
(2009) 08 GAU CK 0095
In the Gauhati High Court
Case No : Writ Petition No. 4892 of 2007

Kalpa Nath Deka

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

Date of Decision : 21-08-2009

Acts Referred:

Assam Secondary Education (Provincialisation) Act, 1977 — Section 2, 3(3)
Assam Secondary Education (Provincialised) Service (Amendment) Rules, 2003 — Rule 24, 24(1), 24(2)
Assam Secondary Education (Provincialised) Service Rules, 1982 — Rule 10, 13, 13(3), 3, 6
Constitution of India, 1950 — Article 14, 16

Citation : (2009) 1 GLD 629 Supp : (2009) 5 GLT 748

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.P. Katakey, J.—This petition is directed against the order dated 18. 7:2007 passed by the director of Secondary Education, Assam determining the seniority amongst the teachers of Sarthebari Higher Secondary School and consequently allowing Smt. Parbati Patowary, respondent No. 4, to hold the current charge of Principal of the said school.

2. The facts leading to the filing of the present writ petition may be noticed as under:

(a) The petitioner Sri Kalpa Nath Deka as provisionally appointed by the Principal of Solmara Higher Secondary School vide order dated 20.10.1979 as subject teacher in English in the said school in the regular scale of pay. The Director of Secondary Education, Assam, thereafter, vide order dated 30.8.1986 regularly appointed the petitioner as elective subject teacher, while he was working in Solmara Higher Secondary School, as per recommendation/selection of the State Selection Board made during the year 1986-1987. He was thereafter, transferred and posted at Sarthebari higher Secondary School vide order dated 30.9.1986 as

subject teacher in English. The petitioner accordingly joined in Sarthebari Higher Secondary School on 1.12.1986.

(b) Smt. Parbati Patowary, the respondent No. 4, was originally appointed as Headmistress of Chamata Girls' High School and joined on 12.12.1974. After amalgamation of the said school, she received the graduate scale of pay in the financial year 1982- 1983. She was thereafter, appointed as subject teacher in Assamese vide order dated 14.11.1985 issued by the Director of Secondary Education, Assam and posted in Rangapara Higher Secondary School, Sonitpur with the condition that such appointment is for the period not exceeding 4 (four) months and subject to regular selection by the State Selection Board, for which she has to directly apply whenever the advertisement is issued by such Board. She was thereafter, transferred to Sarthebari Higher Secondary School vide order dated 2.7.1986 and joined as subject teacher in Assamese on 12.7.1986. Smti. Patowary was appointed regularly as elective subject teacher in Assamese vide order dated 20.6.1987 on the basis of the recommendation/selection of the State Selection Board made during the year 1986-1987. In the said order of regular appointment, it has been stipulated that the same would be from the date of issue of the order, i.e. 20.6.1987.

(c) Sri Bhaben Kalita, impleaded as respondent No. 5, vide order dated 28.5.2009, was initially appointed as subject teacher in Geography in Juria Higher Secondary School, Nagaon vide order dated 21.11.1984 passed by the Additional Director of Public Instruction purely on temporary basis and subject to the selection by the State Selection Board. He was thereafter, transferred and posted at Sarthebari Higher Secondary School vide order dated 2.8.1986 issued by the Director of Secondary Education, Assam, where he joined on 17.8.1986. The respondent No. 5 has been appointed as subject teacher in Geography on regular basis vide order dated 30.10.1990, in terms of the selection made by the State Selection Board in the year 1986-1987 and posted at Sarthebari Higher Secondary School, where he was working.

(d) The petitioner, the respondent Nos. 4 and 5 were thus appointed as subject teacher in 3 (three) different subjects, namely English, Assamese and Geography, respectively pursuant to the selection made by the State Selection Board the year 1986- 1987, i.e. by the same Selection Board in the same year, with effect from 30.8.1986, 20.6.1987 and 30.10.1990, respectively. The respondent Nos. 4 and 5 were working in Sarthebari Higher Secondary School when they were regularly appointed as subject teachers, with effect from 12.7.1986 and 2.8.1986, respectively. It is also an admitted position of fact that the petitioner and the respondent Nos. 4 and 5 were initially appointed as subject teachers in their respective subjects on ad-hoc basis and without there being any process of selection undertaken as required under the Assam Secondary Education (Provincialisation) Act, 1977 and the rules framed thereunder. They were, however, regularly appointed as subject teachers in their respective subjects while they were continuing in the said capacity on ad-hoc

basis.

3. The dispute relating to the seniority amongst the petitioner and the respondent Nos. 4 and 5 arose when the post of Principal of Sarthebari Higher Secondary School fell vacant on 1.3.2007 due to retirement of the Principal In-Charge of the said school, namely Sri Adhar Ch. Deka. Such dispute reached the Director of Secondary Education, Assam because of the appeal dated 3.4.2007 filed by the petitioner for declaration of his seniority over the said respondents.

4. The Director of Secondary Education, Assam vide order dated 18.7.2007 has determined the seniority amongst the petitioners and other teachers of Sarthebari Higher Secondary School including the respondent Nos. 4 and 5, holding that the respondent No. 4 Smti. Parbati Patowary is the senior most teacher of the said school. Such determination has been made on the basis of the dates of joining in the school by the teachers and by taking into consideration the period of ad-hoc services rendered by the petitioner and the respondent Nos. 4 and 5. Hence, the present petition.

5. I have heard Mr. R.P. Sarmah, the learned Senior Counsel for the petitioner, Mr. M.R. Pathak, the learned Standing counsel, Education Department appearing for the respondent Nos. 1 to 3, Mr. B. Goswami, the learned Counsel appearing on behalf of the respondent No. 4 and Mr. U. Bhuyan, the learned Counsel for the respondent No. 15.

6. Mr. Sarmah, the learned Senior counsel for the petitioner referring to the orders appointing the petitioner as well as the respondent Nos. 4 and 5 on regular basis as subject teachers in different subjects has submitted that the seniority amongst them has to be fixed on the basis of such regular appointment made after following the requirements of the Assam Elementary Education (Provincialisation) Rules, 1982 and hence, the period of ad-hoc services cannot be taken into consideration for the purpose of determination of seniority. According to the learned Senior counsel for the petitioner, the date of joining in Sarthebari Higher Secondary School by the petitioner and the respondents, while they were in ad-hoc service in, therefore, not material for the purpose of fixation of seniority in Sarthebari Higher Secondary School, as, such period of ad-hoc services cannot be counted for determination of seniority. Mr. Sarmah, therefore, submits that the date of regular appointment of the petitioner being before the respondent of the petitioner Nos. 4 and 5, the Director of Secondary Education, Assam ought to have declare him senior to the respondent Nos. 4 and 5. Mr. Sarmah, further, submits that the petitioner being senior to the respondent No. 4, the order passed by the Director dated 18.7.2007 needs to be interfered with and the necessary direction may be issued for allowing him to discharge the duties as Principal In-Charge till the regular selection and appointment to the said post is made. Mr. Sarmah, in support of his contention has placed reliance on the decision of the Apex Court in Direct Recruit Class-II Engineering Officers Association v. State of Maharashtra reported in 1992 (2) SCC 715 , as well as State of W.B. and Others Vs. Aghore Nath Dey and Others,

7. Mr. Pathak, the learned Standing counsel, Education Department referring to the various orders of appointments, on ad-hoc basis as well as on regular basis of the petitioner and the respondents, has submitted that though the petitioner was regularly appointed as subject teacher in English prior to the date of regular appointment of the respondent Nos. 4 and 5 as subject teachers in Assamese and Geography, respectively, the dates when the petitioner and the respondent Nos. 4 and 5 joined in the Sarthebari Higher Secondary School, are material for the purpose of allowing the teacher to be the in-charge Principal, till the regular selection and appointment is made, as the senior most teacher in the school is allowed to hold such charge. According to Mr. Pathak, though the period of ad-hoc services may not be counted for the purpose of determination of inter-seniority of the teachers in a cadre, such ad-hoc services has to be taken into consideration for the purpose of arriving at a decision, who should be the in-charge Principal, as has been done by the Director by the order dated 18.7.2007. The learned Standing counsel, Education Department has further submitted that in view of the full bench decision in WA No. 144.2002 Rukmini Borah v. State of Assam and Ors. and batch decided on 25.6.2009, whereby and whereunder Rule 24(2)(ii) of the Assam Secondary Education (Provincialised) Service Rules, 2003 has been declared as ultra vires the provisions of Articles 14 and 16 of the Constitution and wherein it has been held that the Graduate Classical Teachers and General Graduate Teachers though constitute two different cadres, by virtue of both categories having been included in Grade-TV of the service by the Assam Secondary Education (Provincialised) Service Rules, 1982 as amended by the 1991 amendment, they were brought at par or made equivalent with the same avenues of promotion on the basis of the same principle for determination of seniority, the Director has to initiate a fresh exercise to determine as to whether there is any Graduate Classical Teacher in Sarthebari Higher Secondary School, who is senior to the parties to the present writ petition, for the purpose of allowing any teacher to hold the charge of Principal on the basis of the seniority in the school.

8. Mr. Goswami, the learned Counsel appearing for the respondent No. 4 has submitted that it is not in dispute that the said respondent was initially appointed as Headmistress where she joined on 12.12.1974 and she received the graduate scale of pay in the year 1982, therefore, though she was subsequently appointed as subject teacher on ad-hoc basis in Rangapara Higher Secondary School vide order dated 14.11.1985, followed by the regular appointment on 20.6.1987, her period of service for the purpose of seniority has to be reckoned from 12.12.1974 when she joined as Headmistress of Chamata Girls' High School and accordingly, the seniority has to be determined. It has further been submitted that in any case, the basis allowing a teacher to hold the charge of Principal being the seniority in the school concerned, the respondent No. 4 having joined in Sarthebari Higher Secondary School on 12.7.1986 as against the petitioner, who joined in the said school on 1.12.1986, the respondent N. 4 has rightly been declared as senior in the school for allowing her to hold the charge of principal of

the said school.

9. Mr. Bhuyan, the learned Counsel appearing for the respondent No 5 has submitted that though the respondent No. 5, having the requisite qualification, was initially appointed temporarily vide order dated 21.11.1984, subject to selection by the State Selection Board, since such appointment continues and followed by regular appointment vide order dated 30.10.1990, dated of his initial appointment, i.e. 21.11.1984, would be relevant for the purpose of determination of seniority and not the date of regularisation in service. Referring to the decision of the Apex Court in Direct Recruit Class-II Engineering Officers Association, (supra) it has been submitted by Mr. Bhuyan that the respondent No. 5's initial appointment continued in the post uninterruptedly till the regularisation the service in accordance with the rules, hence the said period is to be treated as officiating service and, therefore, Seniority has to be determined with reference to the dated of his initial appointment. Mr. Bhuyan, however, has submitted that for the purpose of allowing a teacher to hold the post of Principal, the school wise seniority of the teachers is relevant. According to the learned Counsel, the respondent N. 4 having joined Sarthebari Higher Secondary School on 12.7.1986, during her ad-hoc services followed by regular appointment, she had rightly been allowed to hold the charge of Principal, the petitioner's date of joining in the said school being 1.12.1986. Mr. Bhuyan, therefore, submits that the Director has rightly passed the impugned order dated 18.7.1007.

10. I have considered the submissions of the learned Counsel for the parties and also perused the pleadings.

11. The facts noticed above are not in dispute. It is also the submission of the petitioner and the respondents that regular appointments were made on the basis of 3 (three) different merit lists prepared by the Board for English, Assamese and Geography. The question, which requires determination is whether the period of ad-hoc services is to be counted for the purpose of determination of seniority and also for the purpose of allowing a teacher to hold the charge of Principal in a particular school, till the regular selection and appointment is made.

12. The schools in which the petitioner as well as the respondent Nos. 4 and 5 were initially appointed as subject teachers, on ad-hoc basis, as well as to which they were transferred subsequently, i.e. Sarthebari Higher Secondary School, are provincialised school, those schools having brought under the scheme of provincialisation under the Assam Secondary Education (Provincialisation) Act, 1977 (in short, "the Act"). A set of rules, namely Assam Secondary Education (Provincialised) Service Rules, 1982 (in short, "1982 Rules") has been framed, in exercise of the power conferred by Section 3(3) of the Act, regulating the service conditions of teachers of such provincialised schools. Rule 3 of the 1982 Rules provides different classes and cadres. Rule 6 of the said rules lays down the methods of recruitment to the posts of post-graduate Teacher, Graduate Teacher, Senior Classical Teacher, Junior Teacher or Junior Classical Teacher, i.e. by direct recruitment based on selection to be conducted by the State Selection Board or

the Assam Public Service Commission, as the case may be. Rule 13 of 1982 Rules lays down the manner in which the inter-se- seniority of the teachers in respect of each cadre is to be determined. It provides that the inter-se-seniority of the existing employees in the respective cadre shall be determined in relation to the (a) dated of continuous appointment; (b) date of joining and (c) date birth. Sub-rule (2) therefore requires the Director to refer the matter to the State Government in case any dispute relating to the seniority arises. Sub-rule (3) of Rule 13 provides that in case of the members entering into the service on and after the "appointed day" their inter-se-seniority is to be determined on the basis of the merit list furnished by the Board or the Commission, as the case may be. The 1982 rules has been amended by the Assam Secondary Education (Provincialisation) Service Rules (Amendment) Rules, 1991 (in short, "the 1991 Amendment Rules"), which came into effect from 3.2.1992. Rule 3 of 1982 Rules has been substituted by a new rule, so also Rules 6, 7, 8, 9 and 10. That apart, the words "or the Commission as the case may be" occurring in Sub-rule (3) of Rule 13 of the said rule have also been deleted. By such amendment, the power of selection vested only on the Board and the inter-se-seniority of the members entering into service on or after the appointed day is required to be determined on the basis of the merit list furnished by the Board.

13. "Appointed day" has been defined in Section 2(i) of the Act, as the day on which the Act came into force in relation to any area. "Existing employee" has been defined in Section 2(iv) as the employee who is, on the appointed day, in the regular pay roll against regularly sanctioned post and whose appointment has been approved by the school authority.

14. The 1982 Rules, as amended by the 1991 Amendment Rule has, however, been repealed and replaced by a new set of Rules, namely the Assam Secondary Education (Provincialised) Service Rules, 2003 (in short, "2003 rules"), which came into force on 11.8.2009. The said 2003 rules also prescribe the classes and cadres in service, the method of recruitment to different posts including the post of Subject Teacher (Post Graduate Teachers), Graduate Teachers, Classical Teachers etc. apart from the post of Principals and Vice Principals of Higher Secondary Schools. Rule 24 of the said rules stipulates that the inter-se-seniority of the teachers of graduate cadre and post graduate cadre on a school shall be considered/determined for filling up the vacancies of Vice Principal on the basis of (i) the date of continuous service in the school irrespective of graduate or post graduate post on regular basis; (ii) the date of joining; (iii) the date of birth, position in the merit list recommended by the State Selection Board; (vi) the date of birth in case the employees holding same position in the merit list."

15. The 1982 Rules as amended by the 1991 Amendment rules as well as 2003 Rules requires appointment to the post of postgraduate teachers (subject teachers) on the basis of the advertisement and selection to be conducted by the State Selection Board. Neither of the Rules provides for ad-hoc appointment or

regularisation of such ad-hoc appointment. Any appointment made on ad-hoc basis is, therefore, de-hors the Rules. In the case in hand, it appears that the initial appointment of the petitioner and the respondent Nos. 4 and 5 as subject teachers in English, Assamese and Geography, respectively, were ad-hoc in nature, without initiating any process of selection and as a stop gap arrangement, subject to the selection by the State Selection Board as required by the Rules. Such appointment, however, were followed by the regular appointments made on 30.8.1986 (petitioner); 20.6.1987 (respondent No. 4) and 30.10.1990 (respondent No. 5). Those regular appointments were made after their selection by the State Selection Board in terms of the 1982 Rules, which was in force at that relevant point of time.

16. The 1982 Rules requires determination of inter-se-seniority of the employees, in each cadre, who entered into service after the "appointment day", i.e. the date when the school was brought under the scheme of provincialisation, on the basis of the position in the merit list prepared by the State Selection Board. The petitioner, the respondent Nos. 4 and 5 were admittedly not the "existing employees" within the meaning of Section 2 (vi) of the Act and, therefore, their seniority is required to be determined as provided in Rule 13(3) of the 1982 Rules.

17. In the case in hand, the State Selection Board prepared the merit lists in the year 1986-1987. As submitted by the learned Counsel for the contesting parties and the learned Standing Counsel, 3 (three) different merit lists of successful candidates for appointment as Subject Teachers were prepared in respect of English, Assamese and Geography. The petitioner was appointed as subject teacher in English and the respondent Nos. 4 and 5 were appointed as Assamese and Geography, respectively, on the basis of the different merit lists prepared by the Board and hence their seniority cannot be determined on the basis of the merit lists furnished by the Board, such merit lists being different in different subjects. Hence, the seniority in the cadre of postgraduate teacher has to be determined on the basis of the length of regular service, i.e. the date when they were regularly appointed. In this case, the petitioner was regularly appointed on 30.8.1986 and the respondent Nos. 4 and 5 were appointment on 20.6.1987 and 30.10.1990, respectively,

18. It appears from the order impugned dated 18.7.2007 passed by the Director that while determining the school wise seniority of the petitioner and the respondents, the period of ad-hoc service has been taken into consideration, though such period of ad-hoc services cannot be taken into consideration for the purpose of fixation of seniority of any teacher, whether it is the seniority in the cadre or the school wise seniority. The Apex Court in Direct Recruit Class-II Engineering Officers Association, case has held that (A) once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad-hoc

and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority; (B) if the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted. The Apex Court in Aghore Nath Dey case explaining the ratio laid down in Direct Recruit Class-II Engineering Officers Association case has held that conclusion (B) in the said case cannot cover cases which are expressly excluded by conclusion (A) and hence conclusion (B) cannot include within its ambit, those cases, which are expressly covered by the corollary in conclusion (A) since the two conclusions cannot be read in conflict with each other.

19. As noticed above, the appointments of the petitioner so also the respondent Nos. 4 and 5, prior to their regular appointment in accordance with the rule, were ad-hoc, without any selection, dehors the rules and as stop gap arrangement. The period of such ad-hoc services cannot, therefore, be counted for the purpose of determination of seniority and the relevant date for determination of seniority would be the dates when they were regularly appointed under the Rules.

20. Rule 13(3) of the 1982 Rules, as amended, provides for fixation of inter-seniority on the basis of the date of regular appointment, in the cadre. Rule 24(1) of 2003 Rules also require fixation of the inter-seniority of the teachers of graduate cadre and post graduate cadre in a school on the basis of the date of continuous services in the school irrespective of graduate or post graduate post on regular basis, hence, the contention of the respondents that for determination of the school wise seniority, the date of the joining in the school even on ad-hoc basis and not the date of regular appointment is relevant, and hence, the respondent No. 4 having joined in the said school on 12.7.1986 as against the petitioner, who joined on 1.12.1986, the Director has rightly declared the respondent No. 4 as senior for allowing her to hold the charge of principal, cannot be accepted as the period of ad-hoc service cannot be taken into consideration, whether it is for fixation of cadre wise seniority or school wise seniority. Admittedly the petitioner as well as the respondent Nos. 4 and 5 regularly appointed as post graduate teachers (subject teacher) on 30.9.1986; 20.6.1987 and 30.10.1990, respectively. The petitioner was thereafter, transferred to Sarthebari Higher Secondary School vide order dated 30.9.1986, where he joined on 1.12.1986 and the respondent Nos. 4 and 5 were working in the said school on ad-hoc basis when they were regularly appointed as subject teachers on 20.6.1987 and 30.10.1990, respectively. The further contention of the respondent No. 4 that the period of service rendered by her prior to her ad-hoc appointment as subject teacher is also to be taken into consideration for the purpose of seniority, cannot also be accepted on the simple ground that she has left the post of graduate teacher on her appointment as subject teacher, initially on ad-hoc basis, and followed by regular appointment as subject teacher on 20.6.1987.

21. A fully Bench decision of this Court in Rukmini Borah, (supra) in its judgment dated 25.6.2009 has held that the seniority of the graduate classical teachers shall also required to be determined on the basis of the 1982 Rules as amended by 1991 Amendment rules as they were brought at par or made equivalent with the general graduate teacher, with the same avenues of promotion on the basis of the same principle for determination of seniority. The full Bench has also declared Rule 24(2)(ii) of 2003 Rules as ultra vires the Articles 14 and 16 of the Constitution, by which the seniority of those classical teachers was given with effect from 3.8.1990. Hence, the Authority, for the purpose of determining the seniority of the teachers of Sarthebari Higher Secondary School, so as to allow the senior most teacher of the school to be the in-charge Principal,, till the regular appointment is made, is now required to ascertain whether there is any other classical graduate teacher in the school, who is senior to the petitioner or any other teachers, as admittedly the criteria for allowing a teacher to hold the charge of Principal is seniority in the school.

22. In view of the aforesaid discussion, the impugned order dated 18.7.2007 passed by the Director is set aside. The authority is directed undertake the exercise of fixation of seniority of teacher of the school in question afresh, within 6 (six) weeks from today, for the purpose of allowing the senior most teacher of the school to hold the charge of Principal, in the light of the observations made hereinabove, till the post is regularly filled up by a regularly selected candidate in accordance with rules. For the aforesaid period of 6 (six) weeks, the present arrangement of allowing the respondent No. 4 to hold the charge of Principal of the school, shall, however, continue.

23. The writ petition is accordingly allowed to the extent indicated above. No cost.