
(2016) 11 GAU CK 0030
In the Gauhati High Court
Case No : WP(C) No. 4974 of 2014

Mrinal Pathak

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 09-11-2016

Acts Referred:

Citation : (2017) 1 GauLT 169

Hon'ble Judges : Mr. Ujjal Bhuyan, J.

Bench : Single Bench

Advocate : Mr. R.C. Saikia, Advocate, for the Petitioner; Mr. K. Gogoi, Mr. B.D. Das, Ms. S.J. Baruah and Mr. S. Biswas, Advocates, for the Respondents

Final Decision : Allowed

Judgement

Mr. Ujjal Bhuyan, J. - This case was heard yesterday and today is fixed for delivery of order.

2. Heard Mr. R.C. Saikia, learned counsel for the petitioner, Mr. K. Gogoi, learned Standing Counsel, Higher Education Department for respondent Nos. 1 and 2 and Mr. B.D. Das, learned Senior counsel assisted by Ms. S.J. Baruah and Mr. S. Biswas, learned counsel for respondent No. 5. None has appeared for respondent Nos. 3 and 4.

3. By filing this petition under Article 226 of the Constitution of India, petitioner seeks quashing of resolution dated 06.02.2014 adopted by the Governing Body of Kharupetia College as well as the subsequent advertisement dated 22.03.2014 cancelling the earlier advertisement dated 13.06.2012 and further seeks a direction to the respondents to complete the selection process for the post of Assistant Professor in the Political Science Department of Kharupetia College in the district of Darrang pursuant to the advertisement dated 13.06.2012.

4. According to the petitioner, he is qualified and eligible to be appointed as Assistant Professor of Political Science. He has experience of serving as Lecturer (since re-designated as Assistant Professor) in the Nalbari College and is

presently serving in the Haji Ajmal Ali College, Nagaon.

5. An advertisement was published in the newspapers on 13.06.2012 by the Principal-cum-Secretary of Kharupetia College inviting applications to fill up one vacancy in the post of Assistant Professor (unreserved), Political Science in the Kharupetia College. According to the petitioner, he responded to the said advertisement and submitted all his particulars before the Kharupetia College. However, to the surprise of the petitioner, a notice was issued by the Principal-cum-Secretary of Kharupetia College on 22.03.2014 cancelling the advertisement dated 13.06.2012. Petitioner sought for certain information from the Kharupetia College authorities under the Right to Information Act, 2005. As per information furnished to the petitioner, 4 candidates had submitted application pursuant to advertisement dated 13.06.2012, which included petitioner and respondent No.5. Petitioner was also informed that the Governing Body of the Kharupetia College had adopted resolution No.4 dated 06.02.2014 whereby it was decided that respondent No.5 would be adjusted against the sanctioned post and that the advertisement dated 13.06.2012 should be cancelled which should be communicated to the Director of Higher Education, Assam. In the said resolution, it was also stated that though a Court case was pending in respect of the advertised post, the same was subsequently withdrawn. Since respondent No.5 was working for more than 8 years having UGC norms, it was decided to adjust him against the sanctioned post.

6. Aggrieved by such cancellation of advertisement, petitioner submitted representation before the Director of Higher Education, Assam requesting the said authority to intervene in the matter so that selection process could be carried out as per advertisement dated 13.06.2012. Since there was no response, petitioner has approached this Court by filing the present writ petition.

7. This Court by order dated 24.09.2014 had issued notice and passed an interim order directing the respondents not to fill up the post of Assistant Professor in the Department of Political Science in the Kharupetia College which was earlier advertised.

8. Respondent No.5 has filed affidavit. In his affidavit, he has stated that he has the qualification and eligibility to be appointed as Assistant Professor of Political Science. It is stated that he was working in the Kharupetia College against a non-sanctioned post since 03.07.2004 following an interview. It is further stated that one Rupjyoti Prasad Dutta, who was serving as Lecturer in Political Science against the sanctioned post in the Kharupetia College, had expired in the year 2011. It is stated that respondent No.5 was entitled to adjustment against the said vacancy in terms of the Government Office Memorandum (OM) dated 17.07.2004. However, the Kharupetia College authorities went ahead and published an advertisement on 13.06.2012 to fill up the said vacancy. At this stage, respondent No.5 preferred a writ petition before this Court being WP(C) No.6227/2012 seeking a direction to the respondents for his adjustment against the aforesaid sanctioned vacant post as per the OM dated 17.07.2004. On verbal

assurance of the Kharupetia College authorities that his case would be considered, respondent No.5 withdrew the writ petition on 08.10.2013. Governing Body of the Kharupetia College thereafter adopted resolution No.4 on 06.02.2014 deciding to adjust respondent No.5 against the sanctioned vacant post in terms of OM dated 17.07.2004 and decided to cancel the earlier advertisement dated 13.06.2012. In this regard, fresh advertisement dated 22.03.2014 was issued. It is further stated that Director of Higher Education, Assam had directed the Principal of the Kharupetia College on 10.07.2014 to submit proposal for regularization of the service of respondent No.5 by way of adjustment as per OM dated 17.07.2004. Accordingly, resolution was adopted by the Governing Body on 26.07.2014. While case of respondent No.5 was being considered, interim order was passed by this Court in the present writ petition.

9. Petitioner has also filed an additional affidavit on 25.01.2016 in support of the writ petition.

10. Mr. Saikia, learned counsel for the petitioner, in his short but effective submission has placed before the Court a copy of order dated 15.07.2015 passed by a Single Bench of this Court in WP(C) No.1119/2009 (Kishore Barman v. State of Assam) to contend that the OM dated 17.07.2004 is no longer in existence as the same has been replaced by another OM dated 12.10.2004 which prohibits appointment against non-sanctioned posts in colleges under the deficit-grants-in-aid system. He submits that this was taken note of by the Court in Kishore Barman (supra) and the claim of regularization by way of adjustment in terms of the OM dated 17.07.2004 was rejected. He therefore submits that similar stand be taken in the present case as well to nullify the decision of the Governing Body to regularize the service of respondent No.5. Referring to the provisions of Assam Aided College Employees Rules, 1960 and the Assam Education Department Selection Rules, 1981, Mr. Saikia submits that holding of interview before selection is mandatory for selection and appointment of Assistant Professor. He further submits that the impugned decision is wholly untenable and should be appropriately interfered with by this Court.

11. On the other hand, Mr. Das, learned Senior counsel for respondent No.5, has relied upon the OM dated 17.07.2004 and contends that respondent No.5 fulfils the criteria for regularization of his service by way of adjustment in terms of the said OM. This aspect was overlooked by the college authorities while issuing advertisement on 13.06.2012. He submits that decision taken by the college authorities to cancel the aforesaid advertisement and to regularize the service of respondent No.5 by way of adjustment in terms of the OM dated 17.07.2004 was taken bonafidely and such decision does not suffer from any infirmity to warrant interference.

12. Submissions made by learned counsel for the parties have been considered. Also perused the materials on record.

13. On a query by the Court, learned counsel for the parties submitted at the Bar

that though Kharupetia College was earlier under the deficit system of grants-in-aid, the said college has since been provincialised in terms of the Assam College Employees (Provincialisation) Act, 2005.

14. Having noticed the above, relevant provisions of the Assam College Employees (Provincialisation) Act, 2005 (Provincialisation Act) and the Assam College Employees (Provincialisation) Rules, 2010 (Provincialisation Rules) may be briefly referred to.

15. As per Section 3 of the Provincialisation Act, all employees of colleges in receipt of grants-in-aid from the Government and which have been provincialised in terms of the said Act, shall be deemed to have become employees of the State Government on and from the date on which the colleges were brought under the deficit system of grants-in-aid. As per Section 6, appointments of both teaching and non-teaching staff in the provincialised colleges shall be made by the Director of Higher Education, Assam on the basis of selection and recommendation of the Governing Body of the respective colleges in accordance with the rules and procedure in force. Section 12 is the rule-making power enabling the State Government to make rules. In exercise of powers conferred under Section 12(1) of the Provincialisation Act, Provincialisation Rules have been framed. Rule 5 deals with the method of recruitment. As per Rule 5(2), appointment to the post of Lecturer (Assistant Professor) shall be made by direct recruitment with prescribed qualifications through open advertisement published in two leading dailies at least in two consecutive issues. As per Sub-Rule (7), Governing Body shall conduct the selection process and make recommendation to the Director of Higher Education who shall issue orders of appointment. The procedure of making appointment is laid down in Rule 7 which provides for recommendation by the Governing Body on the basis of the recommendation of the Selection Committee to be constituted. It provides for holding of interview by the Selection Committee.

16. Having noticed the statutory provisions governing recruitment of Lecturers (Assistant Professor) in the provincialised colleges in the State of Assam, case put up by respondent No.5 may now be examined.

17. According to respondent No.5, he has been working in a non-sanctioned post in the Kharupetia College in the Political Science Department for about the last 8 years. Therefore, on the basis of the OM dated 17.07.2004, his service is required to be regularized by way of adjustment.

18. On a perusal of the OM dated 17.07.2004, it is seen that the said OM was issued by the Higher Education Department as a one-time measure for regularizing the services of Lecturers working in non-sanctioned posts in deficit grants-in-aid colleges by way of adjustment. The OM discloses that there were more than 300 college teachers found to be serving in different degree colleges (deficit grants-in-aid colleges) in the State of Assam since 1989 without any valid sanctioned post. It is for these teachers that the aforesaid OM was issued. It

appears that after the objective of the said OM was achieved, Government of Assam in the Higher Education Department issued another OM dated 12.10.2004 stipulating that no college under the deficit grants-in-aid system should engage any person as a Lecturer where no sanctioned post exists for the purpose. This was taken note of by this Court in Kishore Barman (supra).

19. A Full Bench of this Court in Mizanor Rahman v. State of Assam, 2012 (1) GLT 520, considered the rationale behind issuance of the OM dated 17.07.2004. It was noted that in 1952, the State Government brought 52 degree colleges under the deficit system of grants-in-aid. Thereafter, the State stopped sanctioning new posts of Lecturer in the degree colleges. To cater to the needs of the students, the colleges started appointing Lecturers against non-sanctioned posts. These Lecturers had approached the Court for regularization of service. Directions were issued by the Court to consider their regularization. It is in this backdrop that cabinet decision was taken on 09.06.2004 for adjusting the services of about 300 college Lecturers working against non-sanctioned posts in sanctioned vacant posts. Following the cabinet decision, the OM dated 17.07.2004 was issued. The Full Bench held that it was a one-time decision to adjust the services of only serving Lecturers against the then available 322 regular vacancies. Since the above one-time measure was intended to address the grievances of a specific group of Lecturers, it was held that it should not entitle those outside the targeted group of Lecturers to claim the benefit of adjustment in vacant sanctioned posts of Lecturers. It was an exception to the regular mode of recruitment and continued recourse to this process beyond the one-time measure would defeat the rights of the job aspirants in the open market under Articles 14 and 16 of the Constitution. Therefore, it was clarified that those Lecturers whose cases were not under consideration at the time of the cabinet decision dated 09.06.2004 would not be entitled to the benefit of the OM dated 17.07.2004.

20. That apart, when the statutory Act and Rules are governing the field laying down the procedure to be followed while making appointment to the post of Assistant Professor, there is no scope for application of administrative guidelines in the form of Government OM dated 17.07.2004. After the deficit grants-in-aid colleges have been provincialised by the Provincialisation Act whereafter Rules have been framed laying down the procedure to be followed for making appointment to the post of Assistant Professor, it is not open to the respondents to give a go-by to the statutory provisions and to seek refuge in a Government OM which in any case has been superseded.

21. It is a salutary principle of administrative law that when a statute requires a thing to be done in a particular manner, it has to be done in that manner and in no any other way. This principle has been recognized and applied by the constitutional Courts in India.

22. That being the position, decision of the Governing Body of Kharupetia College dated 06.02.2014 is wholly untenable in law and cannot be sustained.

Accordingly, the said decision dated 06.02.2014 and the consequential advertisement dated 22.03.2014 are hereby set aside and quashed. Respondents are directed to proceed with the selection process in terms of the earlier advertisement dated 13.06.2012 in accordance with law amongst the candidates already in the fray.

23. Writ petition is allowed but without any order as to cost.