
(2019) 02 GAU CK 0061
In the Gauhati High Court
Case No : Writ Petition (C) No. 3332 Of 2015

Nirmal Debnath

APPELLANT

Vs

State Of Assam And 2 Ors

RESPONDENT

Date of Decision : 20-02-2019

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2019) 02 GAU CK 0061

Hon'ble Judges : Nelson Sailo, J

Bench : Single Bench

Advocate : M Barman, S K Medhir

Final Decision : Disposed Off

Judgement

1. Heard Mr. B. Chakraborty, learned counsel for the petitioner as well as Mr. K. Gogoi, learned Standing Counsel for the Higher Education Department, who appears for the respondent Nos. 1 & 2. Also heard Mr. S.K. Medhi, learned counsel appears for the respondent Nos. 3 & 4.

2. The case of the petitioner in brief is that he applied for the post of Lecturer on adhoc basis in the Department of Statistics in Hojai College, Nagaon in terms of the Advertisement that was published in the local daily on 20.07.2000. He was then called for interview on 07.08.2000 and was selected for the post. The petitioner was appointed vide order dated 01.09.2000 and he joined the post on the next day.

3. Be it stated herein that at the time of the appointment of the petitioner and few other Lecturers of other Departments, there were no vacancy but due to the requirement, they were appointed as such but with due process in non-sanctioned posts. The service of the petitioner was then regularized along with other Lecturers pursuant to the Special Body Meeting Resolution of the Governing Body vide order dated 05.12.2000. In the meantime, the Education (Higher) Department came up with an Office Memorandum dated 17.07.2004 to

accommodate the Lecturers of deficit grant-in-aid colleges, working in non-sanctioned post by way of readjustment in the departments having the vacancy. The Governing Body of Hojai College in its meeting held on 20.12.2005 took a resolution for accommodating the Teachers working against non-sanctioned post to vacant posts in other Departments. The resolution was then sent to the Director of Higher Education, who in turn sent the same to the Commissioner and Secretary to the Government of Assam, Education Department for the concurrence of the Government. However, as no such concurrence was forthcoming, the petitioner approached this Court by filing WP(C) No. 6306/2007.

4. The writ petition was disposed of by this Court vide order dated 27.11.2009 with a direction to the respondent authorities concerned to consider the case of regularization of service of the petitioner within a time frame. Despite the direction, since the respondents did not comply with the direction, the petitioner filed a Cont. Cas(C) No. 196/2010 and consequently, the State Government in the Education (Higher) Department accorded sanction and approval for regularization of serving Teachers, working against non-sanctioned post in different deficit grant-in-aid Colleges, which have been since Provincialised vide communication dated 30.10.2010. The said communication was addressed to the Director of Higher Education and along with it, a list of Teachers, who were to be regularized was enclosed and the petitioner's name appeared at Serial No.22. Consequent thereto, the petitioner's service was regularized vide order dated 06.01.2011. As per the order of regularization, the petitioner was given a fixed pay of Rs. 8000/- per month and it was further provided that his regularization will be governed by the provisions of the Office Memorandum dated 17.07.2004. The grievance of the petitioner is that despite his service being regularized, he has not been given a time scale of pay like other similarly situated persons but only a fixed pay.

5. Mr. B. Chakraborty, learned counsel for the petitioner submits that the Teachers, who were regularized with the petitioner or in a similar manner have all been granted a time scale of pay while the petitioner has been denied. The action/inaction of the respondent authorities in not granting the petitioner a similar benefit being arbitrary and unfair warrants the interference of this Court. The learned counsel further submits that the petitioner got himself registered in the M. Phil course in the year 2007 and completed the same on 06.09.2010 and therefore, he is only exempted from qualifying National Eligibility Test/State Level Eligibility Test (NET/SLET). By referring to the University Grant Commission (Minimum Qualifications for appointment of Teachers and Other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education) (4th Amendment), Regulations, 2016, the learned counsel submits that in case of those who have registered for Ph.D course prior to 11.07.2009 have been exempted from qualifying NET/SLET.

6. Mr. B. Chakraborty, further submits that the objection taken by the respondent Nos. 1 & 2 in their affidavit-in-opposition is that the petitioner obtained his M.

Phil degree from Periyar University i.e., Periyar Institute of Distance Education, which offers an off-campus degree. The said degree according to the respondents concerned is not acceptable as per the UGC norms. However, by referring to the Communication dated 02.06.2012, written by the Officer on Special Duty, Higher Education to the Director of Higher Education Department (Annexure-1 to the reply affidavit) Mr. Chakraborty submits that the ban on off-campus M. Phil degree is only for those who obtained such degree after 01.02.2012. Since the petitioner obtained his M. Phil degree on 06.09.2010, his degree has to be accepted. The learned counsel thus submits that under the given facts and circumstances, the respondents may be directed to grant the petitioner the UGC scale of pay w.e.f. the date he obtained the M. Phil degree i.e. 06.09.2010. Mr. B. Chakraborty, learned counsel for the petitioner in support of his submissions relies upon the case of Kishor Singh Rajput Vs. State of Assam & Anr. (2009)5 GLR 364 to contend that those who have obtained M. Phil are exempted from NET/SLET. He also relies upon the case of N. Suresh Nathan & Anr. Vs. Union of India & Ors. 1992 Supp (1) SCC 584 to contend that past practice should not be upset i.e., similarly placed persons having been given pay scale benefit, the same should also be given to the petitioner.

7. Mr. K. Gogoi, learned Standing Counsel for the respondent Nos. 1 & 2 submits the against the claim made by the petitioner in his writ petition, the question that has to be decided is as to whether the petitioner's regularization is a conditional one. Secondly, whether the petitioner requires to qualify NET/SLET in terms of the UGC norms. Thirdly, whether the claim of the petition can be entertained in absence of a challenge made to the Office Memorandum dated 17.07.2004. He also submits that the case of the petitioner is squarely covered by the decision rendered by a co-ordinate Bench of this Court in W.P.(C) No.1228/2015 (Arabinda Kumar Sarma & 26 Ors. Vs. State of Assam & 3 Ors.) vide Judgment and Order dated 09.11.2018.

8. Mr. K. Gogoi, submits that regularization of the service of the petitioner was only subject to him qualifying NET/SLET within a period of 2 years from the date of formal approval of his appointment and failing which, his services are liable to be discontinued. To substantiate his submission, he draws the attention of the Court to the Communication dated 30.10.2010 (Annexure-H) as well as the order dated 06.01.2011 (Annexure-I) of the writ petition. He submits that the Office Memorandum dated 17.07.2004 was issued by the State Government for the purpose of giving an opportunity to those Teachers, who were not appointed on a sanctioned post. However, the same was subject to the condition that the Teachers qualified themselves in NET/SLET. The petitioner in fact has not even challenged the Office Memorandum dated 17.07.2004 and therefore, there is no cause of action against the respondents and the writ petition is liable to be dismissed. He further submits that in respect of those Teachers, who according to the petitioner have been given the benefit of UGC pay scale, he submits that the petitioner cannot take advantage of the same, since it will only attract the concept of negative equality. Mr. K. Gogoi, learned Standing Counsel in support

of his submission relies upon the following authorities:

1. Kurmanchal Institute of Degree & Diploma & Ors. Vs. Chancellor, M.J.P. Rohilkhand Univeristy & Ors. (2007)6 SCC 35
2. Chandigarh Administration & Anr. Vs. Jagjit Singh & Anr. (1995)1 SCC 745
3. Islam Uddin Kazi (Md.) & Anr. Vs. State of Assam & Ors. 2016(3) GLT 641.
4. P. Suseela & Ors. Vs. University Grants Commission & Ors. (2015)8 SCC 129.
5. Judgment & Order dated 24.03.2017 in W.A. No. 79 of 2017 (Sh. Gauri Sankar Das & 20 Ors. Vs. The State of Assam & 5 Ors.),
6. Surendra Kumar & Ors. Vs. Greater Noida Industrial Development Authority & Ors. (2015)14 SCC 382
7. M.P. Palanisamy & Ors. Vs. A. Krishnan & Ors. (2009)6 SCC 428
8. Mizanor Rahman And Others v. State of Assam and Others, 2012 (1) GLT 520
9. Rajashree Singh Acharjee (DR.) Vs. State of Assam & Ors. 2018 (1) GLT 112 (Para Nos. 42 & 52)
9. Mr. S.K. Medhi, learned counsel appearing for the respondent Nos. 3 & 4 adopts the arguments of Mr. B. Chakraborty, the learned counsel for the petitioner. He submits that since other persons have already been granted the pay scale as per the UGC norms, the present writ petitioner, should also be given similar benefit else his Fundamental Rights guaranteed under Article 14 of the Constitution of India will only be infringed.

10. I have heard the submissions advanced by the learned counsels for the rival parties and I have perused the materials on record.

11. The petitioner was admittedly appointed as an adhoc Lecturer in Hojai College against a non-sanctioned post. Despite this, the Governing Body of the College proposed his regularization by way of diversion/adjustment/conversion to a sanctioned post in any other department as permissible under the norms and guidelines followed by the Higher Education Department. It may be noticed that the reason for such proposal was in view of the policy decision taken by the State Government vide Office Memorandum dated 17.07.2004. The said Office Memorandum has been produced for the perusal of the Court by the learned counsel for the parties. Since the contents of the Office Memorandum is important for adjudicating the present controversy, the same may be reproduced as below:

"No. B (2) H. 97/2003/98 Dated Dispur, the 17th July/04.

OFFICE MEMORANDUM

Sub : Allocation of vacant sanctioned posts of Lecturers to the departments of deficit grants-in-aid colleges where teachers are working without sanctioned

posts by way of re-adjustment.

1. There are more than 300 college teachers found to be serving in different degree colleges (deficit-grants-in-aid college) of Assam since 1989 serving for 5 to 14 years without any valid sanctioned post (here in after referred to as 'non sanctioned post'. These teachers have been serving in colleges in a consolidated pay allowed by the respective college authorities from their own fund. These teachers were appointed by the respective Governing Body of the colleges on the need basis as per UGC guidelines. The Govt. have also accorded concurrence to the subjects against which they were appointed. These teachers have also been performing similar responsibilities like those teachers who have been working against sanctioned posts in the colleges.

2. The Government could not sanction any additional post to the deficit-grants-in-aid colleges since 1992. 52 Nos. of colleges were brought under deficit system of grants-in-aid by the Govt. since 1992. But, the Govt. have not sanctioned any additional post of Lecturers since then over and above originally allocated sanctioned post. As a result, the college authorities appointed lecturers without valid sanctioned posts and have to bear the additional financial burden.

3. 140 college teachers serving in different colleges without sanctioned posts, filed suits and the Hon'ble Gauhati High Court in their verdict dated 11th Feb/2003 in writ petition No. 626/02 and order dated 25.7.2003 in writ petition No. 2368/2002 directed to consider the matter of for sanction of post to the college teachers serving without any sanctioned posts.

4. The State Govt. is not in a position to sanction any new post for the colleges to accommodate the aforementioned college teachers serving without sanctioned posts. In view of the same and in pursuance to the approval of the cabinet dt. 9.6.2004, the following procedure/modalities are hereby prescribed for adjustment of service of college teachers working without sanction posts as mentioned above.

(a) Vacant posts in a particular deptt. lying in a grants-in-aid college of Assam may be allotted in order of seniority to accommodate teachers in the same college who is working in some other deptt. without a valid sanctioned post provided that such teacher was appointed by respective G.B observing due procedure i.e. advertisement selection and having IGC norms required and if the need for such a post is justified by enrolment in that Deptt. of the college etc. Provided further, the post is not be considered essential for the deptt. against which it was originally sanctioned.

(b) In case of any future vacancies of sanctioned posts, in a particular deptt. College teachers working without valid sanctioned post but appointed as per procedure stated at (a) above are to be adjusted in preference to fresh teachers.

(c) To accommodate the teachers working without a sanctioned posts or where the number of vacant sanction post is less than the number of teachers proposed

to be adjusted in conformity with this O.M. the Director, Higher Education is authorised to withdraw vacant posts from a deficit-grants-in-aid Colleges where student enrolment or other norms do not justify to the total number of sanctioned posts in that college.

The Director, Higher Education will prepare a list of such vacant withdrawn posts from different colleges giving necessary details. Thereafter he will consider the cases of all those teachers working without sanctioned posts and appointed as per procedure as mentioned at para 4 (a) above in order of their seniority of services for adjustment and send such proposal to Govt. for approval. However, if a vacant sanctioned post is available in a particular college for adjusting such post against any eligible teacher working without a sanctioned post in that College, no additional allotment of post will be made to such Colleges.

(d) The teachers working under non sanctioned post who will be adjusted against vacant sanctioned posts will be required to qualify in NET/SLET within 2 (two) years if they do not possess the same already otherwise their services would be discontinued and till then they will be entitled to basic pay only from the date of approval by Director of Higher Education, Assam.

Sd/- P. K. Borthakur,

Secretary to the Govt. of Assam,

Education (H) Deptt."

12. As may be seen from the Office Memorandum dated 17.07.2004 abstracted above, adjustment of the Teachers from a non-sanctioned post to any other sanctioned post in another department is with a condition that the Teacher concerned, should qualify NET/SLET within 2 (two) years and failing which, the service of the Teacher will be discontinued. As for the petitioner, it is not in dispute that the petitioner has not qualified NET/SLET and he claims exemption in view of having completed M. Phil degree. However, from a perusal of the order dated 06.01.2011 by which he was regularized in service, there is a clear pre-condition that he should get himself qualified in NET/SLET within 2 (two) years from the date of approval of his appointment. The petitioner accepted the order without any protest and therefore, it will be incumbent on his part to abide by the conditions of his regularization. As can be seen from the prayer of the petitioner, Office Memorandum dated 17.07.2004, which is the basis for his regularization in service, has not been put to challenge and therefore, the question is whether in absence of such a challenge, he can claim an exemption from having NET/SLET. As earlier pointed out by Mr. K. Gogoi, a co-ordinate Bench of this Court in W.P.(C) No.1228/2015 (Arabinda Kumar Sarma & 26 Ors. Vs. State of Assam & 3 Ors.) vide Judgment and Order dated 09.11.2018 held that failure on the part of the petitioners therein to challenge the Office Memorandum dated 17.07.2004, a challenge only on the off-shoot of the original Office Memorandum dated 17.07.2004 will be of no help to the petitioners. Consequently, claim for exemption from NET/SLET by the petitioners was

rejected. The decision in my considered view will also apply to the petitioner in the present case as well. Likewise, in so far as the claim towards UGC pay scale is concerned, the petitioner cannot be treated differently and the decision taken in Arabinda Kumar Sarma & 26 Ors. (Supra) will also apply to his case. That being said, there will no necessity to dwell upon the issue differently. The authorities relied upon by the rival counsels also need not be gone into.

13. Paragraph Nos. 19 to 23 of Arabinda Kumar Sarma & 26 Ors. (Supra) being relevant, they are abstracted herein below for ready reference-

"19. In view of the above and the fact that the petitioners have not made a challenge to the O.M dated 17.07.2004, the petitioners cannot claim exemption from not acquiring the qualification of NET/SLET. Accordingly, this Court is of the view that the prayer of the petitioner for setting aside Condition No. 3 of the order dated 22.01.2015 cannot be granted and accordingly the said prayer is rejected. However, this Court finds that while Condition No. 3 of the order dated 22.01.2015 has given only a 2 year time period to the petitioners to obtain NET/SLET qualification, the persons who were provincialized as Assistant Professors vide the orders dated 20.01.2014 etc, have been given 5 years time to obtain NET/SLET from the date of their regularization order in pursuance to the provisions of the 2011 Act. The State should give equal treatment to its employees and as the petitioners herein and those persons who have been provincialised as Assistant Professors vide the orders dated 20.01.2014 etc, are in the same grade and having the same set responsibilities and duties, the petitioners herein should have also been given a 5 year time period for acquiring NET/SLET. Accordingly, in the interest of justice and equity, this Court directs that the State respondents to grant the petitioners herein, another 3 years beyond the 2 years period given under Condition No. 3 of the order dated 22.01.2015, for acquiring NET/SLET. Consequently, in so far as the O.M dated 17.07.2004 and condition No. 3 of the order dated 22.01.2015 does not provide for a period beyond two years for acquiring NET/SLET, a corrigendum or new notification should be issued by the State respondents extending the time period of 2 years given for acquiring NET/SLET to five years.

20. The above being said, the further question that remains is whether the State Government can give unequal/discriminatory treatment in the payment of salary to Assistant Professors, who do not have NET/SLET. It is not the case of the parties that the petitioners herein are not doing similar duties or having different responsibilities than those Assistant Professors, who were provincialized vide the orders dated 20.01.2014 etc (Annexure-9 of the writ petition). The petitioners counsel has submitted that the petitioners have been given Rs. 8,000/- per month till date. In this respect, Condition No. 3 of the order dated 20.01.2015 is to the effect that until the petitioners acquire the NET/SLET qualification, they will receive (basic) pay as admissible from the date of approval by the Director of Higher Education Department, Assam. In this respect, Mr. K. Gogoi, learned counsel for the respondent Nos. 1 & 2 has submitted a letter No.

AHE.349/2016/154 dated 02.02.2018 issued by the Joint Secretary to the Govt. of Assam, Higher Education Department to the Director of Higher Education, which states as follows:-

"Sub: Regularization of services of college teachers who are working against non-sanctioned posts in different Provincialised Colleges of Assam.

Ref: No.G(B)AC/Post Creation/61/2013/Pt/1083 dated 04.01.2018.

Sir, With reference to your letter on the subject cited above, I am directed to state that Govt. of Assam in Higher Education Department is pleased to allow the present UGC Basic Pay of Rs. 15,600/- + Grade Pay Rs. 6000/- = Rs. 21,600/- p.m. to the Assistant Professor of Provincialised Colleges of Assam whose services has been regularized conditionally as per the Govt. OM No.B(2)H.97/2003/98 dated 17.07.2004 with immediate effect. The terms and conditions of the OM dated 17.07.2004 will be strictly followed."

21. The Government of Assam in the Higher Education Department has been pleased to allow the UGC basic pay of Rs. 15,600 + Grade Pay of Rs. 6000 = Rs. 21,600/- per month to the Assistant Professors of provincialized colleges, whose services were conditionally regularized, as per the Government O.M dated 17.07.2004, with immediate effect i.e. 02.02.2018. This in my view would not be in consonance with the judgments of the Apex Court in *Randhir Singh -vs- Union of India*, reported in 1982 1 SCC 618 and in the case of *Bhagwan Dass -vs- State of Haryana*, reported in 1987 4 SCC 634, wherein it has held that the principle of equal pay for equal work was held to be applicable to cases of unequal scales of pay, based on no classification or irrational classification, though both sets of employees (engaged on temporary and regular basis, respectively) performed identical duties and responsibilities. In the case of *State of Punjab - vs- Jagjit Singh*, reported in 2017 (1) SCC 148, the Apex Court has held that it would be fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work cannot be paid less than another who performs the same duty and responsibility. Though, the above cases relate to paying of the minimum pay scale to temporary workers vis-a-vis regular workers, the same analogy can be applied to the petitioners who were regularized on the basis of the OM dated 17.07.2004 and those persons who were provincialised as Assistant Professors vide orders dated 20.01.2014, etc, under the 2011 Act.

22. In the present case, the petitioners have been regularized against sanctioned vacant post as per the O.M dated 17.07.2004. The persons who were appointed as Assistant Professor, vide orders dated 20.01.2004 etc., are similarly placed as the petitioners, though appointed under the 2011 Act. If the persons appointed under the orders dated 20.01.2014 etc., are being given the basic scale of pay prior to acquiring NET/SLET Qualification, the petitioners cannot be denied payment of basic scale of pay as given to Assistant Professors, prior to them acquiring the NET/SLET Qualifications. Further, the approval given for payment of basic pay vide the letter dated 02.02.2018 will have to relate back to the

petitioners regularisation order dated 22.01.2015.

23. In view of the above reasons, the respondents are directed to pay to the petitioners, the basic scale of pay, including the arrears, w.e.f 22.01.2015 within a period of 3 (three) months from the date of receipt of a certified copy of this order. It is needless to add that the fixed pay already given to the petitioners would be adjusted against the basic scale of pay to be given to the petitioners."

14. The above abstract as mentioned earlier only covers the case of the present petitioner. In the result, the writ petition is disposed of by directing the State respondents to extend the time by two (2) years in favour of the petitioner to enable him acquire NET/SLET. The respondents shall also give the petitioner the UGC scale of pay, including arrears w.e.f 06.01.2011 after deducting the fixed pay already given to him within a period of three (3) months from the date of receipt of a certified copy of this order.

15. No cost.