
(2007) 08 GAU CK 0007
In the Gauhati High Court
Case No : Writ Petition (C) No. 3127 of 2006

Kanan Kumar Pandit

APPELLANT

Vs

Commissioner and Secretary, Education Department and
Others

RESPONDENT

Date of Decision : 31-08-2007

Acts Referred:

Assam Secondary Education (Provincialised) Service Rules, 1982 — Rule 10, 10A, 3, 9

Citation : (2008) GLT 788 Supp

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : S. Bora, for the Appellant; M. Bordoloi and I. Hussain, for the Respondent

Judgement

B.K. Sharma, J.—The challenge made in this writ petition is the appointment of the Respondent No. 5 as Assistant Headmaster on regular basis. According to the Petitioner, the select list, on the basis of which the Respondent No. 5 has been appointed, having long expired, the impugned order could not have been issued appointing her on regular basis on the basis of the said select list.

2. Although certain contentions have been raised by both the parties relating to service seniority etc., the same need not be gone into, in view of the fact that the only challenge made in the writ petition is the order dated 26.5.2006 by which the Respondent No. 5 has been appointed as Assistant Headmaster of the school in question on regular basis. In fact, the learned Counsel for the Petitioner, during the course of hearing, fairly submitted that the issue relating to the seniority between the Respondent No. 5 and the Petitioner need not be gone into in this proceeding and that the Petitioner would be satisfied if an adjudication is made on the legality and validity of the impugned order dated 26.5.2006.

3. A selection for appointment of Assistant Headmaster was made in the year 1999 and the Respondent No. 5 was placed at SI. No. 3 of the select list in

respect of the school in question. Her selection was put to challenge by one Shri Subhash Sen by filing an appeal being ATA No. 37/2001 in the Assam Administrative Tribunal. During pendency of the appeal, the Respondent No. 5 approached this Court by filing the writ petition being W.P. (C) No. 4477/2001, which was disposed of by order dated 29.6.2001 providing disposal of the representation dated 26.3.2001 submitted by the Respondent No. 5 to the Director of Secondary Education, Assam. The representation was to be disposed of in accordance with rules and regulations. According to the Petitioner, the writ petition was filed by the Respondent No. 5 in total suppression of fact that her very selection was under challenge in the aforesaid appeal before the Tribunal.

4. After the aforesaid selection was held in 1999, the Respondents held another selection in 2002 in respect of the school in question. According to the Petitioner, in view of holding such selection in 2002, the earlier select list prepared in 1999 became redundant. However, the Respondent No. 5 has been appointed by the impugned order dated 26.5.2005 on the basis of the said selection of 1999 which according to the Petitioner, is illegal and arbitrary.

5. The post of Assistant Headmaster in the school remained unfilled since 2001 to 2006 and the affairs of the school was managed through the Assistant Headmaster-I/C. According to the Petitioner, he appeared in the selection conducted in 2001/2002 and has been selected. Referring to the provisions of the relevant rules, it has been contended by the Petitioner that the select list of 1999 could not have been made operative in 2006 in view of the stipulation that such select list would expire on completion of one year. Further stand of the Petitioner is that since a new selection was held in 2001/2002, the earlier select list prepared on the basis of the 1999 select list could not have been acted upon in 2006.

6. The Respondent No. 5 in her affidavit has denied the contention raised in the writ petition. It is her case that since she was a selected candidate, there is nothing wrong in appointing her as Assistant Headmistress in the school by the impugned order. In Para -12 of the affidavit, it has been stated that the official Respondents, even in absence of any interim order restraining them from appointing, did not appoint her and in the meantime, with the creation of Bodoland Territorial Council (B.T.C.), now B.T. A.D., the matter relating to appointment came within the purview of the B.T.A.D. Accordingly, by the impugned order issued by the Director of Education, B.T.C., she was appointed by the impugned order dated 26.5.2006.

7. In Para-15 of the counter affidavit also, the Respondent No. 5 has stated that there was no interim order passed by the Tribunal restraining the official Respondents from appointing her on the basis of the select list of 1999. In Para-16 of the same, it has been stated that the Respondent No. 5 ought to have been promoted as Asstt. Headmaster in 2001 itself i.e. within the validity period of the select list, but she could not be appointed due to pendency of the appeal before the Tribunal. According to the Respondent No. 5, she had the right to be

considered for promotion till such time the proceeding before the Tribunal continued which came to an end on dismissal of the appeal by order dated 13.12.2006.

8. The official Respondents have not filed any counter affidavit. The Respondent No. 5 has also filed an additional affidavit followed by an affidavit filed by the Petitioner. In the additional affidavit filed by the Respondent No. 5 on 9.4.2007, it has been stated that she could not be promoted to the post of Headmaster in view of the pendency of the appeal before the Tribunal. On the other hand, in the additional affidavit filed by the Petitioner on 27.7.2007, it has been stated that the select list prepared in 1999 having been approved by order dated 14.9.2000, the same got expired upon expiry of one year from 14.9.2000 as per the provisions of the rules. The affidavit has referred to the letter dated 2.2.2002 issued by the Inspector of Schools, Kokrajhar to the respective schools furnishing information regarding a fresh selection scheduled to be held on 26.2.2002. In response to this letter, the school authority by its letter dated 4.2.2002 (Annexure-8 to the addl. affidavit) asked for clarification from the Inspector of Schools as to the number of senior graduate teachers required to be sent for selection. Thereafter, Annexure-9 was prepared containing the names of 5 (five) senior teachers of the school for their appearance in the selection scheduled to be held on 26.2.2002, which included the Petitioner.

9. From the aforesaid pleadings of the parties, what has transpired is that while it is the case of the Petitioner that the select list prepared in 1999 approved on 14.9.2000 could not have been made operative in 2006, after expiry of the validity period and holding of a fresh selection in 2002, it is the case of the Respondent No. 5 that since she could not be promoted in view of the pendency of the appeal before the Tribunal, there was nothing wrong in appointing/promoting her by the impugned order after disposal of the appeal by the Tribunal.

10. The question which calls for consideration is as to whether the Petitioner could have been appointed/promoted as Assistant Headmaster of the school on the basis of the selection made in 1999, approved of 14.9.2000.

11. The post of Headmaster of the school had fallen vacant on 13.7.2001 upon retirement of the incumbent namely, Shri R.K. Das. Thus, the selection held in 1999 was prior to the actual vacancy occurred. Regarding this vacancy position, there is specific averments in Para-5 of the writ petition. There is no denial on the part of the Respondent No. 5. At the time when the selection was conducted, the rules holding the field was the Assam Secondary Education (Provincialized) Service Rules, 1982. Rule 3 of the Rules indicates the class and cadre. It includes the post of Assistant Headmaster in Grade-in. Rule 9 of the Rules provides for recruitment by promotion amongst others to the post of Assistant Headmaster. Rule 10 of the Rules indicates the Selection Board.

12. Rule 10A of the Rules lays down the general procedure for promotion as per which, before the end of each year, the appointing authority shall make an

assessment of the likely number of vacancies to be filled up by promotion in the next year in each cadre and in each school. The requirement of the procedure is to furnish to the Selection Board the relevant information such as, number of vacancies and the candidates for promotion in order of seniority, character rolls and other records are also required to be forwarded. Further requirement of Rule 10A of the Rules is that the appointing authority shall request the Board to recommend within one month a list of candidates found suitable for promotion in order of merit and the Board shall recommend the candidates about double the number of vacancies in order of preference. The appointing authority on receipt of the list of recommended candidates from the Board shall fill up the vacancies in accordance with the preference shown in the list.

13. Considering the fact that the selection was conducted in 1999, but the vacancy in the school had arisen on 31.12.2001, the question necessarily arises as to whether the appointing authority could have considered the said vacancy in 1999. As per Rule 1 OA of the Rules, the assessment of vacancies is to confine to the likely number of vacancies to be filled up by promotion in the next year. If the selection was held in 1999, the year thereafter being 2000, the vacancy which occurred on 31.12.2001 could not have been accounted for.

14. Although there is no specific provision in the rules regarding the validity period of the select list, but having regard to the fact that Rule 10 A of the Rules provides that before the end of each year, the appointing authority shall make an assessment of the likely number of vacancies to be filled up by promotion in the next year in each cadre and in each school, as a natural consequence thereof, the validity of the select list will be for a period of one year. In this connection, I may gainfully refer to the decision of the Apex Court in *Union of India and others Vs. N.R. Banerjee and others*, in which the Apex Court noticing frequency of the panel to be prepared against the vacancies occurring during the course of a year, observed that the life of the panel is one year. In this connection, Para-5 of the judgment is quoted below:

(5) Part II of the guidelines relating to the frequency of meeting of the D.P.C. Para 3.1 indicates that the D.P.Cs should be convened at regular annual intervals to draw panels which could be utilized for making promotions against the vacancies occurring during the course of a year. In other words, the life of the panel is one year. For this purpose, it is essential for the concerned appointing authorities to initiate action to fill up the existing as well as anticipated vacancies well in advance of the expiry of the previous panel, by collecting relevant documents like, A.C.Rs, integrity certificates, seniority list etc. for placing before the D.P.C.

(Emphasis added)

15. Apart from the fact that as per the requirement of Rule 10A of the Rules, the appointing authority, while making the selection in 1999 could not have visualized the vacancies of December, 2001 in view of the fact that as per the

said requirement, the selection could have been conducted pertaining to the vacancies of 2000, the frequency of the penal having indicated in Rule 10A of the Rules which is every year, the select list prepared in 1999, even if counted from the date of the approval, which is 14.9.2000, got expired on 13.9.2001.

16. As per own admission of the Respondent No. 5, there was no stay order towards her appointment. Strictly speaking, on the basis of the select list prepared in 1999, she could not have been appointed against the vacancy occurred on 31.12.2001 and that too, in 2006. The only direction issued towards disposal of the writ petition being WP(C) No. 4477/2001 was to dispose of her representation dated 26.3.2001. In the impugned order, this is the order which has been mentioned coupled with the Government letter dated 19.3.2004. However, the learned Counsel for the official Respondents in spite of granting opportunities, failed to produce this letter for perusal of the Court. Be that as it may, by operation of rules, the selection of the Respondent No. 5 being not against the vacancy occurred on 31.12.2001 and the select list having been expired in the normal circumstances, the Respondent No. 5 could not have been appointed/promoted on the basis of the letter issued by the Government in 2004.

17. Since the impugned order also mentions about the order dated 29.6.2001 passed in the writ petition filed by the Respondent No. 5 being WP (C) No. 4477/2001, the case file was called for and has been perused. On persual of the same, it appears that there is no dispute regarding the selection held by the State Selection Board for selection to the post of Assistant Headmaster. Such selection was held on 25.10.1999 and thus, the vacancy occurred on 31.12.2001 on account of retirement of the regular incumbent could not have been visualized in the said selection. However, on perusal of the records relating to WP(C) No. 4477/2001, it appears that there is averment relating to retirement of the regular incumbent on 31.12.2000, but in the present proceeding, both the parties have indicated that the date of retirement of the said incumbent was 31.12.2001.

18. If the regular incumbent had retired on 31.12.2000 then in that case, the selection conducted in 1999 could take note of the said vacancy, but in case, he had retired on 31.12.2001, the said vacancy could not have been taken into account in the selection conducted in 1999. In absence of any clear picture, the conclusion shall be that if the said vacancy had occurred on 31.12.2001, the 1999 selection could not have been taken note of the said vacancy, but if in fact, he retired on 31.12.2000, the said vacancy would be within the purview of the 1999 selection.

19. This now leads us to the case of the Respondent No. 5 that she could not be appointed in view of the pendency of the proceeding before the Tribunal. As noted above, the Tribunal never issued any order of stay restraining the Respondents from appointing the Respondent No. 5. This is the own case of the Petitioner. In fact, in the additional affidavit filed by the Respondent No. 5, she has categorically stated in Para 16 of the counter affidavit that she ought to have

been appointed during the validity period of the select list. However, she has justified her appointment/promotion in 2006 on the ground of pendency of the proceeding before the Tribunal.

20. The official Respondents have not filed any counter affidavit and thus, the pleas of the Petitioner got unrefuted. However, the learned Standing Counsel, B.T.C., has produced the file bearing No. DE/BTC/HE/3/ 2006 purportedly the relevant file pertaining to the case. The file contains the para-wise comments of the Inspector of Schools forwarded to the Directorate of B.T.C. The only plea taken in Para-wise comments is that after the selection conducted in 1999 and published in 2000, no other select list has been, prepared. The plea of the Petitioner that in the meantime, another selection was-held in 2002, has not been denied. From the select list placed on record, it appears that there was other two teachers above the Petitioner in the select list. However, it is submitted that the said two teachers having retired from service, could not be appointed. On being asked, the particulars relating to their dates of retirement, none of the learned Counsel could furnish anything. Their dates of retirement will have a bearing inasmuch as the Petitioner's position was at SI. No. 3 of the select list. Thus necessarily, it is the said two incumbents above her should have been considered for promotion during the validity period of the select list. The records also do not contain the Government letter dated 19.3.2004 about which a mention has been made in the impugned order dated 26.5.2006. The records also do not indicate as to how the case of the Respondent No. 5 was processed and finalized. The file purportedly containing the relevant records, unfortunately does not have the relevant note sheets.

21. For all the aforesaid reasons and in absence of any assistance from the official Respondents, I deem it fit and proper to refer the matter back to the said Respondents for a decision consistently with the observations made above. Since the matter pertains to BTC, but the impugned order refers to the Government's letter dated 19.3.2004, it will be appropriate if the Respondent No. 3 takes the decision, if need be, in consultation with the Respondents No. 1 and 2. The decision shall be taken indicating the reasons thereof in the form of a speaking order. The order shall be passed as expeditiously as possible but at any rate, not later than 15.11.2007 and shall be communicated to the parties involved. 22. With the above direction and observation, the writ petition is disposed of, without, however, any order as to costs.