

(2002) 04 GAU CK 0007

In the Gauhati High Court

Case No : Writ Petition (C) No's. 8764, 8492, 8509, 8507, 8420, 8497, 8496, 8493, 8508, 8501, 8457, 8419, 8437, 7375, 8461, 8463, 7869, 8440, 8535, 6689, 7829, 7347, 8550, 8503, 7866, 8561, 7828, 7868, 7819, 8148, 4620, 7863 and 7867 of 2001 and 18, 19, 126, 221,

Nirmali Bora and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 08-04-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 41, 45

Citation : (2002) 1 GLT 462

Hon'ble Judges : P.C. Phukan, J

Bench : Single Bench

Advocate : P.K. Goswami, D.K. Saikia, M.B.U. Ahmed, K.K. Mahanta, S. Chakraborty, Arun C., S. Singha, R. Duarah, A.M. Mazumdar, S.S. Dey, M. Nath, R.N. Kalita, C. Bhattacharjee, H.N. Sarma, D.K. Saikia, R.S. Chakraborty, B. Goswami, S. Bharali, B.K. Mahajan, R.K. Pradhan, B. Ahmed, A. Choudhury, N. Haquc, S. Rahman, C. Bhattacharyya, A.S. Choudhury, R. Majumdar, J. Hussain, A. Maleque, R. Ali, N. Saikia, A. Borah, R. Goswami, B.P. Katakya, R.S. Choudhury, U. Bhuyan, S.D. Bhuyan, H. Deka, S.P. Deka, N. Choudhury, S. Bhuyan, A. Khan, P. Sarmah, A.R. Sikdar, R. Islam, B.D. Goswami, S. Borthakur, D. Samra, B.D. Das, H.K. Sarma, N. Goswami, I. Rafique, Z. Hussain, M. Mahanta, U.K. Nair, Z. Hussain, S. Katakya, A.J. Das, R.M. Das and B. Goswami, for the Appellant; A.K. Phukan, A.G. and M. Sarania, Standing Counsel, BAC, for the Respondent

Final Decision : Allowed

Judgement

P.C. Phukan, J.—As agreed to by learned Counsel for the Petitioners and learned Advocate General, Assam appearing for the State Respondents, the above mentioned batch of writ petitions, raising the similar question of facts and law, are taken up for analogous hearing for final disposal and are being disposed of by this common judgment and order.

2. I have heard Mr. P.K. Goswami, learned senior counsel for the Petitioners in WP(C)Nos. 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 8764 of 2001 as well

as Mr. A.M. Mazumdar, learned senior counsel appearing for the Petitioners in WP(C) Nos. 8419, 8420, 8457, 8493, 8496, 8497, 8501, 8503, 8507, 8508 and 8509 of 2001. The learned Counsel for the Petitioners in the remaining writ petitions adopted the arguments advanced by learned Counsel Mr. P.K. Goswami and Mr. A.M. Mazumdar, I have also heard Mr. A.K. Phookan, learned Advocate General, Assam appearing for the State Respondents in all the writ petitions and Mr. M. Sarania, learned Standing Counsel for the Bodoland Autonomous Council.

3. On 28.12.1996 the Director of Elementary Education, Assam issued an advertisement (Annexure-1 to WP(C) No. 8764/2001) inviting applications from intending candidates for about 7500 posts of Assistant Teachers lying vacant in the provincialised MV/ME/ME Madrassa/Senior Basic/Junior, Basic/Junior LP Schools of the different districts of Assam prescribing regular time scales of pay. The advertisement stated, inter alia, "The selection will be made on the basis of a test, qualification and experience. The selection will depend on previous experience as Assistant Teacher, marks secured in different examination and the oral test. The last date of submission- of the applications is 26.1.1997". The Petitioners accordingly submitted their applications. They appeared before the Sub-Divisional Level Advisory Boards for selection. But after the selection process was over, the State Government imposed a ban on any fresh appointment and posts advertised remained vacant.

4. Earlier, in 1987 the Union Ministry of Human Resources Development introduced the Centrally sponsored scheme of "Operation Black Board" ("OBB" for short) laying down the minimum level of facilities to be provided in all Primary Schools of the States such as provision for at least two teachers in every Primary School. On 28.4.98 the Govt. of Assam vide a letter (Annexure-8 to the WP(C) No. 8764/2001) created 4040 posts of Assistant Teachers in regular time scales of pay under the OBB Scheme stating therein that:

.... these posts will be abolished after the 9th Plan period is over and the incumbents will have to be adjusted/absorbed in existing vacancies as the Government of India will not reimburse the expenditure after end of the 9th Plan.

5. The 9th Plan ends on 31.3.2002. In paragraph 13 of the affidavit-in-opposition filed on behalf of the State Respondents sworn by the Commissioner to the Govt. of Assam, Education Department, Dispur it is stated:

.... the teachers who were appointed against the 4040 OBB posts were adjusted against vacant posts in phases as per terms laid down during creation of the said posts. 2378 posts out of these 4040 posts were actually filled up and the rest of the posts were abolished.

6. About three years after creation of the first batch of 4040 posts under the OBB Scheme on 28.4.1998, the State Govt. by Anr. letter dated 8-3-2001 (Annexure-2 to WP(C) No. 8764/2001) created 7066 posts of LP and Middle school Teachers under the OBB Scheme in the fixed pay of Rs. 1900/- per month for LP and Rs. 2,000/- for Middle Schools for a period from 8.3.2001 to

31.3.2002 on condition that:

If the GOI is not agreed to continue these posts beyond the Ninth Plan period under CSS then these posts would stand abolished from 1.4.2002.

7. On the same day (8.3.2001) the State Govt. by a WT message (Annexure-5 to WP(C) No. 8764/2001) lifted the ban on appointment on fixed pay teachers of LP/ME/MV/MEM schools created under the OBB Scheme only. The message further states:

No new applications will be called for. The candidate who had already applied with treasury challans should only be called for interview. Earlier select list may be placed before the new boards for verification etc.

8. Accordingly the Petitioners who had submitted their applications in response to the advertisement dated 28.12.1996 (Annexure-1) were again called for interview and were selected by the Sub-Divisional Level Advisory Boards, and their names found place in the select list prepared by the said Boards for appointment in various LP/ME/MEM Schools against the aforesaid 7066 posts created under the OBB Scheme. The Petitioners were then given identical and exactly similar orders (one is annexed at Annexure-6 to WP(C) No. 8764/2001) containing the same terms and conditions that the appointment would be on fixed pay of Rs. 1800/- for LP and Rs. 2000/- for Middle Schools and would continue upto 31.3.2002. The Petitioners accordingly joined in their respective schools and have been working till date.

9. In WP(C) No. 8764/2001 the Petitioners have prayed for issuance of an appropriate writ to direct the State Respondents:

(i) To regularise their services in regularly sanctioned posts of Assistant Teachers of LP/ME/MEM Schools;

(ii) Not to terminate their services at the end of March, 2002 pending regularisation of their services;

(iii) To pay them the monthly salary with effect from the respective dates of their joining.

10. The other writ petitions contain similar prayers. As regards the prayer for a direction to the State Respondents to pay the Petitioners their salaries, the State Respondents in paragraph 17 of their affidavit in opposition have stated "... the salaries of all legally appointed teachers against 7066 posts will be made on receipt of release of fund from the Government of India. The Government of Assam is duly bound to pay the salaries to the teachers so appointed". It is submitted that the fund is being released by the Govt. of India. That being so, learned senior counsel Mr. P.K. Goswami and Mr. A.M. Mazumdar at the time of argument have confined their submissions to the Petitioners' prayer for directing the State Respondents to regularise their services in regularly sanctioned posts and not to terminate their services pending such regularisation by allowing them

to continue beyond 31.3.2002.

11. Mr. A.K. Phookan, learned Advocate General Assam submits that the Petitioners cannot be allowed to continue in their service beyond 31.3.2002 because they consciously accepted the offer of appointment with express stipulation therein that "the appointment is purely temporary and will continue upto 31.3.2002" and hence they cannot be allowed to approbate and reprobate at the same time. Mr. Goswami, learned senior counsel, however, submits that the poor teachers and the mighty Government are not in the same footing and the Petitioners looking for employment in these days of acute unemployment cannot be blamed for accepting the appointment with such stipulation and they cannot be stopped from assailing such stipulation later, and that they have done so by filing the instant writ petitions. Mr. Goswami, learned senior counsel in this regard refers to Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, wherein it has been held that "the courts will not interfere and will when called upon to do so strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power.. It is true that there is no mutuality in Rule 9(i) the same mutually as in a contract between the lion and the lamb that both will be free to roam about in the jungle and each will be at liberty to devour the other. When one considers the unequal position of the Corporation and its employees, the argument of mutuality becomes laughable."

12. Mr. A.K. Phookan, learned Advocate General, Assam argues that the Petitioners cannot be allowed to continue beyond 31.3.2002 since their selection was made as per Govt. guidelines which are definitely dehors the rules. Nowhere in the affidavit-in-opposition filed on behalf of the State Respondents this was pleaded as a ground for not allowing the Petitioners to continue in service beyond 31.3.2002. That apart, the State Govt. being Respondents to these writ petitions cannot be allowed to attack their own guidelines to be dehorse the Rules (The State of Assam and Anr. v. Raghava Rajagopalachari ALR 1970 SC 57).

13. Learned senior counsel Mr Goswami contends that the Petitioners could not have been appointed for a limited period from 8.3.2001 to 31.3.2002 and that too with fixed pay inasmuch as they applied in response to the advertisement dated 28.12.1996 (Annexure-1) which nowhere indicates that the posts were temporary and to continue till 31.3.2002 only and which prescribed regular time scales of pay. In reply Mr. Phookan, learned Advocate General, Assam submits that the Petitioners were appointed against 7066 OBB posts subsequently created on 8.3.2001 and that no advertisement could be made in respect of these 7066 OBB posts due to paucity of time and the Government decided that the candidates who applied in response to advertisement dated 28.12.1996 be called for interview before the newly constituted Selection Boards for appointment against those 7066 OBB posts and the Petitioners were appointed accordingly. As I understand, the Petitioners who applied in response to the

advertisement dated 28.12.1996 for 7500 non OBB posts could not have been appointed against those non OBB posts for ban imposed on appointment (later shifted only in respect of OBB posts and not in respect of non OBB posts) and they could not have claimed to be appointed without fresh application against subsequently created 7066 OBB posts, and yet the State Government gave them an opportunity to avail the benefit of appointment against these 7066 OBB posts without fresh application. In my view, in the facts and circumstances, the State Govt. cannot be found fault with for doing so.

14. In paragraph 5 of the affidavit-in-opposition filed on behalf of the State Respondents it has been wrongly stated that "These 7500 vacant posts also included 4040 Nos. of posts under the Operation Black Board (OBB) scheme." Because these 7500 posts were advertised on 28.12.96 whereas 4040 number of posts . under OBB Scheme were created only on 24.4.1998. The ban was lifted only "On appointment of fixed pay teachers for appointment to LP and ME/MV/MEM posts created under OBB" vide WT message dated 8.3.2001 (Annexure-5). There is therefore no question of appointing the Petitioners against 7500 posts notified in the advertisement dated 28.12.1996 (Annexure-1) prescribing regular time scales of pay.

15. Now, the question that falls for consideration is whether the State Govt. was justified in creating these 7066 posts under the OBB Scheme only for a limited period from 8.3.2001 to 31.3.2002 in view of the policy, perspective and objectives of the OBB Scheme for universalisation of elementary education.

16. In paragraph 13 of the affidavit-in-opposition filed on behalf of the State Respondents it is stated, " ... at present in the State of Assam, the ratio of pupils-teachers is 36:1 against the National Standard of 40:1. There is absolutely no need for having more teachers." The Petitioners have not approached this Court in these writ petitions for forcing the State Govt. to have more teachers, nor they have asked for permanent retention of these 7066 posts temporarily created under the OBB Scheme. Their limited prayer is to regularize their services in regularly sanctioned posts and not to terminate their services pending such regularisation by allowing them to continue in service beyond 31.3.2002 till such regularisation. In paragraph 10 of the affidavit-in-reply filed in WP(C) No. 687/2002 the Petitioners dispute the claim of the State Government that in Assam pupils-teacher ratio is 36:1. Quoting figures from the Government's own documents, viz., Performance Budget for 2001-2002 for Elementary Education, Assam (Annexure-G to the affidavit-in-reply in WP(C) 687/2002) and Report of Departmentally Related Standing Committee on Education 2002-2003 for Elementary Education (Annexure-H to the affidavit-in-reply in WP(C) 687/2002), it has been shown that the pupils-teachers ratio in the elementary schools of Assam is 47:1 in the year 2000-2001 and 49:1 in the year 2001 -2002, much below the national average.

17. In paragraph-21 of the affidavit-in-opposition it is stated, ".... the State Government was and has been reeling under financial problems leading to

signing of a memorandum between the State Government and the Ministry of Finance, Government of India on 13.01.2000. As a result of the said memorandum, a number of economic measures were undertaken, including non-filling up of vacant posts and abolition of 5,000 Nos. of non-essential posts by 31.03.2000 and of Anr. 10,000 posts by 30.09.2000. All posts which are vacant for one year or more are to be treated as abolished and is to be reviewed with the approval of the State Level Empowered Committee (SLEC). Because of these stipulations between the Government of India and the State Government, it has become difficult for the State Government to create posts within the State Plan budget for continuing these posts after the 9th Plan period, that is, from 01.04.2002 onwards. It is in this background of severe financial difficulties faced by the Government of Assam that these posts were created only for a limited period upto 31.03.2002."

18. A printed copy of this memorandum between the State Government and the Central Government has been place before me. On perusal I find that contrary to what has been stated above by the State Respondents, the posts in the education sector have been excluded altogether from the purview of the suggested economy measures. At page 3 [2](C) thereof) it is stated, "Impose ban on all new recruitment except in human development areas." This means that the State Government can go for a new recruitment in the human development areas and hence may make new recruitment of teachers. At page 4 thereof it is stated, "All non-essential posts, especially the ones not filled up for one year or more excluding the posts in the health & education sector and in the Police Department will be abolished. "This means that the posts in the education sector, fin-that matter, the posts of teachers even if not filled up for one year or more shall not be abolished by the State Government. In fact, Fiscal Reforms Matrix at page 8 of the memorandum indicating actions to be taken and target date for abolition of posts as economy measures excludes posts in the education sector. Thus, the signing of the memorandum between the State Government and the Central Government does not stand on the way of the State Government regularising the services of the Petitioners in regularly sanctioned posts in a phased manner and allowing them to continue in service beyond 31.3.2002 pending such regularisation.

19. It is stated in paragraph 22 of the affidavit-in-opposition filed on behalf of the State Respondents that the Govt. of India follows the pattern of funding the posts created under the OBB for the plan period and thereafter the State Government provides funds for continuing these posts and this was the pattern in respect of the OBB posts created before the signing of the memorandum between the State Government and the Central Government on 13.1.2000. It is elaborated in paragraph 22 that 4040 OBB posts (of which 2378 were filled up) were created on 24.4.1998, before signing of the memorandum on 13.1.2000 and, therefore the Govt. of Assam post creation letter (Annexure-8) itself stated that the incumbents would be adjusted/absorbed in existing vacancies after the 9th Plan period, that is, after 31.3.2002; and accordingly the. Govt. of India was

informed by letter dated 22. 11.2000 (Annexure-A to the additional affidavit filed by the Petitioners in WP(C) 8764/2001) that the Petitioners appointed against OBB posts will be retrenched after the 9th Plan period but will be adjusted against the State Plan/Non Plan State vacant posts. It is further stated in paragraph 22 that 7066 posts under OBB Scheme were created on 8.3.2001, that is, after signing of the memorandum on 13.1.2000 imposing economic measures and the State Government took the conscious decision for continuing the posts only till 31.3.2002. In other words, the State Government decided not to regularise their services against regularly sanctioned vacant posts. But I find that signing of the memorandum between the State Government and the Central Government on 13.1.2000 cannot be shown as watershed to mark the change in the Govt. policy from adjusting one batch of OBB teachers against regularly sanctioned posts after 31.3.2002 to the one of discontinuing the service of Anr. batch of OBB teachers after 31.3.2002 for the simple reason that the said memorandum has excluded altogether the posts in the education sector from the purview of the economic measures to be taken by the State Government. That being so, there is no basis, not to speak of reasonable basis, for differential treatment between the teachers appointed against 4040 OBB posts created before the date of signing of the memorandum and the teachers appointed against 4066 OBB posts created thereafter. Both sets of posts were created under the same OBB Scheme, both sets of posts were created for the limited period till the end of 9th Plan and yet the one batch of teachers is being regularised against regularly sanctioned posts while the other batch is deprived of similar benefit of regularisation and are being ousted from service after 31.3.2002. Such differential treatment amounts to discrimination and constitutes violation of Article 14 of the Constitution of India and is not permissible.

20. Nor the financial difficulties faced by the State Government as pleaded in paragraph 21 of the affidavit-in-opposition can be a ground for such discrimination meted out to the Petitioners. Once the State Government accepted the centrally sponsored scheme of Operation Black Board with its cherished objectives including that of utilisation of elementary education and started its implementation with cent percent Central assistance till the end of the 9th Plan period, it cannot abandon the Scheme half done on 31.3.2002 without achieving its objectives simply because beyond 31.3.2002 no Central assistance would be forthcoming. It is imperative that even without central assistance and beyond 31.3.2002 the State Government should carry on with its own resources. In a letter dated 14.9.2000 (Annexed to the affidavit-in-reply) the Govt. of India wrote to the State Government.

It has been stated that posts of additional teachers in upper primary schools would be abolished after the 9th Plan period. I would like to inform you that the stand of the State Govt. in this regard is not in accordance with the spirit of the scheme of OBB

21. The Govt. of India again wrote to the State Govt. by a letter dated 13.2.2002

(Annexure-C to the affidavit-in-reply). The relevant portion thereof reads as under:

Sub: Reimbursement of salary of primary and middle school teachers appointed during March, 2001.

Sir,

.... As per the appointment orders of new teachers appointed by the State Government under Operation Blackboard the tenure of the appointment is only upto 31.3.2002.

...

It is, therefore, requested to confirm that these posts will be continued after the termination of Ninth Plan and the State Government would take over the liability of these teachers as per the guidelines of the scheme.

22. In paragraph 21 of the affidavit-in-opposition it is pleaded, "It is in this background of severe financial difficulties faced by the Government of Assam that these posts were created only for a limited period upto 31.3.2002." This plea of financial difficulties or economic incapacity of the State Government is not available as these posts were created under OBB Scheme for universalisation of elementary education. The right to elementary education is a fundamental right and is not subject to the limit of economic capacity of the State. In this regard learned senior counsel Mr. P.K. Goswami has referred to the decision in Unni Krishnan, J.P. and others Vs. State of Andhra Pradesh and others etc. etc., wherein it has been held:

A true democracy is one where education is universal, where people understand what is good for them and the nation and know how to govern themselves...It is in the light of these articles that the content and parameters of the right to education have to be determined. Right to education, understood in the context of Articles 45 and 41, means: (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development. (para 171).... The citizens of this country have a fundamental right to education. The said right flows from Article 21. This right is, however, not an absolute right. Its content and parameters have to be determined in the light of Articles 45 and 41. In other words every child/citizen of this country has a right to free education until he completes the age of fourteen years. Thereafter his right to education is subject to the limits of economic capacity and development of the State (para 226).

23. In paragraph 12 of the WP(C) No. 8764/2001 supported by an affidavit, it is stated:

....It has been estimated that there are about 4000 regular Middle School posts in the State of Assam which are lying vacant for last about one year. Your

Petitioners and other similarly situated persons who have been appointed against the 2690 numbers of sanctioned posts on March, 2001 can easily be adjusted against these vacant posts without any additional financial implication, inasmuch as, these vacant" posts are already sanctioned for which budgetary allocation has already been made.

Further there are about 90,000 LP School teachers serving in the State at present under various provincialised LP Schools. It has been estimated that the rate of annual retirement of teachers is about 2% and at that ratio at least 1800 posts middle school Assistant Teachers fall vacant annually due to retirement. Thus, left out teachers if any out of the appointment against 2690 posts can very well be adjusted/regularised against these retirement vacancies by the Government in a phased manner. Added to these are the vacancies created due to death/resignation etc.

24. These averments made in paragraph 12 of the writ petition have not been disputed in the affidavit-in-opposition filed on behalf of the State Respondents. In *Naseem Bano v. State of UP* AIR 1992 SC 2592 it has been held that "if the statements made in the writ petition remains uncontroverted or not contradicted, the Court should proceed on the basis of averments not controverted deeming them to have been admitted."

25. In view of what has been stated above, the above mentioned batch of writ petitions are disposed of with a direction to the Govt. of Assam and other State Respondents to regularise the services of the writ Petitioners appointed as teachers against the posts created under the Operation Blackboard Scheme by adjusting/absorbing them in regularly sanctioned posts/vacancies of Assistant Teachers of LP/Middle Schools of Assam in a phased manner and not to terminate their services pending such regularisation allowing them to continue in service beyond 31.3.2002 by sanctioning retention of these temporary posts created under the Operation Blackboard Scheme till completion of the process of such regularisation.

26. The State Respondents are further directed to pay the monthly salary to the writ Petitioners along with arrears for the period they have been found actually rendering service as teachers in the respective schools, within three months from the date of this order.

27. It shall, however, be open to the State Government to take necessary action following due procedure for termination of services in individual cases if, on enquiry any appointment is found to have been made "in violation of the guidelines like excess appointments or appointments in the manner other than the prescribed format" vide WT message dated 8.3.2001 (Annexure-C2 to the affidavit in reply in WP(C) 687/2002) issued by the Secretary to the Govt. of Assam Education Department.

28. This batch of writ petitions are allowed to the extent as indicated above. In the facts and circumstances, the parties are left to bear their own costs.