

(2019) 06 GAU CK 0087
In the Gauhati High Court
Case No : Writ Petition (C) No. 840 Of 2015

Md Harunar Rashid

APPELLANT

Vs

State Of Assam And Ors

RESPONDENT

Date of Decision : 28-06-2019

Acts Referred:

Evidence Act, 1872 — Section 114

Constitution Of India, 1950 — Article 14, 16, 141, 226

Citation : (2019) 06 GAU CK 0087

Hon'ble Judges : Kalyan Rai Surana, J

Bench : Single Bench

Advocate : M Deka

Final Decision : Dismissed

Judgement

1) Heard Mr. A. Chamuah, the learned counsel for the petitioner and Mr. N. Goswami, the learned Govt. advocate appearing for respondents No. 1 to 4. Also heard Mr. M. Khataniar, the learned standing counsel for the Bodoland Territorial Council, i.e. respondent No.5 and 6 and Mr. P. Nayak, the learned standing counsel for the Finance Department, respondent No.7.

2) At the instance of the learned counsel for the petitioner, the matter has been heard at the admission stage by issuing rule returnable forthwith.

3) By this writ petition filed under Article 226 of the Constitution of India, the petitioner is seeking release of his salary since 28.05.1998 and for regularisation of his service. The case of the petitioner, as projected in this writ petition is that he was initially engaged as Lower Division Assistant - cum- Typist in the office of the Child Development Project Officer, Khoirabari (CDPO, Khoirabari) by virtue of order dated 28.05.1998 passed by the Director of Social Welfare, Assam. The appointment was extended from time to time. It is projected that subsequently, by order dated 26.03.2001, the Director of Social Welfare, Assam had appointed the petitioner on ad-hoc basis in the same post in the scale of pay of Rs.2890/-

to Rs.5725/-. As the petitioner was not paid his salary, he had approached this Court by filing W.P.(C) No. 4823/2005 and this Court by order dated 14.12.2006, inter-alia, directed the respondents to forthwith release his arrear salary. It is claimed that till date, the petitioner has not been paid his salary.

4) The learned counsel for the petitioner has referred to the stand taken by the BTC in the affidavit- in- opposition filed by the respondents No.5 and 6 and it is submitted that as it has been categorically stated in paragraph 7 thereof that the proposal was submitted for arrear and current salaries but fund had not been sanctioned from the Department, the BTC had admitted that the petitioner is rendering his services from 28.05.2008 till date and, as such, the withholding of the salary of the petitioner is illegal.

5) It is submitted that in the previous round of litigation, i.e. by way of order dated 14.12.2006 passed by this Court in W.P.(C) No. 4823/2005, this Court was of the view that as per facts and circumstances of the case, as existed then, the Court could not come at a categorical finding that the petitioner has been rendering service after being appointed by order dated 26.03.2001 so as to hold that the petitioner was entitled to any salary on the basis of the said order dated 26.03.2001. However, the petitioner has now produced copy of call letter dated 18.12.2000, by which he was called for interview for the post of LDA- cum-Typist that was held at the office of the Divisional Programme Officer ICDS Cell, Tezpur on 04.01.2001 and pursuant thereto the petitioner had participated in the interview and he was accordingly, given the appointment letter dated 26.03.2001 at a scale of pay as mentioned in the appointment order. It is further submitted that in this writ petition, the petitioner has annexed a copy of letter dated 01.11.2006 written by CDPO, Khoirabari, Udalguri to the Director of Social Welfare, Assam, thereby informing that the petitioner had been appointed at Khoirabari ICDS Project on ad-hoc basis and that the petitioner was not getting salary as additional budget was not issued by the Directorate of Social Welfare & Probation. Accordingly, it is submitted that after the receipt of affidavit- in- opposition filed by the respondents No. 5 and 6, disclosing that the proposal of payment of salary of the petitioner was sent to the Government and sanction has not been granted, this Court had allowed the petitioner to implead the Principal Secretary to the Govt. of Assam. Department of Finance.

Thus, it is submitted that as the petitioner was working, the Finance Department be directed to release funds as per the proposal submitted by the BTC authorities for releasing the salary of the petitioner.

6) The learned standing counsel for the respondents No.5 and 6 i.e. BTC has referred to the stand of the said respondents in their affidavit- in- opposition. It is submitted that the petitioner was appointed on ad-hoc basis vide order dated 26.03.2001 and he had joined the Khoirabari ICDS Project on 30.03.2001, as such, the BTC authorities had forwarded the proposal before the competent authorities of the State Government for sanctioning and for releasing funds required to pay the salary of the petitioner.

7) The learned standing counsel for the Finance Department has submitted that although he has not received the para-wise comments, but he is prepared to make his submissions on the basis of the materials available on record. It is submitted that the claim of the petitioner can be bifurcated into three parts, viz., (i) claim for arrear salary for the period from 28.05.1998 to 25.03.2001; (ii) claim for regularisation of service; and (iii) claim for salary for the period from 26.03.2001 onwards.

8) On the first part of the claim, the learned standing counsel for the Finance Department has submitted that this Court by order dated 14.12.2006 passed in W.P.(C) No. 4823/2005, had directed that on due verification, whatever amount, if any, is found to be payable to the petitioner for service rendered on the strength of initial order of appointment dated 25.08.1998 and the extensions granted from time to time shall be paid to the petitioner forthwith and without any delay. By referring to the statement made in paragraph 8 of the affidavit- in-opposition filed by the respondents No.5 and 6, it is submitted that it has been categorically stated therein that the petitioner has received his pay (arrear) w.e.f. from period 28.05.1998 to 25.03.2001, which was at fixed pay of Rs.900/- per month as per initial appointment letter. Thus, it is submitted that as regards one part of the claim of the petitioner, it was apparent that the petitioner had received his arrear salary for the period he had worked from 28.05.1998 to 25.03.2001. Hence, the said part of the claim made in this writ petition did not survive. In the said context, it is submitted that the said fact had been withheld by the petitioner from this Court.

9) On the second part of the claim of the petitioner, it is submitted that the issue of regularisation was agitated in the previously filed writ petition. In the said writ petition, this Court in its order dated 14.12.2006 passed in W.P.(C) No. 4823/2005 has categorically and unambiguously recorded as follows:-

"... In so far as the claim of regularisation is concerned, at the hearing, learned counsel for the petitioner submits that the said relief is not being pressed any further in the present application."

Hence, it is submitted that the prayer for regularisation in the present writ petition is hit by the principles of res-judicata, and the said prayer is liable to be rejected.

10) On the third part of the claim of the petitioner, i.e. claim for salary from 26.03.2001, it is submitted that from the order dated 14.12.2006 passed in W.P. (C) No. 4823/2005, it would be clear that the State respondents had hotly contested the claim of the petitioner for the wages for the period from 26.03.2001 by submitting that the appointment of the petitioner was made in a non- existing post and that he was not allowed to join and that in the said writ petition, it was the stand of the State respondents that the petitioner was not allowed to join. Thereafter, this Court had expressed as follows - "... Though the learned counsel for the petitioner has made a valiant attempt to persuade this

Court not to accept the statements made in the affidavit and in this regard has relied on a document (Annexure-F) enclosed in the writ petition, it is the considered view of the Court that the contentions raised by the respective parties give rise to a disputed question as to whether the petitioner had been rendering service after his appointment made by order dated 26.03.2001. The Court exercising jurisdiction under Article 226 of the Constitution cannot attempt to reconcile the aforesaid dispute, as any such reconciliation has necessarily to be on a proper appreciation of oral and documentary evidence that the parties may adduce in this regard. In the above circumstances, the Court cannot come to any categorical finding that the petitioner has been rendering service after being appointed by the order dated 26.03.2001 so as to hold the petitioner is entitled to any salary on the basis of the said order dated 26.03.2001."

11) Accordingly, it is submitted that merely because the respondents No.5 and 6 had forwarded a proposal for releasing the salary of the petitioner w.e.f. 26.03.2001, the petitioner would not be entitled to his salary from the State Government because (i) the appointment of the petitioner was illegal; (ii) the petitioner was not appointed in any substantive posts created by the Government; (iii) there is no record that the petitioner was appointed pursuant to any transparent recruitment process; (iv) after the appointment order dated 26.03.2001 was received, the CDPO, Khoirabari by his letter dated 27.04.2001 (Annexure-C; pg.19 of writ petition), the Director, Social Welfare & Probation, Assam was requested to inform whether the petitioner is allowed to join. Thereafter, by letter dated 22.05.2001, the Director, Social Welfare, Assam by his letter dated 22.05.2001 (Annexure-D to writ petition), directed the CDPO, Khoirabari to allow the petitioner to join and to pay salary from salary budget issued to his department. Therefore, it is submitted that there is no way that the petitioner could be working w.e.f. 30.03.2001, when till 22.05.2001, the petitioner was not allowed to join. Hence, it is submitted that the dispute as to whether or not the petitioner was rendering service still exists because even in WP(C) 4823/05 and even today the State Government has not accepted that the petitioner was lawfully appointed or that the petitioner has been rendering services on the strength of a valid appointment.

12) Considered the submissions made by the learned counsel for both sides and perused the materials available on record.

13) As regards the first part of the claim of the petitioner, it is seen that in the affidavit- in- opposition filed by the respondents No.5 and 6, it has been stated therein that the petitioner has received his arrear pay at the fixed pay of Rs.900/- each w.e.f. from 28.05.1998 to 25.03.2001 in terms of his initial appointment letter. The said statement has not been disputed or denied. Hence, the claim for arrear salary for the said period from 28.05.1998 to 25.03.2001 does not survive. Moreover, the information about the receipt of such payment has been withheld by the petitioner from this Court, which is not at all appreciated.

14) In so far as the second part of the claim of the petitioner is concerned, which was for a direction to regularise his service, this Court is inclined to accept the contention of the learned standing counsel for the Finance Department that as the petitioner had not pressed for the said relief in W.P.(C) No. 4823/2005, the same prayer, as made in this writ petition is found to be hit by the principles of res-judicata. Accordingly, it is held that the issue of regularisation was directly and substantially in issue in the proceedings of W.P.(C) No. 4823/2005, which was heard and not decided as not pressed. Therefore, having abandoned such claim in W.P.(C) No. 4823/2005, it is not open for the petitioner to renew such prayer in the present writ petition. The petitioner is found to have suppressed material fact that his claim for regularisation was abandoned in W.P.(C) No. 4823/2005.

15) On close scrutiny, it appears that the abandonment of the prayer for regularisation was fully justified and that the counsel appearing for the petitioner had acted very fairly as is expected of an erudite and responsible officer of the Court. The reason is simple. On 10.04.2006, the Supreme Court of India had decided the case of Secretary, State of Karnataka Vs. Umadevi (3), reported in (2006) 4 SCC 1, which had extensively dealt with the issue of regularisation and it was held that some categories of appointees could not be regularised. Therefore, on 14.12.2006, when the said W.P.(C) No. 4823/2005 was heard and disposed of, the law on regularisation had been settled in the said case of Umadevi (3) (supra). Therefore, although the learned counsel for the petitioner had questioned the wisdom of the learned counsel who had appeared for the petitioner in W.P.(C) No. 4823/2005, this Court finds that the said learned counsel was not only justified in abandoning the claim, but his conduct in abandoning such claim displays his fairness, which is expected by the Court from the counsel, who are well known as Officers of the Court. Therefore, in the present case, the reiteration of an abandoned prayer is deprecated, both on part of the petitioner and also on part of his counsel supporting such prayer. In this regard, this Court also puts on record its appreciation towards the learned standing counsel for the Finance Department, who had meticulously pointed out the said fact to this Court.

16) In this regard, it would be appropriate to refer to the relevant part of the case of State of M.P. v. Lalit Kumar Verma, (2007) 1 SCC 575, where the Supreme Court had held as follows:

"21. The legal position somehow was uncertain before the decision rendered by the Constitution Bench of this Court in Umadevi (3) [(2006) 4 SCC 1]. It has categorically been stated before us that there was no vacant post in the Department in which the respondent could be reinstated. The State had also adopted a policy decision regarding regularisation. The said policy decision also has no application in the case of the respondent. Even otherwise, it would be unconstitutional being hit by Article 16 of the Constitution of India."

17) In the case of Punjab Water Supply & Sewerage Board Vs. Ranjodh Singh,

(2007) 2 SCC 491, referring to paragraphs 15, 16 and 53 of Umadevi (3) [(2006) 4 SCC 1], the Supreme Court of India had observed:

"17. A combined reading of the aforementioned paragraphs would clearly indicate that what the Constitution Bench had in mind in directing regularisation was in relation to such appointments, which were irregular in nature and not illegal ones."

18) In the case of Official Liquidator Vs. Dayanand, (2008) 10 SCC 1, the Supreme Court had held as follows:-

"75. By virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in State of Karnataka v. Umadevi (3) (2006) 4 SCC 1, is binding on all the courts including this Court till the same is overruled by a larger Bench. The ratio of the Constitution Bench judgment has been followed by different two Judge Benches for declining to entertain the claim of regularisation of service made by ad hoc/temporary/daily wage/casual employees or for reversing the orders of the High Court granting relief to such employees."

19) In State of Orissa & Anr. vs. Mamata Mohanty, (2011) 3 SCC 436, it was observed by the Supreme Court as under:

"36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the notice board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."

20) Coming to the third claim of the petitioner, i.e. for salary for the period from 26.03.2001 till date, it is seen that there is no material on record that the petitioner was appointed in a transparent recruitment process after advertising such appointment. Moreover, the appointment was not in a sanctioned post. It also appears from letter dated 01.11.2006 (Annexure-F to writ petition) that no additional budget was issued from the Directorate of Social Welfare & Probation, Assam for paying salary to the petitioner. Moreover, as the CDPO, Khoirabari had not allowed the petitioner to join, the Director of Social Welfare & Probation, Assam had accepted the joining report. In this writ petition, the petitioner has not disclosed the date when the joining report was accepted by the Director of Social Welfare & Probation, Assam. In W.P.(C) No. 4823/2005, this Court had opined that "... the contentions raised by the respective parties give rise to a disputed question as to whether the petitioner had been rendering service after

his appointment made by order dated 26.03.2001. Accordingly, this Court had permitted the petitioner to avail appropriate remedy to prove his claim by adducing oral and documentary evidence. There is nothing to show that the liberty as granted by this Court by order dated 14.12.2006 had been modified, altered or set aside. Hence, the said order dated 14.12.2006 in W.P.(C) No. 4823/2005 had attained finality. Hence, the fresh prayer for salary w.e.f. 26.03.2001 till 14.12.2006, i.e. the date of judgment in W.P.(C) No. 4823/2005 is also found to be hit by the principles of res-judicata. A mere subsequent proposal by the Director of Social Welfare, Assam to the State Government to release the salary does not prove that the petitioner was working in the establishment of CDPO, Khoirabari since 30.03.2001, because Annexures A to G annexed to the writ petition are prior to the passing of the order dated 14.12.2006 in W.P.(C) No. 4823/2005 and, as such, there is a strong presumption that the said documents were before this Court when the said writ petition was heard.

21) In the case of National Fertilizers Ltd. Vs. Somvir Singh, (2006) 5 SCC 493, the Supreme Court held as follows:-

"23. The contention of the learned counsel appearing on behalf of the respondents that the appointments were irregular and not illegal, cannot be accepted for more than one reason. They were appointed only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee had not been properly constituted. In view of the ban on employment, no recruitment was permissible in law. The reservation policy adopted by the appellant had not been maintained. Even cases of minorities had not been given due consideration.

25. Judged by the standards laid down by this Court in the aforementioned decisions, the appointments of the respondents are illegal. They do not, thus, have any legal right to continue in service.

26. It is true that the respondents had been working for a long time. It may also be true that they had not been paid wages on a regular scale of pay. But, they did not hold any post. They were, therefore, not entitled to be paid salary on a regular scale of pay. Furthermore, only because the respondents have worked for some time, the same by itself would not be a ground for directing regularisation of their services in view of the decision of this Court in Umadevi (3) [(2006) 4 SCC 1]."

22) In the case of State of Manipur Vs. Y. Token Singh, (2007) 5 SCC 65, the Supreme Court had held that if the claim is based on illegal appointment, the appointees are not entitled to receive any salary for the period during which they rendered work on the basis of such illegal appointment.

23) A similar view was taken by this Court in the case of Rukiya Khatun Vs. State of Assam & Ors., 2012 (1) GLT 532: (2012) 1 GLJ 515: (2012) 4 NEJ 80, wherein this Court had held that the petitioners therein were the product of illegal

appointments and consequently they cannot claim payment of salary and accordingly, both the writ petitions were dismissed.

24) In the case of Umadevi (3) (*supra*), which was explained in the case of State of Karnataka Vs. M.L. Kesari, (2010) 9 SCC 247, before anyone can seek regularization, four factors must exist, viz., (i) existence of sanctioned posts, (ii) existing vacancies in sanctioned posts, (iii) persons appointed in vacancies against sanctioned posts are duly qualified persons, and (iv) appointment to such vacant post must have been made through open competitive selection process. The existence of any of these factors could not be demonstrated before this Court in this case. Moreover, the petitioner had not availed the liberty as granted in W.P.(C) No. 4823/2005. Therefore, even after 13 years of the passing of the judgment and order dated 14.12.2006 in W.P.(C) No. 4823/2005, the petitioner is at the same stage where there is no material before this Court to hold that the appointment of the petitioner was valid. The Court has no reason to differ from the opinion already expressed by the Court in W.P.(C) No. 4823/2005. Rather, as the petitioner has not taken any steps to adduce oral and documentary evidence to prove that his appointment was not illegal, there is a strong presumption against the petitioner, which flows from the provisions of Section 114 Illustration (g) of the Evidence Act, 1872. Moreover, the respondent Nos. 5 and 6 have not admitted in their affidavit- in- opposition that the appointment of the petitioner was lawful.

25) Moreover, the learned counsel for the petitioner has asserted that the respondents No.5 and 6 had admitted that the petitioner was working. In the said context, the Court is of the considered opinion that the respondents No.5 and 6 are admittedly not the appointing authority, not the authority to ratify the appointment of the petitioner, and not the authority to sanction and provide funds for payment of salary to the petitioner. Therefore, the admission by the respondents No.4 and 5 is limited to show that the said respondents admit that the petitioner was rendering service, but it does not establish that the appointment of the petitioner was lawful, which is sine qua non i.e. an indispensable condition for directing the State respondents to pay the salary of the petitioner from 30.03.2001 onwards, as claimed by the petitioner.

26) Therefore, unless there is a finding of fact that the appointment of the petitioner was not illegal, this Court cannot allow the claim of the petitioner for payment of salary notwithstanding that he might have been working in the Office of the CDPO, Khoirabari and accordingly, the third claim of the petitioner is also rejected.

27) Consequently, this writ petition stands dismissed. The rule stands discharged. The parties are left to bear their own cost.