
(1999) 01 GAU CK 0003
In the Gauhati High Court
Case No : Civil Rule No. 3867 of 1997

Nityananda Phukan and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 25-01-1999

Acts Referred:

Assam Secondary Education (Provincialisation) (Service and Conduct) Rules, 1979 — Rule 6
Assam Secondary Education (Provincialised) Service Rules, 1982 — Rule 6, 7
Constitution of India, 1950 — Article 226

Citation : (1999) 1 GLT 433

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : R.P. Sharma and H.K. Baishya, for the Appellant; H.N. Sarma and C. Barua, for the Respondent

Judgement

A.K. Patnaik, J.—In this application under Article 226 of the Constitution of India, the five Petitioners have prayed for quashing the orders dated 3.5.97 and 2.6.97 passed by the Commissioner & Secretary to the Government of Assam, Education Department and the Inspector of Schools, Dibrugarh District Circle, Dibrugarh respectively and for directing the Respondents not to terminate the services of the Petitioners in their respective posts in which they have been regularised.

2. The facts briefly are that the Petitioner Nos. 1, 2 and 3 were appointed as Lower Division Assistants by the Inspector of Schools, DDC, Dibrugarh by orders dated 14.6.92, 8.5.92 and 9.4.92 respectively and in the said appointment orders it was stipulated that appointments were purely temporary and would stand terminated automatically if they were not selected by the Selection Board. The Petitioner Nos. 4 and 5 were appointed as Grade-IV employees by the Inspector of Schools, DDC, Dibrugarh by his orders dated 9.4.92 and 12.3.92 respectively. In the appointment order dated 9.4.92 for the Petitioner No. 4 it was stipulated that the appointment was purely temporary and would stand

terminated automatically if he was not selected by the Selection Board. In the appointment letter dated 12.3.92 of the Petitioner No. 5 it was also stipulated that the appointment was purely temporary and would stand terminated automatically on the day of completion of three months. Pursuant to the said orders of appointment the Petitioners joined their respective posts and started working. Thereafter, the District Selection Board, Dibrugarh adopted a resolution on 7.4.93 that all appointments issued to 3rd and 4th Grade employees during the period from 27.11.91 till 15.6.92 would be taken up for regularisation and authorised the Inspector of Schools, Dibrugarh-cum-Member Secretary of the Board to take necessary action in that regard. Pursuant to the said resolution, the Inspector of Schools, Dibrugarh, regularised the services of the five Petitioners in their respective posts with effect from the date of their joining. In the meanwhile, by an Office Memorandum dated 15.6.92, the Government of Assam, Personnel Department, formulated a recruitment policy of appointment of non-gazetted staff other than school teachers in district and below district level offices and as per the said policy each of the districts was to have a Central Recruitment Committee for selection of candidates for appointment to non-gazetted Grade-III and Grade-IV posts and on the basis of such selection made by the Central Recruitment Committee (for short, "C.R.C."), appointments were to be made to different Grade-III and Grade-IV non-gazetted posts. In accordance with the said recruitment policy a selection was conducted by the CRC, Dibrugarh district and various candidates were selected for appointment to Grade-III and Grade-IV posts. When some of the candidates selected for Grade-III and Grade-IV posts by the CRC, Dibrugarh District in the year 1993 were not appointed, they moved this Court in two writ applications numbered as Civil Rule Nos. 287/94 and 288/94 and by judgment dated 5.7.94, a learned single Judge of this Court held, inter alia, that offices of the schools would also be covered by the said recruitment policy formulated under the Office Memo dated 15.6.92 of the Government of Assam, Personnel Department and accordingly directed the Inspector of Schools, DDC, Dibrugarh to make appointment of the writ Petitioners in Grade-III and Grade-IV posts in pursuance of the select list dated 6.3.93 prepared by the CRC, Dibrugarh district. Aggrieved by the said judgment and order dated 5.7.94, the Inspector of Schools, DDC, Dibrugarh, filed Writ Appeal No. 361/94 contending, inter alia, that the recruitment policy incorporated in the Office Memo dated 15.6.92 was not applicable to recruitment to Grade-III and Grade-IV posts in schools. But by judgment dated 24.7.95, the Division Bench of this Court rejected the said contention of the Inspector of Schools, DDC, Dibrugarh, and having found that ad-hocism had been going on for some time though there was select list from which appointments could have been made, directed the Secretary to the Government of Assam, Education Department and the Director of Secondary Education, Assam to conduct an inquiry and to pass reasoned order in respect of appointment to vacant posts of Grade-III and Grade-IV posts on regular basis in accordance with law and in the light of the observations made in the judgment of the learned single Judge and the Division Bench. In compliance with the said directions in the judgment dated

24.7.95 of the Division Bench in the said Writ Appeal No. 361/94, the Commissioner & Secretary to the Government of Assam, Education-Department, Cancelled all ad hoc appointments made by the Inspector of Schools, DDC, Dibrugarh which were subsequently regularised as per the recommendation of the District Level Selection Board by his order dated 23.11.95. Aggrieved by the said order dated 23.11.95, the Commissioner and Secretary to the Government of Assam, Education Department, the Petitioners filed writ application numbered as Civil Rule No. 5114/95 before this Court and on 4.12.95 this Court while issuing rule passed an interim order to the effect that the Petitioners shall not be ousted from service without the leave of this Court and the Petitioners shall also be paid their regular salary etc and the impugned order shall stand suspended. Some others who were similarly situated as writ Petitioners filed another writ application numbered as Civil Rule No. 5115/95. The aforesaid two Civil Rules No. 5114/95 and 5115/95 were again taken up for orders by the Court on 29.8.96 when the court found that if the six Respondents in the Civil Rule No. 5115/95 were appointed, the six Petitioners would be affected and therefore directed that the Petitioners were to be considered by the authorities and observed that the learned Additional Senior Government Advocate, Assam would receive instruction by 30.6.96 as to whether the Petitioners could be accommodated to sort out the whole problem but made it clear that the Petitioners would not be appointed at the cost of the Respondents - 8, 9, 10, 14, 15 and 16 and the Respondents would get their appointment if they were otherwise found to be eligible by the authorities and, accordingly, modified the earlier orders of stay passed by the court. Pursuant to the said order dated 29.8.96 in Civil Rule Nos. 5114/95 and 5115/95, the Commissioner & Secretary to the Government of Assam by his order dated 3.5.97 decided to allow the Petitioners to appear in two subsequent selection processes for the posts of non-gazetted staff irrespective of their age bar if applicable and to allow additional 10% marks for their experience gained by them in their respective services in the two subsequent selection processes. In accordance with the said order dated 3.5.97 of the Commissioner & Secretary to the Government of Assam, Education Department, the Inspector of Schools, DDC, Dibrugarh, by order dated 2.6.97 cancelled the appointment of the Petitioners with immediate effect. Aggrieved by the said order dated 3.5.97 of the Commissioner & Secretary to the Govt. of Assam and dated 2.6.97 of the Inspector of Schools, DDC, Dibrugarh, the Petitioners moved this Court for appropriate relief.

3. At the hearing, Mr. R.P. Sharma, learned Counsel for the Petitioners, submitted that the present Petitioners were not parties to Civil Rule Nos. 287/94 and 288/94 and Writ Appeal No. 361/94 and hence the judgments of the learned single Judge in the said Civil Rule Nos. 287/94 and 288/94 and of the Division Bench in the said Writ Appeal No. 361/94 were not binding on the Petitioners and the principle of res judicata would not apply to the decision in the said cases by the learned single Judge and the Division Bench that the recruitment to the offices of different schools would also be covered by the Office Memorandum

dated 15.6.92 of the Government of Assam, Personnel Department. He relied on the provisions of Rule 7 of the Assam Secondary Education (Provincialised) Service Rules, 1982 and Rule 6(d) of the Assam Secondary Education (Provincialisation) (Service & Conduct) Rules, 1979, and submitted that selection to the posts of Grade-III and Grade-IV staff of the offices of the schools was to be made by the District Level Selection Board and not by the C.R.C. of the District as laid down in Office Memorandum dated 15.6.92 of the Government of Assam, Department of Personnel. He further argued that the policy of recruitment as laid down in Office Memorandum dated 15.6.92 of the Govt. of Assam, Department of Personnel applies to only District Establishments but does not apply to the offices of the schools. He contended that it was open for the Education Department of the Govt. of Assam to lay down its own policy of recruitment to Grade-in and Grade-IV posts of the offices of different schools under the Education Department and that the recruitment policy as contained in Office Memorandum dated 15.6.92 of the Government of Assam, Personnel Department does not apply to the schools. Mr. Sharma further contended that assuming that the said Office Memorandum dated 15.6.92 of the Govt. of Assam, Personnel Department applied also to offices of different schools, the select list prepared by the C.R.C. was valid only upto 31.12.93 as would be evident from the Office Memo. dated 14.9.93 of the Government of Assam, Personnel (B) Department and not beyond 31.12.93. Hence, no action could be taken to appoint any of the candidates from the said select list prepared by the C.R.C. after 31.12.93 in place of the Petitioners. Finally, Mr. Sharma argued that by order dated 29.8.96 passed in Civil Rule Nos. 5114/95 and 5115/95, this Court directed that instructions would be obtained by the learned Additional Senior Government Advocate, Assam for accommodating the Petitioners and the said instructions were to be submitted by the learned Additional Senior Government Advocate by 30.9.96, but no such instructions were reported to the court and instead the impugned orders dated 3.5.97 and 2.6.97 were Issued by the Commissioner & Secretary to the Govt. of Assam, Education Department and the Inspector of Schools, DDC, Dibrugarh respectively for the cancellation of the appointment of Petitioners on an erroneous interpretation of the order dated 29.8.96 of this Court in the said Civil Rule Nos. 5114/95 and 5115/95.

4. In reply, Mr. H.N. Sarma, learned Additional Senior Government Advocate, Assam, appearing for the State-Respondents, contended that the regularisation of the Petitioners in Grade-in and Grade-IV posts was made by the District Selection Board in its resolution dated 7.4.93 without any selection as would be evident from the said resolution itself. Accordingly to Mr. Sarma, learned Addl. Senior Government Advocate, Assam, regularisation can only be done after finding the suitability of a candidate for the post in a selection made by the competent authority and since no selection had been held the question of regularising the petitions in their respective posts did not arise. He relied on the decisions of the Supreme Court in the case of State of Madhya Pradesh and Another Vs. Dharam Bir, in support of his contention that the Petitioners cannot

claim regularisation and appointment as of right on humanitarian consideration. He further submitted that although the Petitioners were not parties to Civil Rule Nos. 287/94 and 288/94 and Writ Appeal No. 361/94, judgments delivered in the said Civil Rules and the Writ Appeal being judicial pronouncements are to be followed by the Government and it is for this reason that the Commissioner & Secretary, Education Department, followed the said judgment of the Division Bench in Writ Appeal No. 361/94. He finally contended that the impugned order dated 3.5.97 of the Commissioner & Secretary, Education Department, would show that the Petitioners have been allowed to appear in two subsequent selection processes for selection to Grade-III and Grade-IV posts and further 10% marks were to be added for their experience in such selection and hence the impugned order dated 3.5.97 is a fair and reasonable order and should not be interfered with by this Court in the present civil rule.

5. It is true, as has been submitted by Mr. RP Sharma, learned Counsel for the Petitioners, that the present Petitioners were not parties to Civil Rule Nos. 287/94 and 288/94 and Writ Appeal No. 361/94, hence the judgments delivered by the learned single Judge in the said Civil Rules and by the Division Bench in the said Writ Appeal are not binding on the Petitioners and the decisions therein that the recruitment policy as contained in Office Memorandum dated 15.6.92 of the Government of Assam, Personnel Department for recruitment by selection through CRC of the District also applied to offices of different schools are not res judicata while deciding the present writ petition. But the case of the Petitioners in this writ petition is that they have been regularised in their respective posts by the Inspector of Schools, DDC, Dibrugarh pursuant to the resolution dated 7.4.93 of the District Level Selection Board. Although, Mr. Sharma, learned Counsel for the Petitioners relied on the provisions of Rule 7 of the Assam Secondary Education (Provincialised) Service Rules, 1982, I find on a reading of Rule 7 along with Rule 6 of the said Rules, 1982, that the said Rule 7 applies to recruitment to cadre of postgraduate teachers, graduate teachers and junior teachers and does not apply to recruitment to Lower Division Assistant and Grade-IV posts to which the Petitioners have been appointed. Further, Rule 6(d) of the Assam Secondary Education (Provincialisation) (Service and Conduct) Rules, 1979, only states that Office Assistant and 4th Grade Officers shall be selected as in the case of other Government servants for similar Government Schools, but does not state that Office Assistant and 4th Grade Officers are to be selected by the District Level Selection Board or the Inspector of Schools. Mr. Sharma has not been able to show any other Rule conferring power either on the District Level Selection Board or the Inspector of Schools concerned to select and appoint Lower Division Assistants and Grade-IV officials in the offices of different provincialised or Government schools. In the absence of any statutory provision for selection and appointment of Lower Division Assistants and Grade-IV employees in different schools, the Government will always have the power to lay down executive instructions for such selection and appointment. Although, Mr. Sharma, counsel appearing for the Petitioners, contended that the Education

Department can always lay down its own policy with regard to selection and appointment of Lower Division Assistants and Grade-IV staff for the offices of different schools, no such policy laid down by the Education Department was produced before the court by the Petitioners and the only policy for appointment to different Grade-III and Grade-IV posts in the District Level Offices and Below District Level Offices that is available on record appears to be the recruitment policy as contained in Office Memorandum dated 15.6.92 of the Government of Assam, Personnel Department under which the CRC of the District was to make the selection on the basis of the written test and interview for appointment to different Grade-III and Grade-IV posts. Hence, the Petitioners have not been able to show that their regularisation in the posts of Lower Division Assistants and in Grade-IV posts were in accordance with any Rule or policy of the Government of Assam.

6. It is also true, as contended by Mr. Sharma, learned Counsel appearing for the Petitioners, that the select list of candidates for appointment to different Grade-III and Grade-IV posts were to be operative till 31.12.93 as per the Office Memorandum dated 14.9.93 issued by the Secretary to the Government of Assam. Personnel (B) Department. But it appears that during the period the select list made by the CRC was operative, 8 Petitioners in Civil Rule 287/94 and 8 Petitioners in Civil Rule No. 288/94 were not appointed and in the circumstances they moved this Court in the said Civil Rules and by judgment and order dated 5.7.94 this Court directed to appoint the Petitioners in Grade-III and Grade-IV posts. The Inspector of Schools. DDC, Dibrugarh, went up in appeal before the Division Bench in WA No. 361/94 against the said judgment and order of the learned single Judge dated 5.7.94 in Civil Rule No. 287/94 and Civil Rule No. 288/94. But the Division Bench did not interfere with the said judgment of the learned single Judge in the two Civil Rules and instead directed the Secretary to the Government of Assam, Education Department and the Director of Secondary Education, Assam to conduct an inquiry and to pass a reasoned order in respect of appointment to vacant posts of Grade-III and Grade-IV on regular basis in accordance with the law. Pursuant to the said judgment of the Division Bench, the Commissioner & Secretary, Education Department on enquiry cancelled the ad hoc appointments of the Petitioners which had been subsequently regularised by the District Level Selection Board. When the Petitioners moved this Court in Civil Rule No. 5114/95, this Court initially granted stay by order dated 4.12.95 and directed that the Petitioners would not be ousted from service without the leave of the court but thereafter by order dated 29.8.96 modified the said order when it was pointed out that the appointments of the Petitioners had to be cancelled for the purpose of appointing Niren Saikia Anuradha Gohain, Asim Sonowal. Padmeswar Das. Ghana Kanta Mili and Bishnu Gogoi who were all Petitioners in the earlier Civil Rules No. 287/94 and 288/94 and in whose favour the court had already issued directions for appointment in the judgment dated 5.7.94. By the said order dated 29.8.96. however, the court required the Additional Senior Government Advocate. Assam, to receive

instructions if the Petitioners could be accommodated, but no direction was given to the Respondents to regularly appoint the Petitioners or to continue the Petitioners in service. Although, Civil Rule Nos. 5114/95 and 5115/95 were not subsequently placed before the court and no instructions were reported by the learned Additional Senior Government Advocate, Assam, to the court, by the impugned order dated 3.5.97, the Commissioner and Secretary, Education Department, Govt. of Assam, keeping in mind the observations of the court in the order dated 29.8.96 in the said Civil Rule Nos. 5114/95 and 5115/95 decided to allow the Petitioners to appear in two subsequent selection processes for the posts of non-gazetted staff other than school teachers irrespective of their age bar if applicable and to allot additional 10% marks towards experience gained by them in their respective services in the two subsequent selection processes. As indicated above, the Petitioners had not been regularised in accordance with the rules or any policy of the Government of Assam. The resolution dated 7.4.93 of the District Level Selection Board, Dibrugarh, for regularising the services of all 3rd and 4th grade employees appointed during the period from 27.11.91 to 15.6.92 by the Inspector of Schools, DDC, Dibrugarh, does not indicate that any selection was conducted to judge the suitability of the 3rd & 4th grade employees before regularisation. The order dated 29.9.93 of the Inspector of Schools, DDC, Dibrugarh, pursuant to the said resolution dated 7.4.93 of the District Level Selection Board regularising the services of the Petitioners also does not indicate that any selection was held for judging the suitability of the Petitioners for regularising their respective services. By the time, the impugned order dated 3.5.97 was passed by the Commissioner & Secretary, Education Department, Govt. of Assam, the CRC, Dibrugarh District constituted pursuant to the Office Memorandum dated 15.6.92 of the Government of Assam, Personnel Department, was no longer available for selecting candidates for appointment to Grade-III and Grade-IV posts and hence the only way to find the suitability of the Petitioners for regular appointment to the posts of Lower Division Assistants and Grade-IV staff is to subject them to a selection process and to allot some additional marks to them for their experience. Considering the law settled by the Apex Court that regularisation, can be done only after finding the suitability of the employee for such regularisation, the order dated 29.8.96 could never have intended that the Petitioners would be accommodated in their respective posts without judging their suitability or without selection. In my considered opinion, therefore, the impugned order dated 3.5.97 of the Commissioner & Secretary, Education Department, Government of Assam cannot be held to be contrary to the order dated 29.8.96 passed by this Court in Civil Rule Nos. 5114/95 and 5115/95.

7. It however appears that by the impugned order dated 2.6.97, the Inspector of Schools, DDC, Dibrugarh, has already cancelled the appointments of the Petitioners. But the Petitioners have stated that notwithstanding the said order of cancellation of their appointments, they have continued to work in their respective posts. The Petitioners who have continued to work in their respective

posts will be allowed to work till they appear in the selection process in accordance with the order dated 3.5.97 issued by the Commissioner & Secretary, Education Department, Government of Assam and will be terminated from service only if they fail to get selected in the second selection process. The Petitioners who are no longer continuing to work in their respective posts will appear in the two selection processes in accordance with the order dated 3.5.97 of the Commissioner and Secretary, Education Department, Govt. of Assam. In the selection process, additional 10% marks towards experience of the Petitioners will be added as directed by the Commissioner & Secretary, Education Department, Government of Assam in the said order dated 3.5.97. It is needless to say that in case any of the Petitioners gets selected in either of the two selection processes, he will be regularised in service. The first selection will be completed within three (3) months from the date of receipt of a certified copy of this judgment and order by the Inspector of Schools, DDC, Dibrugarh from the Petitioners and the second selection will be completed as soon as vacancies arise in respective posts in schools in the Dibrugarh District Circle.

8. With the aforesaid directions, the writ petition is disposed of. However, considering the entire facts and circumstances of the case, I leave the parties to bear their respective costs althroughout.