

(1994) 04 GAU CK 0019
In the Gauhati High Court
Case No : Civil Rule No. 4281 of 1991

Ishaque Uddin Mazumdar and Others APPELLANT
Vs
State of Assam and Others RESPONDENT

Date of Decision : 28-04-1994

Acts Referred:

Assam Elementary Education (Provincialisation) Act, 1974 — Section 27, 3
Assam Elementary Education (Provincialisation) Rules, 1997 — Rule 3

Citation : (1994) 2 GLR 386

Hon'ble Judges : M. Sharma, J

Bench : Single Bench

Advocate : A.K. Phukan and M. Bhuyan, for the Appellant; B. Choudhury, Government Advocate for Assam, for the Respondent

Judgement

M. Sharma, J.—This writ petition has come before this Court for hearing. The Government has not filed any affidavit nor produced any record, After hearing the learned Counsel at length I decide to dispose of the matter on merit of the petition.

2. During the course of argument Mr. A.K. Phukan, learned Counsel for the Petitioner submits that in Civil Rule No. 2307/91 some writ Petitioners prayed for a mandamus directing the Respondents to pay due salaries to the Petitioners. This Court vide order dated 13.8.91 finally disposed of the case directing the concerned Respondents to pay the due salaries to the Petitioners within a period of two months and further observed that if the appointment of the Petitioners were irregular then there will be no bar to terminate their services in accordance with law. Emboldened with that order, it is alleged, the Respondents terminated the present ten writ Petitioners from their services by order dated 30th September, 1991. The impugned termination order (Annexure-14 to the writ petition) indicates that after careful consideration of the reply to the show cause notice served upon the Petitioners it was found that the appointment of the Petitioners were irregular. The abovementioned Civil Rule No. 2307/91 which is

said to be similar, with the present one, as Mr. Phukan urges, covers the present Writ Petitioner's case. Admittedly the Petitioners were appointed in some non sanctioned posts, that they did not face any interview, that they were not selected by any selection process as per existing statutory provisions contained in the Rules for appointment/recruitment of elementary school teachers and that all the Petitioners were appointed (Annexures-1 to 10 to the writ petition) in pursuance to the order of the Secretary, Education Dept, Govt. of Assam, by the Deputy Inspector of Schools, Silchar. The Petitioners is that after such appointment, the Petitioners are Government employees and as such valuable right to the posts has accrued to them and that the Petitioners are entitled to show cause notice and proper enquiry should have been held. It is further contended that though in name, a show cause notice was served on the Petitioners, they duly showed cause highlighting, their rights to the posts as being regularly appointed, after verification of all particulars pertaining to their eligibility and that the alleged notice dated 26.4.91 (Annexure-12 to the writ petition) is vague as it does not disclose any provision of Govt. Instructions being violated. Petitioners allege malafide in issuing the notice of show cause.

3. The appointment letters of the Petitioners annexed with the writ petition show that Petitioner Nos. 1, 2, 3, 5, 6, 7, 8, 9, & 10 was appointed by the Respondent No. 5 in the posts caused vacant due to "retirement/expired" of the incumbent, on purely temporary basis and were appointed in pursuance of the order of the Secretary, Education Deptt. Govt. of Assam (Annexures No. 1, 2, 3, 5, 6, 7, 8, 9 and 10). Petitioner No. 3 was appointed due to high enrolment in the school (Annexure-4 to the writ petition).

4. As visualised from the Annexures all the Petitioners were appointed by the Respondent No. 5, Deputy Inspector of Schools, Silchar on order of the Education Secretary, Govt. of Assam. It is also admitted fact that the schools in which Petitioners were appointed are provincialised schools. The admitted position of law is that after provincialisation of the Primary Schools, M.E. Schools and Madrasahs recruitment to those schools has to be made under the provisions of the Assam Elementary Education (Provincialisation) Rules, 1977 (in short Rule, 1977) These Rules has been made in exercise of powers conferred by Section 27 of the Assam Elementary Education (Provincialisation) Act, 1974. Section 3 in Part-I of the Rules, 1977 is quoted below:

3. (i) Method of recruitment - In the month of January every year the DI shall invite applications in prescribed form for vacancies of elementary school teachers which are likely to occur in the year in his establishment.

(v) Selection Committee - There shall be a Selection Committee in each educational Sub-Division to be constituted by the Sub-Divisional Level Advisory Board for Elementary Education. The Chairman of the Sub-Divisional Level Advisory Board for Elementary Education and the DI of schools shall be the Chairman and Secretary of the Selection Committee respectively.

(vi) On receipt of applications, the Selection Committee shall scrutinise the mark sheets and other necessary testimonials of the candidates and prepare a list of candidates for interview by the Selection Committee.

The Selection Committee shall then finalise the list of successful candidates in order of merit after interview and shall put up the list before the Board for approval. While approving the list, the Board shall be guided by the declared policies of the Government from time to time. After approval of the list by the Board the same shall be sent to the Director of Elementary Education for his final approval.

The Deputy Inspector of Schools will appoint the selected candidates in order of merit from the list approved by the Director as per Government Rules and Government instructions for the time being in force.

The list shall be valid for one year unless its validity is extended by Government.

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5. As transpires, the posts against which the Petitioners were appointed were fallen vacant in the establishment of the DI of schools, Silchar, but for reasons best known to the Respondent No. 5 DI of Schools, Silchar, no application had been invited through advertisement or in any manner. When the mandatory provision for recruitment has been provided, no authority has power/jurisdiction to order appointment deviating the statutory procedure. Admittedly there was no notice through advertisement or in any manner, and no selection process was followed for interview and no selection was made on the basis of the interview. In Civil Rule No. 2307/91 while the authority of the Education Department was directed to pay the salary of the Petitioners for the period they worked this Court further directed the authority to terminate the Petitioners if their appointment is found irregular by the concerned authority.

6. Learned Counsel for the Petitioners submits that the posts held by the Petitioners are sanctioned posts and that after the appointment the Petitioners are Government employees and they are entitled to a proper equity. Mr. B. Choudhury, learned Govt. Advocate submits that it is on record that the posts were sanctioned in the sense that those were left vacant on retirement and death of the incumbents. Even, if, posts are sanctioned posts, the Petitioners cannot claim their appointment to those posts without following the procedure of recruitment under the Rule, 1977. Learned Counsel for the Petitioner referred Director of Technical Education and another Vs. Smt. K. Sitadevi, This case is not applicable to the instant case on the ground that statutory provision has been provided under the Rules, 1977 and when the initial appointment is irregular and illegal it cannot give legality of the appointment inspite of issuance of appointment letter. In R.N. Nanjundappa Vs. T. Thimmiah and Another, it is held that if the appointment itself is in infraction of the rules or if it is in violation of

the provisions of the Constitution illegality cannot be regularised. In catena of decisions the Apex Court held that nobody has a fundamental right to be appointed or retained in Government service. What the Constitution guarantees is the equality of opportunity in the matter of employment and protection against discrimination in matter of employment on grounds of sex, race religion. Submission of Mr. Phukun that natural justice has been denied by depriving the Petitioners of their opportunity of hearing and being Govt. servant they are entitled to a proper enquiry is not sustainable. That Petitioner's appointment were made with sheer deviation from Rule 3 of the Rules, 1977, Nature of appointment, on the contrary has established the fact that opportunity of appointment to other qualified eligible persons have been blocked in a very unfair manner which court cannot allow to do Petitioners were given opportunity to show cause and employer/authority is (sic) has right to terminate the appointments which were found illegal even at a later stage and action taken in such cases cannot amount to arbitrariness or deprivation of natural justice. On the same reason as discussed above allegation of malafide attributed to the Respondents are not sustainable.

7. In view of my above discussion I respectfully held, on merit, the judgment passed in Civil Rule No. 4018/91 is distinguishable. The writ petition is rejected accordingly. However the Petitioners are entitled to their salary for the period they worked, The Respondents are directed to pay the salaries of the Petitioners from the date of their appointment till termination, i.e., for the period they worked.