

(2008) 12 GAU CK 0038
In the Gauhati High Court
Case No : Writ Petition (C) No. 6459 of 2005

Manashi Goswami

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 23-12-2008

Acts Referred:

Assam Elementary Education (Provincialisation) Rules, 1997 — Rule 3
Constitution of India, 1950 — Article 14, 16, 309
Contract Act, 1872 — Section 10, 196, 197, 23, 70

Citation : (2009) 1 GLT 729

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Advocate : N. Dutta and B. Bhuyan, for the Appellant; M. Dutta, for the Respondent

Judgement

Amitava Roy, J.—The Petitioner hereby endeavours to invoke the extra ordinary writ jurisdiction of this Court for an appropriate writ to the Respondents requiring them to regularise her services as an Assistant Teacher in Akaya Girls ME School in the district of Barpeta (hereinafter referred to as the "School") and release her monthly salary, arrear and current.

2. I have heard Mr. N. Dutta, Senior Advocate for the Petitioner and Mr. Dutta, learned Standing Counsel, Education Department for the Respondent Nos. 1 to 4.

3. The pleadings of the parties project their rival stands. The Petitioner has claimed to be a post graduate in Political Science. Being aware of a vacant post of Assistant Teacher in the aforementioned school, she applied through proper channel for appointment thereto. The District Elementary Education Officer, Barpeta by order dated 7.12.1999 on a consideration of her application appointed her in the said capacity in the scale of pay of Rs. 3130-6600/- per month together with other allowances as admissible under the Rules. The Petitioner was duly posted in the school following which, she joined the service on 8.12.99 and claims to have been discharging her duties sincerely to the

satisfaction of all concerned. On an enquiry being made by her about the reason for non payment of her salary withheld, she was apprised that her appointment had been made without the approval of the State Level Empowered Committee as required by the government circular dated 7.12.99. According to the Petitioner, the said circular was communicated to the concerned authorities of the different districts only on 8.12.99 and that the requirement of approval was thus not to their knowledge at the time of issuance of the appointment letter to her.

While the matter rested at that, her school i.e. Akaya Girls ME School was amalgamated with its high school unit on 9.9.2000. She thereafter submitted a representation before the Principal of the amalgamated school for regularization of her services as well as for payment of her salary. Her representation was forwarded to the Director of Secondary School, Assam via the Inspector of Schools, Barpeta District Circle, Barpeta. Though a series of official exchanges thereafter were made, her grievances remained unredressed. The intra departmental correspondences, however, demonstrated two grounds for the stalemate, firstly, absence of approval of the State Level Empowered Committee for her appointment and secondly, ban imposed on all appointments by the Office Memorandum dated 6.12.99 with effect from 7.12.99. Situated thus, the Petitioner has approached this Court.

4. The Respondent Nos. 1 to 4 in their joint affidavit have maintained that the Petitioner's appointment has been dehors the observance of the procedure prescribed by law. According to them, her name did not find place in the select list prepared by the Sub Divisional Level Selection Board, Barpeta and her appointment was in violation of the Office Memorandum No. BW/1/99/1 dated 6.12.99 stipulating approval of the State Level Empowered Committee (for short "SLEC") as an essential pre condition therefor. The answering Respondents contended that the Petitioner's appointment being in total disregard of the process of law, it was non est, ab initio and therefore, she was not entitled to any salary for the services rendered by her.

5. In her reply, the Petitioner while generally reiterating her assertions in the writ petition, has insisted that her appointment cannot be adjudged to be illegal for wrong if any, committed by any departmental official and that she can neither be held responsible, nor be penalized therefor.

6. Mr. Dutta has assertively urged that the Petitioner's appointment having been made admittedly before the enforcement of the stipulation requirement of the approval of the SLEC, as a necessary precondition therefor, denial of her salary on this plea is per se untenable. As the order of Petitioner's appointment in clear terms recognized her to be a candidate selected by the Sub Divisional Level Selection Committee, Balaji, the contention to the contrary is palpably fallacious, he urged. The learned Senior Counsel argued that as the Petitioner admittedly is in service and has not as on date either been suspended or terminated, the Respondents are obliged in law to release her salary for the services rendered. According to him, the documents appended to the petition and bearing on the

issue of regularization of the services of the Petitioner and pay demonstrate a conscious decision of the appropriate departmental authorities on her entitlement thereto. Even assuming that the Petitioner's appointment had been made without the knowledge of the necessity of the prior approval of the SLEC, her continuance in service convincingly evinces the ratification of her induction and the services rendered by her and therefore, in terms of Section 70 of the Indian Contract Act, 1872 (hereafter referred to as the "Act") as well, the State Respondents are obliged in law to release her salary. The ratification of the Petitioner's appointment and continuance in service by the State being apparent, in the facts and circumstances of the case, the ground put forth for denying her salary are wholly frivolous, he pleaded. Mr. Dutta insisted that even assuming that the process of the Petitioner's appointment is afflicted by any omission or falling on the part of the concerned departmental authority, he/she having acted as the agent of the State Government and the latter having permitted her retention and availed her services, there is an explicit ratification of the act of her initial induction thereby effacing, deficiencies, if any, in her recruitment. The State Government though aware of her illegal appointment as claimed, not having terminated the same and instead availed her services, it is estopped in law from absolving itself of its statutory as well as public duty of regularizing her services and releasing her service entitlements. Mr. Dutta placed reliance on the decision of the Apex Court in Govt. of A.P. and Others Vs. K. Brahmanandam and Others, and of this Court in State of Manipur and Others Vs. State Land Use Board Casual Employees' Association and Another, Respondent to reinforce his submission.

7. In refutation, the learned Standing Counsel has argued that the Petitioner's appointment not having been preceded by any selection as mandated by Rule 3 of the Assam Elementary Education (Provincialisation) Rules, 1977 (for short hereafter referred to as Rules), her induction in service is void ab initio. Her appointment being thus non est in law and on facts, any indication to the contrary in her order of appointment is of no consequence, he contended. According to the learned Standing counsel, Petitioner's appointment being ineffective, null and void, there is no question of ratification thereof and therefore her claim for salary is wholly misconceived. Pointing out that the Petitioner had omitted to challenge the official correspondences disclosing her appointment dehors the selection under the Rules, Mr. Dutta has questioned the maintainability of the writ petition on the ground of delay as well. He urged that as in law, no valid contract had ever subsisted between the Petitioner and the State, applicability of Section 70 of the Act cannot be insisted upon. Having regard to the nature of the appointment of the Petitioner, the State Respondents ought not to be directed to release her salary as claimed, he urged. To reinforce his arguments, the learned Standing Counsel placed reliance on the decisions of the Apex Court in - Ashwani Kumar and Others Vs. State of Bihar and Others, ; State of Manipur and Others Vs. Y. Token Singh and Others, ; Govt. of A.P. and Others Vs. K. Brahmanandam and Others, ; Sudhendu Mohan Talukdar Vs. State

of Assam and Others,

8. The competing pleadings and the debate founded thereon have received the anxious consideration of this Court. That the appointment to the post involved is governed by the provisions of the Rules is not in dispute. Rule 3 enumerates in details the method thereof envisaging the stages right from the invitation of applications from the desirous candidates through advertisement in newspapers till the appointment of selected candidates in order of merit as assessed by the Selection Board constituted thereunder. On receipt of the applications, the Selection Board is to scrutinize and process the same to facilitate the interview of the candidates by the Interviewing Committee. The Selection Board, on completion of the interview, is required to add the marks secured by the candidates in the interview as well as for their qualifications and experience and prepare a list constituency wise for each State Legislative Assembly Constituency in the descending order of marks. The select list is to be finalized constituency wise on application of the precepts for reservation and submitted with the Director of Elementary Education, Assam. The preparation of select list for a constituency is debarred, if no vacancy in the school located within its territorial limits exists.

9. The Director of Elementary Education, Assam, to whom the lists are to be forwarded, on receipt thereof would authenticate the same and get it published in his office notice board and also in that of the Inspector of Schools, District Elementary Education Officer, Block Elementary Education Officer and Deputy Inspector of Schools and also in any other manner as the Government may deem fit. The Deputy Inspector of Schools or the District Elementary Education Officer as the case may be would thereafter appoint the selected candidates in order of merit only from the authenticated select list. The provision is categorical to the effect that any appointment given to persons outside the select list would be ab initio void unless the same is approved by the Government on compassionate ground as per the relevant Rules in that regard. The procedure and the parameters prescribed being unequivocal and emphatic, no departure therefrom is either intended or permissible. The Rules framed to regulate the recruitments of teachers of elementary schools of the State indubitably do not contemplate or sanction any other mode of appointment thus demonstrating the mandatory attribute thereof. Axiomatically therefore any appointment dehors the same would be stillborn and null and void.

10. The averments in the writ petition bearing on the appointment of the Petitioner do not disclose her participation in any process as envisaged by the Rules. According to her, she had applied through the proper channel for appointment to the post of Assistant Teacher in the school, which at the relevant time was lying vacant following the upgradation of the earlier incumbent Shri Kumud Chandra Mazumdar. She has averred that the District Elementary Education Officer, Barpeta, appointed her on a consideration of her application. The State Respondents have been consistent in contending that her name was

not included in the relevant select list prepared by the Sub-Divisional Selection Board, Barpeta. As a matter of fact, this stand of theirs is borne out by the official letters dated 17.5.2004, 27.9.2004 and 18.3.2005 (Annexures F, G and H of the writ petition) much before the counter filed by them in the instant proceeding. The Petitioner in her reply though has refuted the assertion of absence of her name in the select list, has abstained from providing the facts and particulars of her participation in any selection for the post involved as obtained by Rule 3 of the Rules. Noticeably the Petitioner did not omit to question the stand of the concerned departmental authority in this regard as referred to in the aforementioned official communications, she has instead relied thereon in furtherance of her endeavour for the reliefs sought for. In the above view of the matter, reference of the Petitioner as a selected candidate in her appointment order dated 7.8.1999 is not of any definitive consequence in her favour. On a totality of the consideration of the pleadings of the parties and the contemporaneous official documents appended thereto, this Court is of the unhesitant opinion that the Petitioner's initial appointment as Assistant Teacher of the School vide order dated 7.8.1999 had been dehors the Rules and has to be construed as void and nonest in law. Though the State Respondents have also sought to repudiate the Petitioner's appointment as illegal for having been made sans the prior approval of the SLEC and during the subsistence of a ban in face of the invalidation thereof for transgression of the Rules, no dilation on this count is considered essential.

11. In *Ashwani Kumar* (supra), appointments far in excess of the sanctioned posts were made in violation of the peremptory Government instructions, which were cancelled as illegal. In response to a challenge thereto, the Apex Court while strongly reprehending the manner in which the appointments had been effected sustained the action of the State authorities in refusing to release the salary to the appointees construing them to be *persona non grata* and not employees in the real sense of the term. It was held that as appointments were made contrary to all recognized recruitment procedures and thus highly arbitrary, those were not binding on the State. The prayer for regularization of such appointments were also negated. Their Lordships were of the view that the question of regularization in any service would arise in two contingencies, firstly if the appointments have been made on *ad hoc* basis or daily wage basis by a competent authority and are continued from time to time and secondly when the initial entry of the employee against the available vacancy is found to have suffered from any flaw in any procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed the due procedure for such recruitment. It was, however, recorded that in the first eventuality, the initial entry of such an employee must be made against an available sanctioned vacancy by following the Rules and Regulations stipulated. In the second, in view of the irregularity or defect, the same would be required to be waived or condoned by a competent authority. It was, however, laid down in no unclear terms that the initial entry must not be totally illegal or in breach of

all the established Rules and Regulation governing such recruitment.

12. The Apex Court in *Krishan Yadav and another Vs. State of Haryana and others*, was seized with a fact situation where the selection process pertaining to the appointment of Taxation Inspectors in the State of Haryana on an investigation conducted by the Central Bureau of Investigation was found to be tainted by grave irregularities including fabrication of records, fake/ghost interviews, forgery and favouritism. Their Lordships while drawing the inference that the revealed outrages had been motivated by extraneous considerations, annulled the selection.

13. The appointments of the Appellants in *Nazira Begum Lashkar and Ors. v. State of Assam and Ors.* (2001) 1 SCC 143 were cancelled being against the procedure prescribed by the Rules as well as against nonexistent posts. A report of the enquiry committee composed by this Court substantiated the above imputations. Dismissing the plea on behalf of the Appellants based on equity and humanitarian considerations to save their appointments, the Apex Court propounded that as the procedure therefore had not been followed, the same would not confer any right on the appointees and thus they cannot claim any equitable relief from any Court. Their Lordships recounted the above observations in *Aswini Kumar (supra)* to add that as the eventual appointments had been made contrary to the statutory rules, the continuance of such appointees would be unauthorized and no right would accrue to the incumbents on that count.

14. In *State of Manipur and Ors. v. Y. Token Singh (supra)* some appointments were made in the post of Mondols, Process Servers and Ziladars allegedly by the Revenue Commissioner of the Government of Manipur without the knowledge of the Government. The cancellation of their appointments having been successfully challenged before this Court, the State carried the issue in appeal to the Apex Court. Their Lordships while observing that it was for the Respondents/appointees who had filed the writ petitions to prove the existence of a legal right in their favour and a corresponding legal duty in the State Respondents to be continued to be employed, ruled that the State while offering appointments, having regard to the constitutional scheme adumbrated in Articles 14 and 16 of the Constitution of India must obligatorily comply with its constitutional duty and that even assuming that no recruitment rules under Article 309 were available, any action taken by an authority not competent therefore and in complete violation of the constitutional and legal framework would not be binding on the State. Their Lordships noticed in the contextual facts that the Respondent appointees had failed to refer to any advertisement issued for inviting applications from eligible candidates to fill up the posts and returned a finding that they were not entitled to hold the same. The requirement of observance of the principles of natural justice was also obviated as the same was construed to be futile.

14A. The Apex Court in *Secretary, State of Karnataka and Others Vs. Umadevi*

and Others, authoritatively underlined the inflexible enjoinder of appointments in public service in strict conformity with the constitutionally envisaged scheme therefor. Their Lordships were of the view that consistent with such framework an appointment unless made in terms of the relevant Rules and after a proper competition amongst qualified persons cannot be accepted to confer any right on the appointee. Though observed in the context of regularization of temporary or casual appointments, their Lordships while disapproving any infraction of the constitutional scheme of appointments sounded a caveat that relaxation of such imperatives would create Anr. mode of public appointment, which is impermissible.

15. The preponderant judicial opinion inscribed hereinabove, evidently demonstrates that an appointment in public service governed by a set of statutory Rules, if made in contravention thereof would be void, nonest and ineffective in law so much so that the same would not endow the appointee with any right therein to continue on the basis thereof. The decision of this Court in State of Manipur Casual Employees Association and Anr. (supra) is of no avail to the Petitioner vis-a-vis her claim for salary as in the accompanying facts and circumstances her ignorance of the vitiating illegality of her appointment cannot be inferred. Not only has she been aware that her appointment had been without any selection under the Rules, she continued as such being fully conscious that her induction in service is illegal as has been disclosed by the concerned departmental authorities from time to time in their official exchanges.

16. On the other hand in Sudhendu Mohan Talukdar Vs. State of Assam and Others, this Court had observed that a person who seeks appointment as a teacher is presumed to know the law governing such recruitment and if such person is not appointed in accordance with the statutory rules or the prescriptions of public appointment, he/she is not legally entitled to claim salary. This Court observed in conclusion that the Government being the custodian of public money, cannot thus be allowed to misuse public fund by making payments of salary of persons who had not been validly appointed and had accepted such appointment knowing fully well that it was not valid.

17. The arguments based on Section 70 of the Act needs to be decided at this juncture. The above provision is lodged in Chapter V of the Act pertaining to certain relationship resembling those created by contract. Thereunder if a person lawfully does anything for Anr. person, or delivers anything to him, not intending to do so gratuitously, and if such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to resolve, the thing so done or delivered. The provision envisages an eventuality where absence of any formal contract notwithstanding, on the existence of the requisites comprehended therein, an obligation is created in law against the beneficiary to compensate the benefactor for the act done by him lawfully or the delivery of the article involved.

18. The text and tenor of the above legal provision however testify the

lawfulness of the acts of the benefactor to be the essence of his/her right to receive compensation therefore or restoration of the thing by the beneficiary. The backdrop of the association between them would thus have a definite bearing on the legality or otherwise of the acts done or the delivery of the property involved. If the person to be compensated is not legally competent or empowered to perform the act to the benefit of the other, the obligation u/s 70 of the Act would not be attracted. The relationship between the parties, resembles one otherwise created by a contract under the Act and, therefore, necessarily must be informed with the essentials of a valid contract u/s 10 of the Act. All agreements thereunder are contracts if they are entered into with the free consent of the parties competent to do so for a lawful consideration and with a lawful object and not expressly declared to be void. The consideration or object of an agreement would be unlawful if inter alia it is forbidden by law or if permitted, would defeat the provisions of any law as is delineated in Section 23 of the Act. In the estimate of this Court, therefore, if the alliance between the parties contemplated in Section 70 of the Act is based on a consideration, which is either forbidden by law or subversive of any provision of law, the act done by the person claiming compensation cannot be construed to be lawful to avail the benefit of the said legal provision.

19. In *Government of A.P. v. K. Brahmanandan* (supra), the Respondents had been appointed as Secondary Grade Teachers in Church of South India Upper Primary Elementary School without adhering to the Andhra Pradesh Educational Institutions (Establishment, Recognition, Administration and Control of Schools under Private Managements) Rules, 1993. Thereunder the institution in question is required to scrutinize the applications for appointment and grant permission in connection therewith. The provisions prescribing the mode of grant of permission and recognition are also outlined. The procedure such as advertisement for recruitment in at least two newspapers, information to the employment exchange, constitution of Staff Selection Committee to undertake the recruitment process etc. has been laid down as well. The appointments are to be made subject to the approval of the competent authority. The Management of the institution involved, however, before the appointment of the Respondents neither obtained any prior permission from the District Education Officer nor made any advertisement or notified the employment exchange. No approval of the said appointments was also obtained from the District Education Officer. The Apex Court in this factual background vis-a-vis the issue of liability of the State to pay the salary of such teachers held as hereunder.

14. ...The liability of the State to pay salary to a teacher appointed in the recognized schools would arise provided the provisions of the statutory rules are complied with, subject to just exception. The right to claim salary must arise under a contract or under a statute. If such a right arises under a contract between the appointee and the institution, only the latter would be liable therefor. Its right in certain situation to claim reimbursement of such salary from the State would only arise in terms of the law as was prevailing at the relevant

time. If the State in terms of the statute is not liable to pay the salary to the teachers, no legal right accrues in favour of those who had been appointed in violation of mandatory provisions of the statute or statutory rules.

....

16. ...Appointments made in violation of the mandatory provisions of a statute would be illegal and, thus, void. Illegality cannot be ratified. Illegality cannot be regularized, only an irregularity can be.

20. Their Lordships by recounting the relevant observations made in *Secretary, State of Karnataka and Ors. v. Umadevi* (supra) while refusing to direct regularization of the services of the Respondents held the school authorities liable to pay salary in terms of Section 70 of the Act. It was, however, propounded that the principles of quasi contract was not applicable against the State.

21. A cumulative reading of the text of the decision proclaims in obvious terms that all appointments to public service made in violation of mandatory provisions of a statute would be illegal and void and cannot be ratified. In such a situation the State cannot be held liable to pay the salary to the appointees as no legal right had accrued to them. Any order of regularization of such an appointee would be violative of the constitutional scheme, it held. Noticeably in the reported case, the educational institution concerned had failed to perform its assigned role prescribed by the Rules. The Apex Court noticing its failings and the resultant infringement of the Rules absolved the State of any liability to pay the salary of such illegally appointed teachers. It, however, discerned a liability of the institution to pay the salary independent of the statutory rules, it having availed the services rendered by such appointees. Section 70 of the Act therefore was invoked vis-a-vis the institution.

22. The decision does not enunciate a proposition that a statute or statutory rule notwithstanding a liability of the State otherwise not arising therefrom can still be traced to a contract like relationship to make it accountable for payment of salary to a appointee inducted in total disregard of the legally ordained procedure. The responsibility of the State to implement the service conditions of an appointee in public service is conditioned by the provisions of the statutory rules if enacted and cannot be guided by the concept of quasi contract otherwise mutilative thereof. The recognition of the accountability of the State under a quasi contract, if otherwise not enjoined by the statutory rules would in fact presuppose and recognize an additional or alternative mode of recruitment not sanctioned by law and thus repugnant to the constitutional scheme of public employment. The liability of the State, if governed exclusively, by the statutory rules, as in the instant case, applicability of Section 70 cannot be imported to render it responsible for the payment of salary of an appointee drafted in blatant violation thereof.

23. It is inconceivable that the District Elementary Education Officer, in the case

in hand, was unaware of the sanction of the Rules. His apparently illegal, irresponsible and unauthorized act of recruiting the Petitioner in outright infringement of the Rules smacks of impertinent and oblique considerations. Even assuming that in doing so, the said departmental authority had acted as an agent of the Government, the order being in palpable violation of the Rules is wholly unauthorized and unlawful and cannot bind the Government thereby. The ratification of an act of an agent by his principal as comprehended under Sections 196 and 197 of the Act presupposes a lawful doing but beyond the authority conferred. No ratification of an act unauthorized as well as illegal is contemplated thereby. Ratification by the principal is permissible if the agent's acts though legal or lawful transgresses the bounds of authority conferred. If the act is per se illegal and, therefore, nonest in law, ratification thereof under Sections 196 and 197 of the Act is not conceptualized.

24. The analogy of liability u/s 70 of the Act as is sought to be drawn in the facts of the instant case, therefore, does not commend for acceptance. The liability of the State being defined by the Rules, the same cannot be extended beyond its framework on the strength of a quasi contract otherwise repugnant thereto. The District Elementary Education Officer, Barpeta, being neither competent nor authorized to appoint the Petitioner in the manner done, no legitimate expectation of her for regularization of her service or payment of salary can be entertained in law as well. The stray recommendatory observations in some of the official exchanges initiated on the Petitioner's representation for the relief's claimed, in the teeth of the above determination, are of no consequence.

25. Judged on the touchstone of the pronouncements recited hereinabove and the scheme of the Rules, this Court is of the considered opinion that the Petitioner's claim for regularization of her services and salary is not sustainable in law.

The petition, on a consideration of all above, therefore, lacks in substance and is rejected. Before parting, this Court considers it pressingly essential to place on record the necessity of exemplary and stringent penal measures against those responsible for making recruitments to public offices in outright and cavalier violation of law. These officials ought to be identified forthwith and brought to book if the credibility and trustworthiness of the system in public estimation is to be preserved. The District Elementary Education Officer, Barpeta, in the case in hand has resorted to a procedure unknown to law assuredly with the full knowledge of the transgression being indulged in. This Court in the contextual facts therefore considers it fit and proper to direct the Commissioner and Secretary to the Government of Assam, Education (H) Department to cause necessary steps to be taken to enquire into the circumstances under which the Petitioner's appointment came to be made. In course of the probe so ordered the authority aforementioned would also ensure investigation pertaining to similar such appointments made by the said officer and Ors. in the Department, if any. This should be done within a period of four weeks from the date of receipt

of the certified copy of this order. It would be the responsibility of the Commissioner and Secretary to the Government of Assam, Education (H) Department to oversee the process and cause a report in connection therewith to be submitted before this Court immediately after the exercise is completed. No costs.