

(2019) 03 GAU CK 0008
In the Gauhati High Court
Case No : Writ Petition (C) No. 4462 Of 2015

Khanindra Kalita

APPELLANT

Vs

State Of Assam And 8 Ors

RESPONDENT

Date of Decision : 06-03-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2019) 03 GAU CK 0008

Hon'ble Judges : Kalyan Rai Surana, J

Bench : Single Bench

Advocate : R.C. Saikia, P. Khataniar, K. Saikia, A. Borah, Karabi Saikia, J. Abedin, R. Boro Bora, P. Nayak, J. Kalita

Judgement

1. Heard Mr. R.C. Saikia, learned counsel for the petitioner as well as Mr. J. Abedin, learned standing counsel for Education (Secondary) Department, respondents No. 1 to 4 and 7. Also heard Ms. R. Boro Bora, learned standing counsel for the BTAC, respondents No. 5 and 6 and Mr. P. Nayak, learned standing counsel for the Revenue Department, respondent No. 8 and Mr. J. Kalita, learned counsel appearing for respondent No.9.

2. By this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the order under Memo No. GB-EST/DSE/CC/60/2012/159 dated 10.05.2012 by which, it was projected that the service of the petitioner, Sri Khanindra Kalita, Assistant Teacher of Paschim Banbhag H.S. School, Khatikuchi, Nalbari was adjusted w.e.f. 01.02.2003 and hence, he would be not covered by the "New Defined Contribution Pension Scheme", which was applicable for all new entrants joining State Govt. Service on regular basis after 01.02.2005.

3. The truncated facts, relevant for the purpose of this order is segregated into three parts for the sake of convenience:

a) The first part relates to the claim of the petitioner that he had participated in

the selection process for being appointed as Addl. Science Teacher, claiming his right under the scheme of 10% quota reserved for sons and unmarried daughters of retired teachers, then in force in the State by projecting that his father Sri Narayan Kalita had retired on superannuation on 30.04.1999 as an assistant teacher. The petitioner claims to be initially appointed as an Assistant Teacher on honorary basis by the Principal of Paschim Banbhag LP School on 28.01.1991, in which capacity he had worked till 31.01.2003. He claims to have participated in the selection process for appointment of Addl. Science Graduate Teacher conducted by the District Level Selection Committee in the year 1992 and it is projected that the name of the petitioner appeared at Sl. No. 125 in the Selection List. As per statement made in para 8 of the writ petition (which does not co- relate to the contents of Annexure-3 of the writ petition), it is claimed that the petitioner appeared in a selection test and interview conducted for selection of Assistant Teachers and though his name appeared in Sl. No. 125 of the Select List, he was not appointed. Relying on the judgment passed by this Court in WP(C) 5394/1999, it is projected that this Court had issued a direction for consideration the case of the petitioner against the scheme of 10% quota reserved for appointment of sons and daughters of retired assistant teachers and therefore, by a letter/ order dated 25.02.2003, the Inspector of Schools, NDC, Nalbari is stated to have allowed the petitioner to draw his monthly salary against the vacancy which arose due to retirement of Sri Anil Kumar Sarma, 18 of Nehru Milon High School, Kharuajan, who retired on 31.01.2003. Thereafter, by order dated 07.06.2004, the service of the petitioner was adjusted against the post of Assistant Teacher at Nehru Milon High School, Kharuajan, but attached to Paschim Banbhag H.S. School, Khatikuchi. Thereafter, as per the request of Joint Director of Secondary Education, Assam dated 29.07.2006, the GPF account of the petitioner was opened on 12.10.2006 by the Accountant General (A & E), Assam by allotting the petitioner an Account No. PED/291314, showing the date of his joining as 01.02.2003.

b) The second part relates to the stoppage of the salary of the petitioner since 01.01.2006 for which the petitioner had approached this Court by filing WP(C) 1573/2007, which was disposed of by order dated 03.08.2007 in same lines as in the judgment and order passed in the case of Sudhendu Mohan Talukdar Vs. State of Assam, WP(C) 2147/1999, disposed of on 06.04.2006. The matter was then taken up by the Expert Committee. The Sub-Committee heard the matter relating to the petitioner on 08.02.2008 and on examination of the documents, it was held that the petitioner was appointed after due selection and it was recommended that his service maybe regularized against the vacancy in PBHS School. However, the Expert Committee in its meeting held on 18.09.2008 observed that the appointment of the petitioner was illegal and without authority and it was recommended that the State Government may not interfere with the appointment matter of BTAD as has been done in that case and the Committee finally recommended as follow: (a) rejection of the claim of the petitioner, (b) by directing charges against the concerned Inspectors of Schools for illegal action

and (c) to consider the case of the petitioner for appointment on compassionate ground against 10% quota in the next drive of appointment as and when made in compliance of the order by this Court. The petitioner had challenged the Expert Committee's decision taken on 18.09.2008 by filing WP(C) 5532/2010. This Court, by order dated 24.02.2012, having observed that there was no reference to the finding arrived at by the Sub-Committee, set aside the recommendation of the Expert Committee insofar as the petitioner is concerned and directed the authorities to pay salary to the petitioner from March, 2006 as expeditiously as possible, but at any rate, not later than 31.03.2012, failing which consequences thereof including withholding of salary of the respondents would follow. Referring to the said order, the Director of Secondary Education, Assam, having observed that although this Court had directed for release of the salary of the petitioner from 01.03.2006, but as salary of the petitioner was due w.e.f. 01.01.2006, request was made to the Government to release the salary of the petitioner w.e.f. 01.01.2006 with a further request to allow the director to adjust the petitioner w.e.f. 01.01.2006 against the vacant post of Assistant Teacher (Science Graduate) in Paschim Banbhag H.S. School, Khatikuchi, Nalbari. Accordingly, by order under Memo No. GB-EST/DSE/CC/60/2012/151 dated 04.04.2012, the petitioner was adjusted in the said school w.e.f. 01.01.2006 in the pre-revised scale of pay of Rs.3,580/- to Rs.8,750/- per month plus other admissible allowances against the vacant post of Late Lakshidhar Talukdar, Assistant Teacher, expired, which was done with the approval of Finance (SIU) Department as well as Government approval accorded by letter dated 30.03.2012.

c) The third part relates to the grievance of the petitioner relating to Office Memorandum dated 06.10.2009 by which the State had introduced "New Defined Contribution Scheme", providing that the scheme would be applicable to all new entrance joined State Government services on regular basis against the vacant sanctioned posts on/ or after 01.02.2005, pursuant to which the impugned letter dated 10.05.2012 was issued covering the petitioner under new Pension Rules.

4. The learned counsel for the petitioner has submitted that in Clause 4 of the said O.M. dated 06.10.2009, it is provided that "the existing provisions under defined benefit pension and GPF would not be applicable to new Govt. Servants joining Govt. Services on/ or after 01.02.2005". In this connection, it is submitted that in the GPF account number given to the petitioner by the Accountant General (A & E), Assam, the date of joining of the petitioner in Govt. service is shown as 01.02.2003, which is also reiterated in the order dated 15.07.2013, passed by the Inspector of Schools, NDC, Nalbari and also entered in his service book. It is further submitted that the petitioner had become entitled to be appointed as the Assistant Teacher in the school in question under the 10% quota reserved for sons and daughters of retired teachers for which he had participated in the selection process in the year 1992 and therefore, as the petitioner had being initially appointed as Graduate Teacher on 28.01.1991, on honorary basis, the petitioner is deemed to be in the Govt. Service since

28.01.1991 and in extreme case w.e.f. 01.02.2003 as per the letter of allotment of GPF account dated 12.10.2006 when the date of joining is reflected as 01.02.2003. Referring to the order dated 24.02.2012 passed by this Court in WP(C) 5532/2010, it is submitted that this Court had taken into cognizance of the adjustment of the petitioner in the year 2004 vide order dated 07.06.2004 and therefore, merely because the respondents had delayed in regularly appointing the petitioner, the petitioner cannot be compelled to join the New Defined Contribution Pension Scheme w.e.f. 01.01.2006. It is submitted that if the petitioner is compelled to join the new scheme, it would be adversely affect his service career because from all intents and purposes, the petitioner is deemed to be in Govt. service since 28.01.1991 and in extreme case w.e.f. 01.02.2003, which is the date entered in the service book of the petitioner. In support of the submissions, the learned counsel for the petitioner has relied on the case of Kailash Kalita Vs. State of Assam and Ors., WP(C) 710/2011, disposed of by judgment and order dated 20.04.2017 to project that the petitioner had become entitled to be appointed as the Assistant Teacher under the 10% quota, which can be related back to the year 1992 when District Level Selection Committee had selected the petitioner for appointment as Addl. Science Teacher, as his name appeared in Sl. No. 125 in the selection list and moreso, because similarly situated persons have been given benefits of a regular service as an Addl. Science Teacher under Nalbari District and Secondary Schools and who have been treated as Govt. employee ever since their date of appointment and, as such, the learned counsel for the petitioner has invoked the principles of parity and principles of equality in law. It is also submitted that the new pension scheme that has been introduced is financially detrimental to the interest of the petitioner.

5. The learned standing counsel for the Secondary Education Department has submitted that the petitioner is clubbing up two separate issues. According to him, the first issue relates to his claim for appointment under 10% quota reserved for sons and daughters of the retired teachers. In that regard, it is submitted that in the said selection process, notwithstanding the claim of the petitioner that his name was at Sl. No. 125, the petitioner was never appointed as an Addl. Science Teacher or as an Assistant Teacher under the said 10% quota scheme. According to the learned standing counsel for the Secondary Education Department, the second part of the claim of the petitioner is that as per para 3 of this writ petition, it is claimed that the petitioner was working as honorary Science Graduate Teacher in Paschim Banbhag L.P. School on and from 28.01.1991 where he had worked his same capacity till 31.01.2003 on a honorary basis. Therefore, on the aforesaid facts, it is submitted that at the own showing of the petitioner, he was working as a Science Teacher on honorary basis from 28.01.1991, the petitioner cannot have legitimate for appointment under the 10% quota. By referring to the order dated 17.04.2003 (Annexure-7 of writ petition), it is submitted that as on 17.04.2003, the Government was considering the matter of appointment of the petitioner under 10% quota and there was no

whisper of the appointment of the petitioner in Paschim Banbhag H.S. School. Hence, it is submitted that in convenience with the then In-charge Inspector of Schools, Nalbari, the petitioner had been able to procure the order dated 25.02.2003 from the In-charge Inspector of Schools, Nalbari wherein by referring to order passed in WP(C) 5394/1999, the Inspector of Schools had allowed the petitioner to draw his monthly salary against the vacancies which arose due to retirement of Sri Anil Kumar Sarma, Assistant Teacher of Nehru Milon High School, Kharuajan, who retired on 31.01.2003 by mentioning therein that the monthly salary are admissible w.e.f. 01.02.2003. It is submitted that the petitioner was not appointed under the said 10% quota. It is submitted that the said Nehru Milon High School, Kharuajan was a school falling under control of Bodoland Territorial Autonomous Council (BTAC) and therefore, no appointments to the said schools could have been made without the concurrence of BTAC. Realizing the said position, the then In-charge Inspector of Schools by a subsequent order dated 07.06.2004, once again referring to WP(C) 5394/1999, while adjusting the petitioner against the post of Assistant Teacher at Nehru Milon High School, Kharuajan attached the petitioner to Paschim Banbhag H.S. School, Khatikuchi with immediate effect. It is submitted that in this manner, the petitioner, who was appointed as temporary teacher in Paschim Banbhag H.S. School, Khatikuchi was surreptitiously shown to be in regular Govt. service w.e.f. 01.02.2003. It is further submitted that the entry of date of joining as 01.02.2003 in the GPF account number, itself does not create any right in favour of the petitioner because it is only by way of the order dated 04.04.2012 (Annexure-23 of the writ petition), the service of the petitioner was regularly appointed w.e.f. 01.01.2006, but by then, the New Defined Contribution Pension Scheme as notified on 06.10.2009 had come into effect from 01.02.2005 and accordingly, Govt. servants who were regularized against regular post on/ or after 01.02.2005 would not be able to join the earlier pension scheme, which was not in force for them.

6. It is further submitted that the aforesaid facts could not be properly placed before this Court when the WP(C) 5532/2010 was heard and disposed of by order dated 24.02.2012 and as the said order has attained finality, the Secondary Education Department had to adjust the petitioner as Assistant Teacher in the Paschim Banbhag H.S. School, Khatikuchi so as to avoid a personal liability under the contempt jurisdiction because even otherwise the petitioner was in honorary service in the said school for a long time and was entitled to continue salary for his service rendered in the said school. It is further submitted that as the petitioner has not challenged the order dated 04.04.2012 (Annexure-23) by which his service was regularized w.e.f. 01.01.2006, the challenge made against the order dated 10.05.2012 (Annexure-31) was not sustainable as this was a follow up pursuant to the regular appointment of the petitioner w.e.f. 01.01.2006.

7. The learned standing counsel for the Finance Department has submitted that it is evident from the order dated 03.08.2007, passed in WP(C) 1573/2007

(Annexure-15 to the writ petition), this Court had observed that though the petitioner was selected for regular appointment, his services had not been regularized and his salary had not been released since 01.01.2006. The said observation demonstrated that while filing the said WP(C) 1573/2007, the petitioner was aware that his service was not regularized and therefore, a mere entry in the service book of the petitioner showing him to be working since 01.02.2003 would not make him a regularized Assistant Teacher. It is submitted that the regularization of service of the petitioner w.e.f. 01.01.2006 came about pursuant to the request made by the Director of Secondary Education, Assam to the Secretary to the Govt. of Assam, Education (Secondary) Department by his letter dated 14.03.2012 (Annexure-22), which was followed by the order of regularization dated 04.04.2012 as Assistant Teacher in Paschim Banbhag H.S. School, Khatikuchi. It is further submitted that as per the subsequent notification issued by the Govt. of Assam, Finance (Budget) Department, it made clarified that a Govt. servant joining the State Govt. service on/ or after 01.02.2005 shall be governed by the New Defined Contribution Pension Scheme, as such, they are not entitled to enjoy the benefit of the existing Assam Service (Pension) Rules, 1969 and GPF Rules.

8. The learned counsel appearing for the standing counsel for BTAC as well as the learned counsel appearing for the respondent No. 9 have made their respective submission in support of the petitioner.

9. Having examined the materials on record, it appears from the order dated 24.04.2012 passed by this Court in WP(C) 5532/2010, this Court had directed that the respondents are to pay the salary of the petitioner from March, 2006 onwards. Although there is an observation in the said order that the petitioner was adjusted in the year 2004 vide order dated 07.06.2004, but there is no finding given by this Court that the said order dated 07.06.2004 gives the petitioner the status of a regular appointee to the post of Assistant Teacher in the Paschim Banbhag H.S. School, Khatikuchi. No material has been placed before this Court that merely by adjustment of the petitioner to Nehru Milon High School, Kharuajan and the attachment of the petitioner to Paschim Banbhag H.S. School, Khatikuchi by the In-charge Inspector of Schools by order dated 07.06.2004 (Annexure-10) dated 07.06.2004 would amount to provide the petitioner the status of a regular appointment without prior concurrence from the competent authority. No material is also placed before this Court to show that In-charge Inspector of Schools could be the Appointing Authority of the petitioner to a regular appointment. If that be so, then the petitioner could not have been again appointed on a regular basis by the Director of Secondary Education by order dated 04.04.2012 (Annexure-23). There is no dispute that WP(C) 5394/1999 was filed by the petitioner to claim appointment in the 10% quota reserved for sons and daughters of retired Assistant Teachers. Hence, the order dated 24.02.2012 passed by this Court in WP(C) 5532/2010 can only be interpreted to mean that this Court had directed the respondents to pay salary to the petitioner. Moreover, in view of the fact that in the proceedings of WP(C)

5532/2010, this Court was not dealing with the issues as to when the petitioner was regularized. Therefore, the observation in the said order that the petitioner was adjusted by order dated 07.06.2004, with all respect, can only be treated as an obiter and therefore, not precedential. The said order is relevant only to the extent that pursuant to the said order, this Court had issued a direction to the respondents to pay the petitioner of his salary which in turn resulted not only the release of the salary to the petitioner, but in the said process, the service of the petitioner as Assistant Teacher was regularized w.e.f. 01.06.2006, which is independent of the direction contained in order dated 26.03.2002 passed in WP(C) 5394/1999 which, as stated above related to claim of the petitioner for appointment as teacher under 10% reserved quota.

10. In view of the discussions above, this Court is of the view that merely because in the service book there is a entry of date of joining of 01.02.2003, the said entry can only be related to the purely temporary appointment which was held by the petitioner, who is found to be actually regularized w.e.f. 01.01.2006 by virtue of order dated 04.04.2012 (Annexure- 23).

11. The entries of date of joining as 01.02.2003 in the GPF account allotted to the petitioner is also not a conclusive proof of the regular appointment of the petitioner from that date. Such entries came to be recorded on 12.10.2006, when the new pension had come into force w.e.f. 01.02.2005. Such entry cannot be allowed to defeat the requirement of New Defined Contribution Pension Scheme as per the O.M. dated 06.10.2009, which mandates as follows: "this scheme would be applicable to all new entrance joining State Government services regular basis against vacant sanctioned posts on or after 01.02.2005".

12. It may be stated that the learned counsel for the petitioner had laid much stress on part of the order dated 04.04.2012 (Annexure-23), wherein it is stated that the "post was originally created vide Govt. Letter No. EPG.567/91/113 dated 16.11.1991 and retained the same permanently vide Govt. Letter No. PMA.93/2002/ Pt-II/ 200, dated 29.04.2003", by which it is projected that the said post of Assistant Teacher was earmarked for the petitioner. This submission appears to be without any basis because for appointment to any regular Govt. service it must be made against a vacant post. It was only because the post was created and retained the, earlier incumbent to the post of Assistant Teacher, including Late Lakshidhar Talukdar whose name appears in the order dated 04.04.2012 was working in the said Paschim Banbhag H.S. School, Khatikuchi. Hence, it cannot be said that by creating a post and permanently retaining it, the same was done only for the petitioner, who was never appointed under the 10% reserved quota and it is not in the case of the petitioner that the petitioner was regularly appointed against a vacant post created for him.

13. It is seen from the affidavit-in-opposition filed by the BTAC that they had taken a stand that the case of the petitioner does not fall under BTAC jurisdiction and therefore, the statement that the case of the petitioner falls under the service benefits of old pension scheme, is not supported by any record which can

bind the State respondents No. 1 to 4 and 7, being the concerned respondents. Moreover, from the affidavit-in-opposition filed by respondent No.9, it is seen that the Principal of Paschim Banbhag H.S. School, Khatikuchi had stated in para 5 that the petitioner was adjusted against the death vacancy post of Lakshidhar Talukdar, Assistant Teacher of the school w.e.f. 01.01.2006 and his original appointment was regularized vide order dated 04.04.2012, issued by the Director of Secondary Education Department, Assam and as per the said order, the petitioner has been drawing his salary from 01.01.2006 clearly shows that the appointment of the petitioner was regularized w.e.f. 01.01.2006 only.

14. In view of the discussion above, this Court is of the view that as the impugned Memo No. GB-EST/DSE/CC/60/2012/159 dated 10.05.2012 (Annexure-31) is an order consequential to the Memo No. GB-EST/DSE/CC/60/2012/151 dated 04.04.2012 (Annexure-23) by which the appointment of the petitioner was regularized w.e.f. 01.01.2006. Without any challenge to the said order dated 04.04.2012, which had attained finality, the challenge against the consequential order dated 10.05.2012 is not sustainable because as mentioned hereinbefore, the O.M. dated 06.10.2009 (Annexure-13) contains clear mandate that the New Defined Contribution Pension Scheme would be applicable to all new entrants joining State Government services on regular basis against vacant sanctioned post on/ or after 01.02.2005 and the petitioner after being appointed on regular basis w.e.f. 01.01.2006, would stand covered by the new pension scheme and not by the previous pension scheme and GPF scheme in force in the State prior to 01.02.2005.

15. Therefore, this writ petition fails and the same is dismissed.

16. Parties are left to bear their own cost.