promotion was made. Accordingly, a conclusion was arrived that on 03.04.2017 when the Chinakona ME School was amalgamated with the Chinakona High School, the post of Headmaster in the amalgamated Chinakona High School was a vacant post. By stating so, the Special Commissioner had arrived at his conclusion that the advertisement dated 27.05.2015 could not have been continued in respect of the amalgamated Chinakona High School.

12. We have given our consideration to the aforesaid reasons recorded by the Special Commissioner in the order impugned dated 10.08.2021. We have taken note of that WP(C) No.4514/2015 was instituted by Labanya Bhuyan assailing the advertisement dated 27.05.2015 on the ground whether the B.Ed degree was compulsory for promotion to the post of Headmaster.

13. The legal issue raised in WP(C) No.4514/2015 as to whether B.Ed degree was mandatory for promotion to the post of Headmaster was given a consideration by the Division Bench of this Court in Mahendra Nath Mudoi and others -vs- State of Assam and others, reported in 2017 (4) GLT 501 and other writ petitions, which also included WP(C) No.4514/2015. It is specifically taken note of that in paragraph 19 of the judgment of Mahendra Nath Mudoi and others (Supra), the Division Bench had specifically taken note of that in WP(C)

No.4514/2015, there was an interim order of 07.08.2015 to the effect that the selection process may be continued, but the finalization of the select list shall not be done till the disposal of the batch of writ petitions.

14. Although as recorded by the Special Commissioner the select list dated 27.08.2015 which included the name of the petitioner Sri Gajen Ch Swargiary, was approved by the Joint Secretary in the Education Department of the BTC on 09.11.2015, but because of the interim order it cannot be construed that the selection process was finalized. As per the provision of the interim order dated 07.08.2015 in WP(C) No.4514/2015, we have to understand that the Court having allowed the selection process to be continued, but no final decision thereof be taken, the select list dated 27.08.2015 remains on record and the validity of the same cannot come to its end after a period of one year from the date on which the said select list was approved. In other words, the legal position would be that the said select list dated 27.08.2015 was yet to be finalized. The interim order dated 07.08.2015 in WP(C) No.4514/2015 stood vacated by the judgment dated 31.07.2017 in Mahendra Nath Mudoi and others (supra), when the writ appeal under consideration of the Division Bench stood dismissed. In other words, on the interim order dated 07.08.2015 being vacated as per the judgment dated 31.07.2017 in Mahendra Nath Mudoi and others (supra), it was for the respondent authorities to finalize the select list of 27.08.2015.

15. In the aforesaid context, we have to understand that the said select list of 27.08.2015 stood impliedly finalized by the order dated 16.08.2017 when the petitioner Sri Gajen Ch Swargiary was promoted. From the said point of view, we have to conclude that the reasons given by the Special Commissioner to arrive at his conclusion that the post of Headmaster of the amalgamated Chinakona High School was lying vacant as because the validity of the select list dated 27.08.2015 came to its end cannot be accepted. If the said reason is not accepted, the conclusion arrived at by the Special Commissioner that the advertisement dated 27.05.2015 for the post of headmaster which was issued when the Chinakona High School was at its pre-amalgamated stage, cannot be continued and acted upon to carry forward the recruitment process also cannot be accepted as such conclusion would be a conclusion without supported by any valid reason.

16. When there was a requirement by the judgment dated 03.03.2021 in WP(C) No.1343/2021 for the Commissioner and Secretary/Special Commissioner to take a decision as to whether the advertisement dated 27.05.2015 can still be continued and acted upon for making the promotion of a regular Headmaster after the amalgamation of the Chinakona ME School had taken place with the erstwhile Chinakona High School on 03.04.2017, it has to be understood that there was a requirement on the part of the Commissioner and Secretary/Special Commissioner to decide on its own merit whether the nature, character and status of the Chinakona High School after its amalgamation had changed to such extent that the earlier advertisement cannot be continued any further.

17. We are of the view that the said aspect of the matter was not at all gone into by the Special Commissioner while passing the order impugned dated 10.08.2021. Such decision as to whether the advertisement dated 27.05.2015 can still be acted upon and continued for making the regular promotion of Headmaster would have to be decided independent of all such happening as sought to be relied upon by the Special Commissioner in the order impugned dated 10.08.2021 which had already been found to be unacceptable as provided hereinabove.

18. We further take note of that by the impugned order dated 10.08.2021, the Special Commissioner in the penultimate paragraph had arrived at a conclusion that in the amalgamated Chinakona High School, it is the respondent No.7 Sri Jiten Ch Kalita who will be senior and therefore, he will be eligible for promotion as the Headmaster of the amalgamated Chinakona High School and that his entitlement for such promotion would be with retrospective effect from 16.08.2017 when the writ petitioner Sri Gajen Ch Swargiary was promoted. We are of the view that such stand on the part of the Special Commissioner would be wholly unsustainable and untenable inasmuch as, the only decision that the Special Commissioner was required to take was whether the earlier advertisement dated 27.05.2015 could have been continued and acted upon after the amalgamation had taken place.

19. If the answer is yes, the earlier process under the advertisement dated 27.05.2015 would be a valid process under the law. If for reasons to be given by the Special Commissioner, the answer would be no, the consequence thereof would be that the situation would require a fresh process for promotion to be initiated as per the Rules. As it was already held in the earlier judgment dated 03.03.2021 in WP(C) No.1343/2021, the respondent No.7 Sri Jiten Ch Kalita had no legal right in his favour for the promotion to the post of Headmaster prior to the amalgamation. If it is so, the conclusion arrived in the penultimate paragraph that it is the respondent No.7 Sri Jiten Ch Kalita who will be promoted as the Headmaster of the amalgamated Chinakona High School would be a decision in conflict and without following the due procedure of law and an usurpation of jurisdiction which otherwise is not vested on the Special Commissioner to the Government of Assam in the Secondary Education Department in the present situation, where he is exercising his jurisdiction only on a remand being made pursuant to the judgment dated 03.03.2021 in WP(C) No.1343/2021 where the limited question to be answered is whether the earlier advertisement dated 27.05.2015 can still be continued and acted upon for the promotion to the post of Headmaster after the amalgamation had taken place.

20. We are aware that we have heard this matter at the stage of motion itself, but we also take note of that all the respective respondents have entered appearance and have made their submissions before the Court.

21. The conclusion arrived can be construed to be a prima-facie case being made out against the order impugned dated 10.08.2021 by the Special Commissioner

to the Government of Assam in the Secondary Education Department warranting an interim stay. But Mr. R Islam, learned counsel for the respondent No.7 Sri Jiten Ch Kalita states that the said respondent has a very limited period of service left and therefore, if the order impugned is stayed by issuing notice further time would go by for the respondent No.7 to espouse his claim for promotion as the Headmaster of the school concerned.

22. In such situation, it is an agreed position of all the respective parties that in view of the conclusion arrived, the order dated 10.08.2021 of the Special Commissioner to the Government of Assam in the Secondary Education Department be set aside and the matter be again remanded back to the Special Commissioner or the Commissioner and Secretary (as the case may be), to the Government of Assam in the Secondary Education Department to pass an appropriate order strictly on the question as to whether the advertisement dated 27.05.2015 can still be continued to be acted upon after there was an amalgamation of the Chinakona ME School and the Chinakona High School and in doing so, the Special Commissioner or the Commissioner and Secretary (as the case may be) may take note of the observations made in this order.

23. Accordingly, on the order dated 10.08.2021 being set aside, the matter stands remanded back to the Special Commissioner or the Commissioner and Secretary (as the case may be) to the Government of Assam in the Secondary Education Department for a fresh consideration on the aforesaid question of the validity and continuation of the advertisement dated 27.05.2015 after the amalgamation of the school had taken place in the context of there being any change in the nature, character and status of the amalgamated Chinakona High School.

24. The requirement of passing the reasoned order be done within a period of one month from the date of receipt of a certified copy of this order. Till such reasoned order is passed, the writ petitioner Sri Gajen Ch Swargiary to continue as the Headmaster of the amalgamated Chinakona High School.

25. We also observe that in the event the conclusion of the Special Commissioner or the Commissioner and Secretary (as the case may be) to the Government of Assam in the Secondary Education Department is in favour of the validity and continuation of the advertisement dated 27.05.2015, in such event, the earlier regular appointment of the writ petitioner Sri Gajen Ch Swargiary as per the order dated 16.08.2017 to continue. On the other hand, if the conclusion is that the advertisement will not continue, appropriate steps be taken for initiating a fresh selection process in which all eligible candidates including the petitioner and the respondent No.7 be given the opportunity to participate and be done according to the law that would be prevailing.

26. In terms of the above, the writ petition stands allowed.