

(2003) 02 GAU CK 0053

In the Gauhati High Court

Case No : W.A. No's. 516, 519 and 520 of 2001

Nabin Ch. Bordoloi

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 03-02-2003

Acts Referred:

Assam Public Service Commission (Limitation of Functions) Regulations, 1951 — Regulation 3

Citation : (2003) 2 GLR 561 : (2003) 2 GLT 147

Hon'ble Judges : P.P. Naolekar, C.J.;Ranjan Gogoi, J

Bench : Division Bench

Advocate : A.M. Mazumdar, N. Saikia, A. Borah, S. Sharma and R. Goswami, for the Appellant; G.A., K.H. Choudhury and S.K. Muktar, for the Respondent

Final Decision : Dismissed

Judgement

P. P. Naolekar, C.J.—As common question arises out of similar facts, these appeals are heard together and decided by a common judgment.

2. The facts in brief are that the appellants, viz., Nabin Chandra Bordoloi and Suraj Ali Laskar (whose heirs are brought on record since he expired during the pendency of the proceeding) were appointed on 5.5.1984 under Regulation 3(f) of the Assam Public Service (Limitation of Function) Regulation, 1951 (for short the Regulation 1951) to the post of District Elementary Education Officers (DEEO) and they joined, duties on 22nd May, 1984. Later on the Government issued an order dated 20.12.1989 regularising their services with retrospective effect from 16.1.1987.

3. On 13.7.1988 the Assam Public Service Commission has conducted a selection process for appointment on the post of DEEO Respondent Nos. 3 to 10 were selected and were appointed in the post by order dated 13.7.1988, whereas the appellants also participated in the same selection process but could not clear it. On 20.4.1992 the State Government has published a provisional gradation list of District Elementary Education Officers, wherein the appellants were shown

juniors to respondent Nos. 3 to 10 taking their dates of appointment and the period of service from the date of the order of regularisation, i.e., 20th December, 1989 and not from the date the appointment order was given effect to, i.e., 16.1.1987. The appellants submitted representations unsuccessfully. Ultimately the Government has issued a final seniority list of DEEO on 22.7.1997, where the appellants were shown as juniors to respondent Nos. 3 to 10. Aggrieved by the position assigned to them the appellants have filed two writ petitions (viz., Civil Rule No. 336/98 by Nabin Ch. Bordoloi and Civil Rule No. 337/98 by Suraj Ali Laskar). Respondent Nos. 3 and 5 also filed a writ petition in the High Court challenging the retrospective regularisation of the appellants, which was registered as WP(C) No. 5342/99 (H.K. Sarma and Anr. v. State of Assam and Ors).

4. All these writ petitions were heard together and disposed of by the learned Single Judge by a common judgment and order dated 4.10.2001. The learned Single Judge was of the view that the petitioners service from 16.1.1987 till they have been regularised cannot be counted for the purpose of ascertaining their seniority as they were appointed on ad hoc basis. The learned Single Judge has placed reliance on the decisions of the Division Bench of this Court in Hemanta Kumar Pegu and Ors. v. State of Assam and Ors. 1988 (1) GLJ 383 and Pranjit Kumar Das v. State of Assam and Ors. (1995) 1 GLR 229. The learned Single Judge by its order dated 4.10.2001 dismissed the petitions filed by the appellants herein and allowed the writ petition filed by the respondent Nos. 3 and 5. Aggrieved by the said judgment the three appeals have been preferred by the appellants.

5. It is contended by Ms. N. Saikia, learned counsel for the appellants that since the appellants have been appointed on the post of DEEO under Regulation 3(f) of Regulation 1951, the service rendered by them has to be counted for the purpose of counting their seniority from the date of their initial appointment, in any case, from the date they have been regularised, i.e., 16.1.1987. The appellants having been appointed under Regulation 3(f) of Regulation 1951, the State Government was justified in giving regularisation to the appellants with retrospective effect and the policy decision taken by the Government does not fall within the ambit, of the arbitrariness. On the other hand, the submission of Mr. K.H. Choudhury, learned counsel for the private respondents is that the appellants were never appointed on regular basis to the cadre post, the appointment of the appellants at best could be treated as temporary or ad hoc, therefore, the Government has committed an error in granting retrospective regularisation to the appellants. It is further contended that there is no reasonable justification for giving the appellants march over the respondents, who have been appointed regularly on regular basis under the Regulation 1951 to the post, particularly so, when the appellants and respondents have appeared in the same selection process and the appellants were declared failed, whereas the respondents have cleared the examination and were appointed. The persons, who were unsuccessful in the same examination cannot be permitted to be

supersede the successful candidates by executive fiat. The action of the Government in these circumstances is arbitrary.

6. At present, we need not go to the controversy in detail in view of the decision of the Division Bench of this Court in *Pranjit Kumar Das v. State of Assam and Ors.* (supra). Paragraph 11 of the said judgment reads thus:

"This Regulation 3(f) of the Regulation of 1951 came up for consideration by the Division Bench of this court in *Hemanta Kumar Pegu and Ors. v. State of Assam* 1988 (1) GLJ 383 : (1989) 1 GLR 7, The Division Bench considered Regulation 3(f) and held in paragraph 27 of the judgment that this regulation does not provide a source of power for appointment, but only provides the mode of appointment and that regularise does not connote permanence. The contention that the persons who were appointed under Regulation 3(f) can be regularised if they are otherwise qualified was not accepted by the court, and it was held that regularisation means making regular appointment by selection irrespective of the question whether the petitioners were already appointed under Regulation 3(f) or not. The ratio laid down in the above decision in our opinion is the correct proposition of law and there is no reason to take a different view. Therefore, in view of the above ratio, we are constraint to hold that merely because the appointments of the appellants were converted to appointment under Regulation 3(f) of the Regulation of 1951, they cannot claim regularisation due to length of their service."

7. The Division Bench of this Court has taken a categorical view that the appointments made under Regulation 3(f) of Regulation 1951 does not authorise the very person to claim regularisation on the basis of appointment made under Regulation 3(f). Thus, in other words, this Court has held that the service rendered by any incumbent under the appointment made in exercise of power under Regulation 3(f) of Regulation 1951 cannot be a ground for regularisation of the incumbent on that basis. For the same reason, the services rendered by the incumbent cannot be counted for the purpose of assigning the seniority.

8. In *Anup Kumar Das v. Sanjib Kakati* 2000 (1) GLT 429 a Division Bench of this Court has held that services rendered by an incumbent to a post appointed under Regulation 3(f) of the Regulation 1951 is not to be counted for the purpose of seniority.

9. The Supreme Court in *Rudra Kumar Sain and Others Vs. Union of India and Others*, while dealing with the nature of the appointment held that if an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a "stopgap" arrangement and a appointment in the post as "ad hoc" appointment.

10. Regulation 3(f) of Regulation 1951 contemplates exactly the same situation where the appointments are made on the temporary basis for four months

because of the fact that regular appointments could not be made within the short span of time. The appellants' appointments being a "stop gap" arrangement on ad hoc basis till they have been regularised on 20.12.1989, their service on ad hoc basis could not be counted for the purpose of seniority. The decision of the Government giving retrospective effect to appellants' regularisation cannot be said to be a correct decision. However, the Government has corrected its decision by not assigning the seniority to the appellants with retrospective effect and they were given seniority from the date they have been regularised, i.e., 20.12.1989.

11. In our considered view the action of the Government does not require any interference nor the order passed by the learned Single Judge. As a consequence thereof, the appeals are dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.