
(2019) 09 GAU CK 0026

In the Gauhati High Court

Case No : Writ Petition (C) No. 53, 67, 116, 997, 6175, 861, 6520 Of 2016,
7973, 7988, 7981, 7969 Of 2015

Mihir Chakroborty And 4 Ors @APPELLANT@Hash State Of Assam And 5 Ors

Date of Decision : 11-09-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 16, 309
Assam Secondary Education (Provincialised) Services Rules, 2003 — Rule 3, 3(2)(a) (ii), 3(2)(b), 4, 4(a)(i), 5, 6, 8(c)
Assam Directorate Establishment (Ministerial) Service Rules, 1973 — Rule 10, 10(3)
Assam Ministerial District Establishment Service Rules, 1967 — Rule 6, 6(5), 6(5)(a), 6(5)(b), 6(6)(b)
Assam Secondary Education (Provincialised) Service (Amendment) Rules, 2012 — Rule 4(a), 4(b), 4(a)(i), 8, 8(4)

Citation : (2019) 09 GAU CK 0026

Hon'ble Judges : A. K. Goswami, J; Manish Choudhury, J

Bench : Division Bench

Advocate : A K Dutta, S Saikia, Mdi H Khan, P J Dutta, B P Borah, P K Goswami, B K Mishra, Mrb Taid, F U Barbhuiya

Final Decision : Disposed Off

Judgement

A. K. Goswami, J

1. We have heard Mr. P. K. Goswami, learned Senior counsel appearing for the petitioners in WP(C) 116/2016, WP(C) 7969/2015, WP(C) 7973/2015, WP(C) 7981/2015, WP(C) 7988/2015, WP(C) 53/2016 and WP(C) 67/2016; Mr. A. K. Dutta in WP(C) 997/2016; Mr. S. Islam in WP(C) 6175/2016 and Mr. M. U. Mondal in WP(C) 6520/2016. Also heard Mr. D. Mazumdar, learned Additional Advocate General, Assam, assisted by Mr. B. Talukdar, learned Standing counsel, Education (Secondary) Department as well as Mr. R. Borpujari, learned Standing counsel, Finance Department, appearing for the State respondents. None has appeared for the petitioner in WP(C) 861/2016.

2. In this batch of writ petitions, barring WP(C) 997/2016, the petitioners have, essentially, prayed for declaring and adjudging Rule 4 of the Assam Secondary

Education (Provincialisation) Service Rules, 2003 (for short, "2003 Rules"), as unconstitutional and void. In WP(C) 997/2016, prayer is made for incorporating provision for promotion of Grade-IV employees to the next higher post of Junior Assistant in Grade-III. Prayer is also made to amend an Office Memorandum dated 29.12.2015, issued by the Secretary to the Government of Assam, Secondary Education, on the subject of guidelines for recruitment of Junior Assistant in provincialised Higher Secondary and High School/High Madrasa. In WP(C) 7973/2016, WP(C) 7981/2015, WP(C) 7988/2016, WP(C) 53/2016, WP(C) 67/2016 and WP(C) 861/2016, advertisements to fill up various posts of Junior Assistant/Lower Division Assistant are also challenged. In WP(C) 116/2016, WP(C) 6175/2016 and WP(C) 6520/2016, the Office Memorandum dated 29.12.2015 is assailed.

3. Mr. Goswami has submitted that he will address his arguments on the basis of the pleadings contained in WP(C) 116/2016. WP(C) 116/2016 is filed by a registered Association represented by its Secretary, who himself is the petitioner No. 2. We have proceeded accordingly and have considered the pleadings in WP(C) 116/2016 for the purpose of disposal of the batch of writ petitions.

4. Although, apart from the petitioner No. 2, as indicated above, there are no other petitioners who are Grade-IV employees, however, it is contended that the petitioners were appointed at various schools in the cadre of Grade-IV during the years 1982 to June, 2013. What is sought to be meant, it appears, that the members of the petitioner No. 1 Association had been appointed to various schools in the cadre of Grade-IV during the period from 1982 to June, 2013. The petitioners in rest of the writ petitions are all Grade-IV employees.

5. It is stated that some of the members of the petitioner Association were appointed under the Assam Directorate Establishment (Ministerial) Service Rules, 1973 (for short, "1973 Rules") and the others under the 2003 Rules. All the members of the petitioner Association are working as Grade-IV employees. The members of the petitioner Association, who were appointed under the 1973 Rules, have legitimate expectation that when vacancies arise they would be promoted to Grade-III in terms of Rule 10(3) of the 1973 Rules and vacancies indeed had arisen post-2003 when the 2003 Rules had come into force. Rule 4 of the 2003 Rules, contemplates mode of recruitment to Grade-III by way of direct recruitment only from a select list prepared by the School Selection Committee under the provisions of Rule 8(c) on the basis of test and interview and, therefore, there is no promotional scope for the Grade-IV employees under the 2003 Rules. Despite the provision contained in Rule 4, the Government was upgrading posts of Grade-IV to Grade-III as appointments were made prior to 2003 and that vacancies had also arisen before 2003, but because of the Office Memorandum dated 29.12.2015, it becomes evident that posts of Grade-III in the schools will be filled up only by direct recruitment by application of Rule 4 of the 2003 Rules. Mr. Goswami has submitted that in absence of any scope for promotion for the Grade-IV employees under the 2003 Rules, the same is

violative of Articles 14 and 16 of the Constitution of India. So far as the members of the petitioner Association, who were appointed prior to 2003 and who had promotional avenue, had been deprived of promotion, thereby taking away vested right for being considered for promotion. It is submitted by him that some of the members of the petitioner Association, if not all, have the requisite qualification for being appointed to Grade-III and, therefore, there is no rational in discontinuing the practice of upgrading the post of Grade-IV to Grade-III as earlier followed. It is submitted that Rule 4 of 2003 Rules is unconstitutional and void as it does not include any promotional avenue for Grade-IV employees and prescribes direct recruitment as the only mode of recruitment to Grade-III. Mr. Goswami has also submitted that way back on 26.09.1973, the Deputy Secretary, Government of Assam, had written a letter (Annexure-B to the writ petition) to all Heads of Departments to follow Rule 6(5)(b), though wrongly recorded as Rule 6(6)(b) of the Assam Ministerial District Establishment Service Rules, 1967 (for short, "1967 Rules"), which provides for promotion of Grade-IV employees having requisite qualification to a reserve quota of 10% vacancies in the cadre of L.D. Assistant in amalgamated establishment of Deputy Commissioner of the District or Sub-Divisional establishments. On the basis of the same he submits that the Government at all times desired that there should be some promotional avenue for Grade-IV employees having requisite qualification to the next higher post. Referring to a letter dated 02.09.1987 (Annexure-C to the writ petition), Mr. Goswami further submits that the Director of Secondary Education, Government of Assam, had written a letter to all the Inspectors of Schools stating that there is no promotional avenue for Grade-IV employees though most of them had obtained the requisite qualifications and that steps should be taken to give preference to the qualified Grade-IV employees in provincialised schools at the time of selection for appointment of Grade-III under their jurisdiction. Accordingly, he submits that all through the Government had sought to protect the interest of the Grade-IV employees in respect of making available promotional avenue to them. Mr. Goswami has placed reliance on the judgements of the Hon'ble Supreme Court in the cases of Dr. Ms. O. Z. Hussain vs. Union of India and Others, reported in AIR 1990 SC 311 and Food Corporation of India and Others vs. Parashotam Das Bansal and Others, reported in (2008) 5 SCC 100.

6. Mr. A. K. Dutta, Mr. S. Islam and Mr. M. U. Mondal, learned counsel have endorsed the submissions advanced by Mr. P. K. Goswami.

7. Relying on the affidavit filed, it is submitted by Mr. Mazumdar that Grade-IV employees working in the provincialised High/Higher Secondary schools had been encadred for the first time in the year 2003 Rules as Class IV cadre. It is submitted by him that number of post in respect of Junior Assistant in Grade-III is one or, at the most, two, for each school and the post in respect of each school constitute a separate cadre. He has submitted that the 1973 Rules do not apply to the members of the petitioner Association who were appointed prior to 2003 and, similarly, the 1967 Rules is also not applicable to such members. He has

submitted that provision for promotion of Grade-IV employees, as in 1967 Rules or 1973 Rules, will not be workable given the number of posts in the higher cadre, which is one or two, unlike the considerable number of employees in the establishments falling under the 1967 Rules or the 1973 Rules. He has submitted that as per the Assam Service (Revision of Pay) Rules, 2017 (for short, "2017 Rules"), the Government has introduced the Modified Career Progression Scheme (MACP) to grant financial up-gradation thrice in the entire service period on completion of 10, 20 and 30 years to those employees who have no promotional avenue and the members of the petitioner Association are entitled to the benefit under the MACP Scheme and, therefore, lack of promotional avenue has been appropriately taken into consideration and dealt with. It is submitted by him that any order passed by any subordinate authority up-grading a Grade-IV employee to Grade-III, without there being any provision, is an illegal order and no right flows to the members of the petitioner Association on the basis of such orders which have no legal sanctity. He has also submitted that there is no merit in the contention advanced by the petitioners that Rule 4 is unconstitutional and that the Office Memorandum dated 29.12.2015 is arbitrary, as the same was issued only as a guideline for recruitment under the 2003 Rules. Drawing attention to the Assam Secondary Education (Provincialisation) Service Rules, 1982 (for short, "1982 Rules"), the rule that was holding the field prior to coming into force of the 2003 Rules, Mr. Mazumdar submits that 1982 Rules did not consist of any post in Grade-IV, they being not teachers, as the 1982 Rules regulated the recruitment and conditions of service of teacher of the High and Higher Secondary schools which had been provincialised under the Assam Secondary Education (Provincialisation) Act, 1977. He has submitted that Grade IV employees having requisite qualifications can certainly compete for Class III post. It is further submitted by Mr. Mazumdar that the decisions relied upon by Mr. Goswami were rendered in the context of one set of similarly situated employees being denied promotion vis-à-vis other set of employees, which is not the case here and, therefore, the decisions will have no application in the facts of the present cases.

8. We have considered the submissions of the learned counsel for the parties and have perused the materials on record.

9. The 1967 Rules were framed under the proviso to Article 309 of the Constitution of India to regulate recruitment and conditions of service of persons appointed to the Assam Ministerial District Establishment Service. Under Section 2(4) of the 1967 Rules, "District Establishment" means and includes all non-gazetted ministerial staff in the offices of the Deputy Commissioner, Sub-Divisional Officers and Sub-Deputy Collectors of the District. The note appended to Section 2(4) indicates that the Offices of the Deputy Commissioner and Sub-Divisional Officers shall include branches like Supply, Textile, Election, Revenue, Excise, Development and other general branches. Section 2(6) defines "Member of the service" to mean a member of the Assam Ministerial District Establishment Service. Under Section 2(9), "Service" means the Assam Ministerial District

Establishment Service. As per Section 3, under the heading "Cadre", the service is comprised of the categories of posts as indicated therein, which are: (i) Revenue Sheristadar; (ii) Sadar Head Assistant, Sub-divisional Head Assistant; Supervisory Assistant; (iv) Senior Assistant, Sadar Nazir and Sub-divisional Nazir; and (v) Junior Assistant. Rule 6 provides for recruitment to the service to be made by the appointing authority. Rule 6(5)(b), on which reliance is placed by Mr. Goswami, reads as follows:

"6. Recruitment to the service shall be made by the appointing authority according to the procedure laid down below -

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(5) Junior Assistants.-

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(b) By selection on the basis of seniority-cum-merit from amongst Grade-IV staffs of the district establishment concerned who have passed the High School Leaving Certificate or equivalent examination and have rendered at least 7 years of continuous service in the district establishment on the first day of the year in which selection is made.

Note:- (i) The proportion of vacancies to be filled in any year according to clauses (a) and (b) of sub-rule (5) of Rule 6 shall be 90:10 respectively. In the event of sufficient number of qualified or suitable persons not being available in category (b), the balance shall be made from category (a) i.e., through direct recruitment. Here vacancies shall include both permanent and temporary vacancies.

(ii) Appointment by selection under clause (b) of sub-rule (5) of this rule shall be made by the Deputy Commissioner from amongst the eligible Grade IV staffs."

10. The provisions of the 1967 Rules demonstrate that Grade IV staff is not a member of the service. Rule 6(5)(b) also goes to show that vacancies will be filled in any year according to clauses (a) and (b) of Rule 6(5) at the ratio of 90:10 respectively. The Grade IV staff has to be working in the district establishments concerned. The definition of "District Establishment" makes it abundantly clear that a school does not come under the purview of district establishment. Though the letter dated 26.09.1973 indicates that provision for promotion of Grade IV staff, as available in the 1967 Rules, should also be made available in respect of other District and Sub-divisional establishments, it does not appear that any Rules have been framed till date to that effect.

11. 1973 Rules was framed under the provision of Article 309 of the Constitution of India to regulate recruitment and conditions of service of persons appointed to the ministerial service in various offices of the Heads of Department of Government of Assam. Section 1(2) provides that the 1973 Rules shall be applicable to the ministerial staff of the offices of Heads of Departments,

mentioned in column (1) of Schedule I. In terms of Section 2(c), "District Offices" mean and include the different district offices of District Officers and other offices declared as such under the controlling authority of the officer as indicated under column (1) of the Schedule I. Section 2(e) defines "Member of the Service" to mean a member of the ministerial service in the respective offices appointed to the service either before or after the commencement of the Rules. Section 2(f) defines "Office" to mean an office of any of the Heads of Department named in the column (1) of Schedule I. As per Section 2(g), "Service" means the ministerial service in the respective office where the member serves. Section 10 of the 1973 Rules reads as follows:

"10. Junior Assistant - Appointment shall be made by the appointing authority -

(1) By direct recruitment;

(2) By selection on the basis of suitability with due regard to seniority from amongst other Class-III employees as classified in the Assam Services (Revision of Pay) Rules, 1983 of the office whose scale of pay are less than that of the Junior Assistant and who have passed (i) the Higher Secondary School Leaving Certificate Examination/ Pre-University Examination or equivalent examination and have rendered not less than 5 years, or (ii) the Matriculation or equivalent examination and have rendered not less than 7 years of continuous service in the Office on the 1st day of the year in which the selection is made.

(3) By selection on the basis of suitability with due regard to seniority from amongst the Grade IV staff of the office who passed (i) the Higher Secondary or equivalent examination and have rendered not less than 5 years or (ii) the matriculation or equivalent examination and have rendered not less than 7 years of continuous service in the office on the 1st day of the year in which the selection is made."

12. Schedule 1 to the 1973 Rules does not include any provincialised school. In view of the provisions of 1973 Rules, it does not appear to us that the members of the petitioner Association were appointed on the basis of the 1973 Rules. In Section 3, under the heading "Cadre", in the categories of posts there is no reference to any Grade IV staff and, therefore, a Grade IV staff does not come under the purview of ministerial service. The letter dated 02.09.1987, on which reliance is placed by Mr. Goswami, makes it clear that Grade IV employees in provincialised schools have no promotional avenue. The said letter belies the contention of the petitioners that they were appointed on the basis of the 1973 Rules and were legitimately expecting promotion in terms of Section 10(3) thereof.

13. Section 3 of the 2003 Rules reads as follows:

"3. Classes and Cadres - (1) The service in provincialised School shall consist of the teaching and non-teaching staff. The teaching staff shall consist of following classes and cadres, each one of these constituting a distinct and separate cadre

as on the commencement of these rules, namely :-

(a) Class II (Senior) :- It includes the cadres of -

(i) Principal;

(ii) Vice-Principal;

(iii) Post-Graduate Teacher;

(iv) Headmaster/Superintendent;

(b) Class II (Junior) :- It includes the cadres of -

(i) Assistant Headmaster/Assistant Superintendent;

(ii) (a) Graduate Teacher, (b) Hindi teacher having Bachelor Degree from any recognized University, (c) Classical teacher (Sanskrit/Arabic/Language teacher) having Bachelor Degree from any recognized University;

(iii) Demonstrator;

(iv) Senior Classical Teacher without Bachelor Degree;

(v) Music Teacher;

(vi) Junior Teacher/Junior Classical Teacher/Junior Hindi Teacher;

(vii) Craft Teacher:

Provided that there shall be no fresh recruitment to the cadres of Junior Teacher, Junior Classical Teacher, Junior Hindi Teacher, Senior Classical Teacher, and all such existing posts shall stand upgraded as Graduate Teacher or Hindi Teacher having Bachelor Degree from any recognized University or Classical Teacher (Sanskrit/Arabic/Assamese Language Teacher, as the case may be) from the date such posts become vacant either as a result of retirement of existing incumbent or otherwise;

(2) The non-teacher staff in provincialised School shall consist of the following classes and cadres on the date of commencement of these rules, namely:-

(a) Class-III :- It includes the cadres of -

(i) Senior Assistant;

(ii) Junior Assistant;

(b) Class-IV :- It includes the cadres of -

(i) Laboratory Bearer;

(ii) Grade-IV."

14. The method of recruitment, as laid down in Rule 4 of the 2003 Rules reads as follows:

"4. Method of recruitment-

(a)(i) Recruitment to the Cadres of Lower Division Assistant under rule 3(2)(a)(ii) and in Class IV posts under rule 3(2)(b) in the office of the High, Higher Secondary, Higher Secondary and Multipurpose Schools shall be made directly by the Appointing Authority from the select list prepared by the School Selection Committee constituted under the provisions of rule 8(c) on the basis of test and interview;

(ii) The Principal or the Head Master, as the case may be, where the vacancy exists or likely to exist within the next 3 months shall submit the proposal for filling up the said posts to the Inspector of Schools for approval. After obtaining approval of the Inspector of Schools the Principal or the Head Master shall inform the District Employment exchange about the vacancies with a request to send the list of candidates for selection to fill up the vacancies;

(iii) After receipt of the list of candidates from District Employment Exchange the Principal or the Headmaster shall inform the School Selection Committee to hold the written test for selection of Lower Division Assistant along with typewriting test and written test along with viva-voce for Class IV posts in consultation with the Inspector of Schools concerned;

(iv) Then the School Selection Committee shall prepare a select list of candidates containing double the number of vacancies and the Member-Secretary shall submit the select list to the Appointing Authority for appointment.

The Appointing Authority, i.e. the Inspector of Schools concerned shall fill-up the vacancies in order of merit/preference from the select list and shall maintain the reservation provisions as per rule wherever applicable.

(a) Academic qualification -

The qualification for direct recruitment for the post of Lower Division Assistant in High, Higher Secondary, Higher Secondary and Multipurpose Schools shall be Higher Secondary examination passed or equivalent and having diploma in English and Assamese typewriting. The qualification for the post of Class IV employee shall be Class X standard.

(c) Age - A candidate for the post of Lower Division Assistant and Class IV shall be within the age limit of 18 to 36 years as on the 1st day of January of the year of advertisement for direct recruitment."

15. Academic qualification is indicated at Rule 4(a) but it should have been Rule 4(b). Further-more, after substitution of Rule 8 by the Assam Secondary Education (Provincialised) Service (Amendment) Rules, 2012, School Selection Committee is constituted under Rule 8(4). However, corresponding amendment in Rule 4(a)(i) is not effected.

16. A perusal of Rule 3 of the 2003 Rules goes to show that in respect of non-teaching staff in provincialised school, Class III includes the cadres of (i) Senior

Assistant and (ii) Junior Assistant and Class IV includes the cadres of (i) Laboratory bearer and (ii) Grade-IV. Though the cadres are identified as Senior Assistant and Junior Assistant, in Rule 4 there is reference of Lower Division Assistant and not Junior Assistant. Similarly, in Rules 5 and 6, there is reference to U.D.A. though the same has been substituted in some provision by "Senior Assistant". The expression "Junior Division Assistant" as occurring in Rule 5 had been substituted by the expression "Junior Assistant" by subsequent amendment.

17. It appears from Schedule-III (B) of the 2003 Rules that the strength of non-teaching staff, i.e., Lower Division Assistant (Grade-III) and Laboratory Bearer/ Grade IV (Grade-IV) in Assam, was 1403 and 5553, respectively, as in June, though the year is not indicated. Having regard to the fact that the 2003 Rules were framed in the year 2003, it might refer to the year 2003, but nothing can be said with certainty. There is apparently non-application of mind in drafting the "Schedule III (B) Non-Teaching" as there is reference to Upper Division Assistant and Lower Division Assistant, but the cadre does not indicate any such post of Lower Division Assistant or Upper Division Assistant. Even though some amendments were effected correcting the nomenclature by substitution, such substitution of wrong expressions have not occurred in all the provisions.

18. There is no dispute that in view of the extant rule, namely, 4(a)(i) of the 2003 Rules, recruitment to the cadre of Junior Assistant is to be made by direct recruitment by the appointing authority from the select list prepared by the School Selection Committee constituted under the provision of Rule 8(4) on the basis of test and interview. Thus, there is no promotional avenue either for the cadre of Laboratory Bearer, which is in Class IV (i) and for Grade IV, which is in Class IV(ii).

19. Rule 5 of the 2003 Rules reads as follows:

"5. Recruitment by promotion to the post of U.D.A. - (1) Recruitment to the post of Senior Assistant in the Office of the High, Higher Secondary and Higher Secondary and Multipurpose Schools shall be made by promotion in the manner provided in Rule 6.

(2) The post of Senior Assistant in the High, Higher Secondary, Higher Secondary and Multipurpose Schools shall be filled up from the Junior Assistant in each Office of the schools according to the district seniority having minimum 5 years of continuous experience in the service."

20. From the above it appears that the post of Senior Assistant is to be filled up from the Junior Assistant having minimum 5 years of continuous experience in service in each office of the Schools according to the district seniority. Thus, it is evident that there has to be a common seniority list of Junior Assistants for a district from which promotion to the post of Senior Assistant is to be made based on seniority. There is no such similar provision for preparation of a district-level seniority list for Class IV employees.

21. In service jurisprudence, promotion usually means advancement in rank, grade or both. Promotion generally means appointment to a different post carrying a higher scale or pay in the service. From a perusal of the materials on record it is apparent that there is no provision for promotion of Class IV employees working in provincialised schools although instances have been brought on record to indicate that some up-gradation of existing Class IV employee to the post of Junior Assistant had been made till permanent arrangements were made. There does not appear to be any basis for the same.

22. In Rule 4(a)(i) of the 2003 Rules there is a reference to Select List to be prepared by the School Selection Committee. The aforesaid provision indicates that such Selection Committee is to be constituted school-wise for the purpose of appointment to the school. It is not disputed by the petitioners that the class and cadre under the 2003 Rules are school based. The number of post in each cadre, including the cadre of Junior Assistant in each school is one or two, as submitted by Mr. Mazumdar. The qualification prescribed for Class IV and Junior Assistant under the 2003 Rules is different. It is also not clear regarding the qualification of members of Class IV who were appointed prior to coming into force of the 2003 Rules.

23. In Dr. Ms. O.Z. Hussain (supra), which was referred to by the Hon'ble Supreme Court in the case of Parashotam Das Bansal (supra), the Hon'ble Supreme Court had observed that the provision for promotion increases efficiency of public service while stagnation reduces efficiency and makes the service ineffective. In Parashotam Das Bansal (supra), the Hon'ble Supreme Court observed that though an employee of the State has no fundamental right of promotion, he has a right to be considered therefore. What is necessary is to provide an opportunity of advancement, promotion being a normal incidence of service. It was also observed that when employees are denied an opportunity of promotion on the ground that they fall within a category of employees excluded from promotional prospect, superior court will have the jurisdiction to issue necessary direction.

24. It is true that in terms of the 2017 Rules, MACP Scheme has been introduced and the members of the petitioner Association would be entitled to financial up-gradation thrice in their service career as they have got no promotional avenues. But then there can be no gainsaying the fact that employees have aspiration to climb the ladder in the hierarchy during their service career. A perusal of the aforesaid judgements goes to show that provision for promotion also increases efficiency of public service while stagnation reduces efficiency and makes the service ineffective. Therefore, an employee should be given an opportunity of advancement and the State must provide realistic opportunities to employees to move up by way of promotion.

25. Mr. Goswami is right in submitting that though the Government was alive to the need to provide promotional avenues to Class IV employees, the same, however, did not materialise in the 2003 Rules. In the present facts and

circumstances, we are of the considered opinion that it will be in the interest of justice to mould the relief by directing the respondents to consider framing suitable provision for promotion of Class IV employees to the post of Junior Assistant by prescribing such eligibility criteria, as it may deem appropriate, in addition to filling up the posts of Junior Assistant by way of direct recruitment, within a period of six months.

26. The writ petitions stand disposed of with the above directions and observations. No cost.