
(2021) 05 GAU CK 0005

In the Gauhati High Court

Case No : Writ Petition (C) No. 8602, 8072, 8688, 9374, 9451 Of 2019, 25, 1365, 1357, 1355, 1371, 1372, 1374, 1673, 1397, 1400, 5743 Of 2020

Kuladhar Talukdar And 8 Ors

APPELLANT

Vs

State Of Assam And 4 Ors

RESPONDENT

Date of Decision : 18-05-2021

Acts Referred:

Citation : (2021) 05 GAU CK 0005

Hon'ble Judges : Michael Zothankhuma, J

Bench : Single Bench

Advocate : M BHAGABATI, K N CHOUDHURY, J P DAS, H R A CHOUDHURY, D BORGHAIN, G.GOGOI, K U AHMED

Final Decision : Dismissed

Judgement

1. Heard Mr. K.N. Choudhury, learned senior counsel assisted by Mr. R.M. Deka, Advocate for the petitioners in WP(C) 8072/2019, WP(C)

8602/2019, WP(C) 8688/2019 and WP(C) 9374/2019; Mr. M. Bhagabati, learned counsel for the petitioners in WP(C) 9451/2019, Mr. K.U. Ahmed,

learned counsel for the petitioners in WP(C) 25/2020; Mr. J.P. Das, learned counsel for the petitioners in WP(C) 1355/2020, WP(C) 1357/2020,

WP(C) 1365/2020, WP(C) 1371/2020, WP(C) 1372/2020, WP(C) 1374/2020, WP(C) 1397/2020 & WP(C) 1400/2020 and Ms. D. Borgohain, learned

counsel for the petitioners in WP(C) 1673/2020. Also heard Mr. B. Goswami, learned Addl. A.G., Assam, assisted by Ms. S. Chutia, Advocate and

Mr. B. Gogoi, learned Standing Counsel, Finance Department.

2. The challenge made in the bunch of writ petitions is to the office order dated 25.11.2013 issued by the respondent No. 1, the order dated 28.08.2017

issued by the respondent No. 2 and the letter dated 28.09.2018 issued by the Chief Engineer, Water Resource Department, by which a decision has been taken to the effect that the regularized Muster Roll labourers and Work Charge labourers, who have been regularized against post which are made personal to them, cannot be promoted in terms of the Assam Ministerial District Establishment Service Rules, 1967.

3. The case of the petitioners is that they were initially working as Muster Roll Labourers and Work-Charge Labourers in the Water Resource

Department prior to 01.04.1993. Thereafter, consequent to a decision taken by the State Government, their services were regularized in the year 2005

vide various orders. The regularization orders of the petitioners stated that the posts to which they had been regularized, was personal to the

respective workers (petitioners) holding the post and would stand abolished automatically, as soon as he relinquishes his post in any manner.

Subsequently, the petitioners were promoted from Grade-IV posts to Grade-III posts. Some were even given further promotion. However, vide

various orders issued over different years, the petitioners in some of the writ petitions have been reverted back to the post in which they were

regularized, on the ground that they had been wrongfully promoted. The petitioners in several other writ petitions have challenged the show-cause

notice issued to them, asking them as to why they should not be reverted back from their promotional posts, to the post they were regularized in.

4. The petitioners' case is that as they have been duly promoted and have been serving in the promotional post for a number of years, they could

not be reverted back to their original posts. On the other hand, the case of the respondents is that persons who have been regularized against personal

post cannot be promoted, as the personal posts were ex-cadre post and as such, an ex-cadre post cannot be a feeder post for promotion to a cadre

post. In support of their submission, the respondents have relied upon decisions of this Court in WP(C) 4254/2014 and WP(C) 2416/2014, wherein this

Court had upheld the submission of the State respondents and the judgment of the Single Judge had been upheld by the Division Bench of this Court in

the case of Sri Dilip Talukdar and 21 Others vs State of Assam and 5 Others, reported in 2017 2 (GLT) 135.

5. The counsels for the petitioners submit that while some petitioners have been promoted twice, one of them has been promoted thrice. They have

also been given increments. Further, the promotions were done by the Water Resource Department in public interest. They also submit that the AH &

Veterinary Department, Govt. of Assam have taken a decision to make Work-charged and Muster Roll workers eligible to all benefits, including

promotion, as per the prevailing Government Rules. As the Govt. cannot speak in two voices, the reversion of the petitioners to their original posts

cannot be done in the absence of statutory rules.

6. Mr. K.N. Choudhury, learned senior counsel submits that there is no concept of personal post though there is a concept of personal pay. He

submits that a reading of Rules 9(4), 9(22), 9(23), 9(30) and 9(30-A) of the Fundamental Rules would go to show that there is no concept of personal

post in the Government service and only personal pay.

The senior counsel submits the expressions "personal post" is a misnomer, inasmuch as, FR 9(23) speaks of personal pay. As provided in FR

9(23) personal pay is granted to a Government servant to save him from loss of substantive pay in respect of a permanent post other than a tenure

post due to Revision of Pay or due to any reduction of such substantive pay otherwise than as a disciplinary measure, or in exceptional circumstances

or for other personal considerations. Having regard to the meaning of personal pay defined in FR 9(23) and also having regard to the right to be

considered for promotion, which has now been elevated to that of a fundamental right, the stipulation in the impugned order dated 25.11.2013 that

regularized WC and MR workers cannot be considered for promotion as per the Assam Ministerial District Establishment Service Rules, 1967 is

wholly arbitrary, discriminatory and capricious and hence the same cannot withstand judicial scrutiny. In any case, the right of the petitioners to be

considered for promotion cannot be taken away by any executive fiat.

7. He also submits that the petitioners being regularized Government servants, there cannot be discrimination between persons who have been

appointed to regular posts and those who have been regularized against personal posts. He submits that both the categories of Government servants

would have a right to be considered for promotion, which is a fundamental right.

8. The senior counsel also submits that as the regularization orders of the petitioners states that their services have been regularized in the respective

cadre, the petitioners services have been regularized in their respective cadres,

which is against Grade-IV post. He also submits that the Office Order dated 25.11.2013 has provided for filling up of 10% of Grade-III (SA) post from Grade-IV (Khalasi) employees. As the right to be considered for promotion is a fundamental right, the petitioners have a right to be considered and promoted within 10% quota of Grade-III (SA) post reserved for Grade-IV employees.

9. The petitioners counsels submit that the petitioners had initially approached this Court vide WP(C) 6121/2017, when the respondent authorities were intending to revert back the petitioners to their original Grade-IV posts, on the ground that they were not entitled to be promoted, as they were regularized against the personalized post. WP(C) 6121/2017 was disposed of vide order dated 25.10.2017, wherein this Court passed a direction that in the event the respondent authorities intended to revert the petitioners back to their original posts, the same may be done after issuing show cause notice to the petitioners. The operative portion of the Order dated 25.10.2017 passed by this Court in WP(C) No. 6121/2017 is in paragraph 10 and 14, which are as follows:

â??.....

10. Mr. Nayak, learned counsel on the other hand also makes a submission that in the aforesaid judgment, this Court had also held that although before the reversion, the two petitioners therein, ought to have been put on notice, but at the same time, it also cannot be over looked that given the factual scenario even if opportunity of hearing would have been granted, it would have made no material difference to the final outcome of the reversion. The said observation of this Court was obviously in reference to a factual situation that the petitioners involved in the other two writ petitions were regularized against the personalized posts. But in the instant case, although the Office Memorandum dated 20.10.2005 provides that the muster roll workers would be regularized against the posts sanctioned for such regularization and therefore, the posts so sanctioned, would be personal to the respective muster roll workers, but there is no such factual determination in the present case as to whether the petitioners were also regularized against any personalized posts or they were regularized against any regular sanctioned posts.

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14. In such view of the matter, this writ petition stands disposed of by providing that in the event the respondent authorities intend to revert the

petitioners back to their original post, the same be done after issuing show cause notice to the petitioners and the petitioners would be at liberty to take

any stand that they may desire to do. Upon such show cause notice being given and the petitioners reply being obtained, an appropriate speaking order

be passed thereon and the respondent authorities shall be at liberty to take any decision as may be justified under the law.â??

10. The further stand of the petitioners is that though the respondents issued notices intending to revert the petitioners to Grade-IV posts, they have

not passed any speaking order, prior to reverting the petitioners to their original posts as stipulated in the order dated 25.10.2017 passed in WP(C) No.

6121/2017. They accordingly pray that the notices intending to revert back the petitioners to their original posts and the orders reverting the petitioners

to their original posts should be set aside.

11. Mr. B. Goswami, learned Addl. A.G., Assam submits that the regularization of the petitioners in the first instance was de-hors the Rules, as

regularization is not a mode of recruitment. It was due to various requests made by the petitioners that a concession was given by the State

Government, by which their services were regularized on humanitarian grounds, wherein regularization was made in excess of the sanctioned strength

without the Government giving reference to their actual requirement or eligibility of the petitioners. The only requirement made by the Government for

regularization of MR and WC employees was that they should have been in service on or before 01.04.1993. The Addl. A.G. submits that the

regularization of the petitionersâ?? service has been made in respect of post, which are personal to them and the same are not substantive posts.

They will automatically be abolished after the concerned person leaves the post. He also submits that as per the full bench judgment of this Court in

the case of Jitendra Kalita and Others vs. State of Assam and Others, reported in 2006 (2) GLT 654, the full bench had held that

â??.....Inclusion, in the Muster Roll or engagement against specific works does not follow adherence to any acceptable principle of recruitment in

public service. The eligibility, suitability and fitness of such employees are hardly decided at the time of their induction. That is precisely why Courts

had frowned upon the continuance of such employment for long as long employment, by itself, have always given rise to claims for regularisation.

Regularisation not being a mode of appointment and the existence of a large work force under the State on an uncertain basis, having been perceived

by all concerned, to be posing a human problem. Courts have repeatedly emphasized that the State must make all endeavours not to allow the and

situation to go out of hand so as to become Constitutional aberrationâ??.

12. He also submits that the words â??respective cadreâ? used in the regularization orders of the petitioners has been used to show that their salary

would be equivalent to Grade-IV post. He also submits that a further reading of the regularization orders of the petitioners clearly states that the posts

against which the services of the petitioners have been regularized is personal to the respective worker and would stand abolished as soon as he

relinquishes the post. He further submits that as the issue herein has already been decided by the Single Bench and the Division Bench of this Court in

Sri Dilip Talukdar and 21 Others (supra), the present petitions should be dismissed.

13. Mr. B. Goswami, learned Addl. A.G., Assam submits that besides the illegal promotions made to the petitioners, the promotions were made

without following any selection process by the respondents. Further, the alleged three promotions made against the petitioner No. 1 in WP(C) No.

1673/2020 shows that he was promoted from one cadre/grade to the same cadre/grade, which is impermissible, as the same cannot be said to be a

promotion. Further, they were temporary promotions, made dehors the Rules.

14. Mr. B. Gogoi, learned counsel for the Finance Department submits that there is no requirement of retention orders for regular posts from the

Finance Department, while retention orders for personal post are required to be approved by the Government, through the Finance Department every

year. He also submits that the regularization order of the petitioners has clearly stated in the very first line that regularization has been done in

pursuant to the Finance Department, Government of Assam letter dated 22.08.2005, which at Sl. No. 5 and 11 states as follows:

â??5. The posts are personal to respective Work Charged/Muster roll workers and will be abolished as soon as the incumbents relinquish

the posts in any manner.

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11. The retention of the posts so created concerned Administrative Department will move respective Control Branch of Finance Department

with names of incumbents every year till relinquishment of these person posts by the concerned incumbents. These posts, in no case, will be

retained by the Department as per provision of the Delegation of Financial Power Rulesâ??.

15. I have heard learned counsels for the parties.

16. The affidavit-in-opposition filed by the Additional Secretary to the Government of Assam, Personnel (B) Department is to the effect that there is

no scope of promotion of employees holding personal posts and that the State Government has not framed any Policy or Rules for employees holding

personal posts to be promoted. Further, the entire process of regularization of Muster Roll labourers and Work Charge labourers, by creating posts

against their individual names was without reference to the existing vacancy position of the respective departments and without reference to any set

of Rules.

17. The main issue in all the writ petitions is as to whether Muster Roll/Work-Charge Workers who had been regularized in the year 2005 against the

posts which were made personal to them could be promoted and whether their reversion to their regularised post was legally sustainable.

18. The present issue has already been decided by the Co-Ordinate Bench of this Court in WP(C) Nos. 2416/2014, 3116/2014 and 4254/2014. The

petitioners, who were regularized Muster Roll/Work charge workers in the Water Resource Department, Govt. Of Assam filed WP(C) 2416/2014(Sri

Dilip Talukdar and 21 Others vs State of Assam and 5 Others) where they challenged their reversion to their original posts after being promoted.

WP(C) 2416/2014 was disposed off by a Co-ordinate Bench of this Court on 16.03.2015, holding that when regularization of a Grade-IV Muster

Roll/Work-charge worker has been done against a personal post, the post held by those persons would be outside the cadre of Grade-IV post, i.e., an

ex-cadre post. Unless a person who is holding an ex-cadre post is en-cadred into a cadre post, which is a feeder cadre to a higher cadre post, the

person holding the personal post cannot be promoted to a higher cadre post. This Court thereafter dismissed the writ petition filed by the petitioners.

WP(C) No. 3116/2014 was with regard to the claim of the petitioners therein for promotion from Grade-IV post to the post of Section Assistant, which is a Grade-III post. Here also, the petitioners who were in the Water Resource Department, Govt. of Assam had been regularized against posts which were made personal to them and which were to be abolished as soon as the incumbent relinquished the post in any manner. A Co-Ordinate Bench, after having discussed the manner of regularization of the petitioners therein and keeping in view the Office order dated 25.11.2013, issued by the Commissioner & Special Secretary to the Govt. of Assam, Water Resource Department held that the petitioners were not entitled to promotion to the post of Section Assistant and as such, had to be reverted back, as the post held by them were against Cadre post and as such, they could not be promoted to a regular post.

19. Being aggrieved, the writ petitioners in WP(C) No. 2416/2014 and WP(C) No. 3116/2014 thereafter filed appeals, vide W.A. No. 124/2015 & 111/2016 which is reported in 2017 2 (GLT) 135, *â??Dilip Talukdar & Others v. State of Assam & Others.â??*

The Division Bench dismissed the appeals on the ground that a claim for promotion from a person holding an ex-cadre post was not legally tenable.

The Division Bench held that promotion in the Department can be considered only from eligible employees in the feeder cadre post and the writ

petitioners being outside the cadre, they could not have any enforceable rights for promotion, particularly when the regularization order itself stipulates

that they are regularized in a post personal to them. The extract of the order passed by the Division Bench in the case of Dilip Talukdar and 21

Others, 2017 (2) GLT 135, which is at paragraph 12 is re-produced below :

â??12. We have seen the reasons recorded by the learned Judge for the impugned verdict and find that the posts against which the writ petitioners

were regularized were never added to the notified cadre in the department. Yet no plea was advanced for en-cadrement of the posts held by the

affected parties. The promotion in the department can be considered only from the eligible employees in the feeder cadre and the writ petitioner being

outside of the cadre, cannot have any enforceable right to claim promotion, particularly when, the regularization order itself stipulates that they are

regularized in posts personal to them. Such temporary creation of post cannot

automatically add to the cadre strength of the department and claim for promotion from a person holding an ex-cadre post, is not legally tenable. Therefore we see no basis to take a different view in the matter than the one taken by the learned Single Judge, in dismissing the casesâ??.

20. The writ petitioners being similarly situated as the writ petitioners in the case of Dilip Talukdar & Others (supra), this Court accordingly finds that the present issue is already a covered matter in terms of the judgments passed by the Co-Ordinate Bench of this Court in WP(C) Nos. 2416/2014 and 3116/2014, which has been upheld by the Division Bench of this Court in Dilip Talukdar & Others(supra). Accordingly, in view of the reasons stated above, the present batch of writ petitions stand dismissed.