
(2016) 08 GAU CK 0083
In the Gauhati High Court
Case No : WP(C) No. 3045 of 2012

Haren Borgohain

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 08-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 6 GauLJ 732 : (2017) 1 GauLR 81 : (2016) 5 GauLT 456

Hon'ble Judges : Ujjal Bhuyan, J.

Bench : Single Bench

Advocate : Mr. A Deka, Advocate, for the Respondent; Md. M.U. Ahmed, Mr. S.F. Chistie, Mr. N.K. Chakraborty and Ms. Neog, Advocates, for the Petitioners

Final Decision : Allowed

Judgement

Ujjal Bhuyan, J. - Heard Mr. M. U. Ahmed, learned counsel for the petitioners and Mr. A. Deka, learned counsel for the Elementary Education Department, Govt. of Assam.

2. 22 petitioners have joined together and have instituted the present proceeding under Article 226 of the Constitution of India seeking a direction to the respondents to strike off their names from the list of teachers holding supernumerary posts in Sivasagar district, thereby including their names in the list of regular teachers. Further direction sought for is to make payment of salary and allowances to the petitioners w.e.f. March, 2012 and thereafter to continue payment of regular salary to the petitioners.

3. Case of the petitioners is that they were appointed as Assistant Teacher of Lower Primary (LP) Schools in the Charaideo-Sonari Sub-division of Sivasagar district by the Deputy Inspector of Schools during the period 1994-96. It is contended that such appointments were preceded by due selection. Details of the petitioners are mentioned in paragraph-8 of the writ petition.

4. Petitioners were initially appointed against sanctioned vacancies under the non-

plan head, because of which they received their salary regularly till August, 2006. After August, 2006 payment of regular salary to the petitioners stopped. It was found that names of the petitioners were included in the list of excess teachers i.e. teachers appointed in excess of existing vacancies. As a result, salary was released to the petitioners on annual retention basis against supernumerary posts. This created difficulties in the regular payment of salary as a result payment of salary to the petitioners became very irregular and ultimately from March, 2012, there has been no payment of salary as it appears that Government in the Education Department has not sought for extension of retention beyond March, 2012.

5. Asserting that petitioners are neither excess teachers nor appointed on irregular/illegal basis, it is contended that petitioners were appointed as LP School teacher in the Charaideo-Sonari Sub-Division in Sivasagar district following due selection process against sanctioned available vacancies. Therefore, treating them as excess teachers and showing them as appointed against supernumerary posts with annual retention was not justified. That apart from March, 2012 there has been complete stoppage of payment of salary because of non-retention of the posts. Stating that similarly situated teachers of Sivasagar district were treated as regular teachers under the non-plan head which facilitated payment of salary to such teachers on regular basis, petitioners have filed the present writ petition complaining of discrimination and unfair treatment and seeking the relief as indicated above.

6. As would be evident, this case is pending since the year 2012.

7. Director of Elementary Education, Assam, respondent No. 4, has filed affidavit. It is stated that 1,528 excess appointment of teachers were found in Sivasagar district. Petitioners belong to the category of 1,528 numbers of excess teachers. Government of Assam created 1,528 numbers of supernumerary posts to facilitate payment of salary to such excess teachers in the district of Sivasagar. Approval for temporary retention of 1,528 supernumerary posts was accorded by the Govt. of Assam on 07.01.2011. Those teachers received salary upto February, 2012. It is stated that petitioners were appointed without following the provisions of the Assam Elementary Education (Provincialisation) Act, 1974 and the Assam Elementary Education (Provincialisation) Rules, 1977. Those teachers were appointed against non-existent posts. Therefore, they are not entitled to salary.

8. Petitioners have filed reply affidavit as well as additional reply affidavit. In their reply affidavit, petitioners have denied the contention of the Director that they belong to the category of 1,528 excess appointees of teachers of Sivasagar district. Details of each of the petitioners have been mentioned and it has also been stated that they were allowed to draw revised scale of pay as per recommendation of Assam Pay Commission, 1998 and notification of the Finance Department. Service book of the petitioners were opened and therefore, it cannot be contended under any circumstances that petitioners were appointed

against non-sanctioned posts or that they are excess appointees not entitled to salary. It is stated that no Committee or no authority has identified the petitioners to be irregular or illegal teachers till date. Their names were not included in the list of irregular or illegal teachers whose services were regularized following Cabinet decision.

9. In the additional reply affidavit, petitioners while reiterating their earlier statements have also stated that authorities of the Education Department had given undertakings as employer to banks and financial institutions for obtaining loans by the petitioners. In such undertakings, the authorities mentioned that petitioners were permanent employees, therefore it is not open to the respondent No. 2 to describe the petitioners as excess or illegal teachers now.

10. Submissions made by learned counsel for the parties have received the due consideration of the Court.

11. In the course of hearing, Mr. Ahmed, learned counsel for the petitioners placed before the Court a copy of judgment and order dated 04.04.2014 passed by a Single Bench of this Court in WP(C) No. 870/2012 (Babul Ali v. State of Assam) and contends that present petition being identical, similar relief should be extended. However, Mr. Deka, learned Standing Counsel, Education Department submits that the two writ petitions are not identical and both the cases are distinguishable. Therefore the above judgment relied upon by learned counsel for the petitioners would not be attracted to the facts and circumstances of the present case.

12. From a perusal of the judgment and order dated 04.04.2014, it is seen that petitioners of that writ petition were appointed initially as Stipendiary Teacher in the Nazira Sub-Division of Sivasagar district. On passing their Junior Basic Training examination, they were granted regular scale of pay. However, their salary was stopped from March, 2011 which compelled them to approach the Court. In that writ petition also stand taken by the respondents was that supernumerary posts were created for 1528 excess teachers of Sivasagar district which included petitioners of that case as well with annual retention. Because of non-retention of posts beyond March, 2011 those petitioners were not paid salary. Further stand taken was that both Finance Department and Education Department had decided not to create any supernumerary posts for payment of salary to those teachers beyond March, 2012. On due consideration, this Court held that petitioners were subjected to hostile discrimination by illegally and arbitrarily denying them current salary and directed payment of salary to the petitioners. It was noticed that respondents in that case had not specifically pleaded that the petitioners were illegal appointees or excess teachers. To that extent, the present petition may be said to be distinguishable from the facts and circumstances of the case projected in WP(C) No. 870/2012 but on a careful analysis of the said judgment and the affidavit filed by respondent No. 2 in the present case it transpires that the core stand of the Directorate is that petitioners were enlisted in the list of 1,528 excess appointees for which supernumerary

posts were created having annual retention; since retention was not granted beyond March, 2012 salary could not be released to the petitioners.

13. Petitioners have vehemently argued that their appointments cannot be construed as illegal or excess under any circumstances. However, even assuming that petitioners are included in the list of 1,528 numbers of excess teachers, the fact remains that Government in the Education Department with concurrence of the Finance Department had created equivalent numbers of supernumerary posts for these 1528 excess appointees. The concept of supernumerary post as is understood in service law is that it denotes creation of a temporary post outside the cadre personal to the incumbent. It would mean existence of the post co-terminus with the service of the incumbent i.e. till the incumbent holds office. But the moment the incumbent relinquishes the office either on account of superannuation, death or such other eventuality, it would cease to exist. It is thus evident that the Government had created 1528 numbers of supernumerary posts to enable the incumbents to discharge their duties in their respective schools and to receive salary. Having once embarked upon this course of action it may not be open to the Government to abandon the same after a couple of years having regard to the concept of supernumerary post as elaborated above.

14. Creation of such supernumerary posts can be construed to be an equitable measure on the part of the State. The Supreme Court in *Ashok Kr. Sharma v. Chander Shekhar* reported in (1993) Suppl. 2 SCC 611 has observed that equity does not know the half way. If the principle of equity is to be invoked, it must be applied to the fullest extent. Having extended equitable benefit to the petitioners by treating them to be excess teachers and including them in the list of 1,528 such teachers (though highly disputed and contested by the petitioners), it was not open to the State to abandon the petitioners in the lurch after extending such benefit for a couple of years.

15. Logical corollary of the above deliberation would be that the supernumerary posts being held by the petitioners would continue as personal to them till such time they remain in service. The moment petitioners relinquish their service, the supernumerary posts would stand extinguished.

16. Having regard to the above discussions, respondents are directed to release the salary of the petitioners without any further delay by granting annual retention of the supernumerary posts. While the current salary of the petitioners shall be released within a period of 2 (two) months from the date of receipt of a certified copy of this order, the arrear salary from March, 2012 shall be released to the petitioners within a period of 4 (four) months from the date of receipt of a certified copy of this order.

17. Writ petition is accordingly allowed but without any order as to cost.