
(1988) 02 GAU CK 0012
In the Gauhati High Court
Case No : Civil Rule No. 988 of 1987

Nripen Kalita

APPELLANT

Vs

State of Assam and Ors.

RESPONDENT

Date of Decision : 08-02-1988

Acts Referred:

Assam Secondary Education (Provincialisation) (Service and Conduct) Rules, 1979 —
Rule 3(v)(a), 3(v)(a)

Citation : (1988) 2 GLR 17

Hon'ble Judges : K.N.Saikia, C.J. and J.M.Srivastava, J

Bench : Division Bench

Advocate : P.Roy, M.Z.Ahmed, D.N.Choudhury, B.R.Sarma, Advocates appearing for Parties

Judgement

Srivastava, J.—Sri Nripen Kalita, Assistant Teacher in the Fatasil Town High School, Gauhati who had been upgraded as Graduate Teacher in the same school, has by this petition under Article 226 of the Constitution assailed the order dated 9.9.87 of the Inspector of Schools, Kimrup District Circle, Gauhati reverting him to his original post of Assistant Teacher in undergraduate scale and temporarily upgrading Sri Guru Prasad Medhi, Assistant Teacher, respondent no. 3 in this petition, as Graduate Teacher in the same school.

2. The admitted facts are that the petitioner was appointed as Assistant Teacher in the said school with effect from 13.6.77, the respondent no. 3 had also been appointed as Assistant Teacher in the same school with effect from 25.2.77. The petitioner and the respondent no. 3 have been continuously serving in the aforesaid school which was provincialised with effect from 1.10.77 when the Assam Secondary Education (Provincialisation) Act, 1977, hereafter "the Act" came into force. The Assam Secondary Education (Provincialisation) (Service of Conduct) Rules, 1979, hereafter "the Rules" under the said Act regulates the condition of service of the petitioner and the respondent no. 3. The petitioner and the respondent no. 3 were both upgraded temporarily as and when

vacancies occurred in the post of Graduate teacher. The petitioner was upgraded to the post of Graduate teacher and scale by order dated 6.10.86, AnnexureB to the petition, the respondent no. 3 was similarly upgraded by order dated 8.10.86 in pursuance of the Director of Secondary Education letter dated 23.9.86 in AnnexureC. On 9.9.87, the impugned order was made which is as under :

"(1) Sri Nripen Kalita, B.Sc. A/T. Natun Fatashil Town High School who was upgraded to act as A/T in Graduate scale of pay vide this office No. E1/338,86/1513134 Dt. 6.10.86 is hereby reverted to his original post as A/T in undergraduate scale in the same school with effect from 30.6.87 (after noon).

(2) Subject to discharge at any time without notice & without assigning reasons thereof and subject to approval by the D.S.E. Assam, Sri Guru Prasad Medhi, B.A. A/T Natun Fatasbil Town High School is hereby upgraded temporarily to act as Graduate teacher in the scale of pay of Rs. 6201315/ p. m, with effect from 1.7.87, vide Sri Umesh Ch. Deka, A/T granted lien.

Sd/T. R. Taid,

Inspector of Schools, K. D. C.. Guwahati

3. The petitioner's contention is that he is senior to the respondent no. 3 inasmuch as both of them had been appointed against the sanction of posts with effect from the date of the sanction of the posts vide order at Annexure"A", and the posts were sanctioned with effect from 1.10.77, when the Act had come into force. Sri P. Roy, learned counsel appearing for the petitioner, has referred to the definition and meaning of "appointed day", "date of appointment" "employee", "existing employee" in Section 2 of the Act, and to the definition of "sanctioned post", "date of recognition" in Rule 2 and subrule (5) of Rule 3 of the Rules and contended that since the date of recognition of both the existing employees, that is, the petitioner and the respondent no, 3 being the same and the time of joining not ascertainable, the date of birth shall be the criteria to determine seniority and the petitioner being elder to the respondent no. 3 in age he is senior and should not have been reverted by the impugned order. Sri P. Roy in this connection also placed reliance upon Annexure"G" a letter dated 30th December, 1985 by the Director of Secondary Education, Assam, to contend that since the vacancy in the post of graduate teacher was in the lien of Sri Umesh Chandra Deka, a graduate teacher in Science, the post of Graduate Teacher in Science stream could be available only to a Science teacher as the petitioner and not to an Arts teacher as the respondent no. 3, and hence the impugned order was clearly wrong.

4. On the other hand, Sri B. K. Sarma, learned counsel appearing for respondent no. 3, has refuted the submissions for the petitioner and has contended that the respondent no. 3 had been senior as teacher in the school to the petitioner, that the criteria of determination of seniority urged by the learned counsel for the petitioner was not correct, that the seniority in service of the respondent no. 3 and the petitioner in the school has to be determined on the basis of the date of

joining service in the school and not with effect from the date of sanction of the posts, and that since the respondent no. 3 had joined earlier in the School he was clearly senior to the petitioner, that Annexure12, a circular dated 6.5.87 from the Secretary to the Government of Assam in the Education Department laid down the criteria for promotion/appointment of Assistant Teachers serving in Intermediate scale to Graduate post and that the said circular clearly laid down that the scale of Graduate Teacher was to be given when vacancy occurs according to seniority, irrespective of Science or Arts stream. Sri Sarma has also submitted that under subclause (2) of Clause (a) of subrule (v) of Rule 3, any dispute has to be referred by the Director to the State Government "who shall determine the seniority on the basis of such evidence as may be deemed necessary", and had contended that this petition without having availed the said remedy is not maintainable. Sri P. Roy, learned counsel for the petitioner, has submitted that the availability of an alternative remedy shall not be a bar to the exercise of jurisdiction by this Court under Article 226 of the Constitution.

5. We have considered the submissions for the parties.

6. Sri P. Roy, learned counsel for the petitioner, has submitted that under clause (vi) of Section 2 of the Act, "existing employee" means an employee who is, on the appointed day, in the regular pay roll, employed against regular sanction and whose appointment has been approved by the school authority and has argued that since according to AnnexureI the appointment of the petitioner and the respondent no. 3 was made against the sanctioned posts with effect from 1. 10.77, the petitioner and the respondent no. 3 were "existing employees" only from that day, and the "date of recognition" as defined in clause (v) of Rule 2 of the Rules hence thus being the same, their inter se seniority, has to be determined on the basis of date of birth.

6. We have considered the submission but are unable to accept the same for the reasons that while it is true that the petitioner and the respondent no. 3 can be considered as existing employees with effect from the date they held post against regular sanction, Subrule (v) of Rule 3 provides the basis on which seniority is to be determined. It reads :

"(v) The inter se seniority of an employee belonging to a cadre or class shall be on the basis of its date of recognition, provided that

(a) when more than one employee has the same date of recognition, the inter se seniority shall be determined

(1) On the basis of the time and hour of joining the service of a Secondary School and where the joining time is not ascertainable the date of birth shall be the criterion.

(2) in case of any dispute, the Director shall refer the dispute in details to the State Government who shall determine the seniority on the basis of such evidence as may be deemed necessary."

A consideration of the above Rule clearly shows that the inter se seniority is to be determined on the basis of the date of recognition, provided that when more than one employee has same date of recognition as in the instant case, the inter se seniority shall be determined on the basis of the time and hour of joining the service of the Secondary School (emphasis supplied), which clearly indicates that when the date of recognition is the same, the time and hour of joining the service of a Secondary School, shall be the basis for determination of seniority. It is only where the joining time is not ascertainable, then alone the date of birth is to be considered for the purpose of determination of seniority. In the present case, it is clear from the admitted facts of the case that the respondent no. 3 had joined the service of the School in February, 1977, whereas the petitioner had joined the service sometime in June, 1977. The time and hour of joining the service of the school, thus being available in the case of both the petitioner and the respondent no. 3, there is no need for recourse to the criteria of the date of birth. The respondent no. 3 is undoubtedly, therefore, senior to the petitioner.

7. Sri P. Roy, learned counsel for the petitioner, submitted that the service prior to the period when the petitioner and the respondent no. 3 came to hold sanctioned post is to be ignored in view of the definition of the "existing employee". We are unable to accept the contention for the reason that in subclause (1) of clause (a) of subrule (v) of Rule 3, the plain meaning and scope of the words "on the basis of the time and hour of joining the service of a Secondary School" would not justify any restrictive interpretation as would follow if the submission of Sri P. Roy is accepted. Besides, it is also not reasonable to accept the submission that the service prior to the date when the petitioner and the respondent no. 3 came to hold sanctioned posts is to be ignored. We think that the said provision requires the date and hour of time of joining the service of a Secondary School to be considered for the purpose of determination of seniority. We, therefore, hold that the meaning and scope of subclause (1) of clause (a) of subrule (v) of Rule 3 of the Rules is, that where the date of recognition of the employees is the same as in the present case, the basis for determination of inter se seniority shall be the time and hour of joining the service of the school, and where it is not possible, then alone the date of birth shall be the basis or criteria for determination of seniority. The reference to Government circular AAP 27/50 dated 31. 3. 1960 in para 7.2 at page 96 of the Assam Government Hand Book of General Circulars in this connection by Sri P. Roy, learned counsel for the petitioner, is of no assistance to the petitioner, because Subrule (v) of Rule 3 of the Rules itself provides the basis for resolving the controversy in regard to seniority between the petitioner and the respondent no. 3.

8. Sri P. Roy, learned counsel for the petitioner, has relied on Annexure G to submit that the post was of a Science Graduate Teacher and the petitioner being a Science graduate, he alone could hold the post of Science Graduate Teacher and the respondent no. 3 who is an Arts graduate could not be so appointed by the impugned order dated 9. 9. 87. the meaning and scope of the letter at

Annexure G, as urged by Sri P. Roy, learned counsel for the petitioner, in our is not correct. The letter, AnnexureG, reads:

"GOVERNMENT OF ASSAM

OFFICE OF THE DIRECTOR OF SECONDARY EDUCATION : ASSAM KAHILIPARA : GUWAHATI19.

NO. GMSC. 145/85/27 Dated Kahilipara, the 30th

December, 1985

From : Shri M. C. Talukdar, M. Sc.

Director of Secondary Education : Assam : Kahilipara : Guwahati 19.

To

The Inspector of School's (All)

SUB : RECOMMENDATION FOR UPGRADATION TO GRADUATE SCALE OF PAY AND ADVERTISEMENT FOR THE POST OF GRADUATE TEACHERS OF SECONDARY SCHOOLS.

Sir,

In inviting a reference to subject quoted above, I have the honour to say that it has been found in the past that without examining science graduate with Mathematics in graduate scale of teachers in school, the Inspector of Schools recommended/submitted proposals for upgradation of Arts graduate serving in Intermediate scale to upgrade to graduate scale when vacancy arises.

Further, when advertising for a post of graduate teacher, She requirement of science teachers in the school was not examined whether there are sufficient number of science teachers with Mathematics in graduate scale of teachers in the school. This will permanently hamper the teaching of Mathematics and science in the school.

I, therefore, request you to see that the matter may be carefully avoided and indicate whether science graduate or Arts graduate is required at the time of advertising for new recruitment and sending proposal for upgradation. This is Most Urgent.

Yours faithfully,

Sd/Director of Secondary

Education, Assam Kablipara, Guwabati19

It thus directed as to bow the post should be advertised for filling up vacancies. We are unable to accept the contention that it was in the nature of a circular which could be the basis for determination of the controversy under consideration before us.

9. As a matter of fact, Annexure12 is of more relevance and has a direct bearing on the question under consideration. Annexure12 reads:

"Government of Assam

Education Department: Dispur,

Guwahati781006.

Dated the 6th May, 1937.

From : Sri B. Bhattacharyya, IAS,

Secretary to the Government of Assam Education Deptt., Dispur.

To : The Director of Secondary Education,

Government of Assam, Kabilipara, Guwahati19,

SUB : CRITERIA FOR PROMOTION/APPOINTMENT OF ASSISTANT TEACHERS SERVING IN INTERMEDIATE SCALE TO GRADUATE POST.

Ref : Your letter No. GMSC.45/85/179 dtd. 17.11.86.

Sir,

I am directed to say that after careful examination and consideration of all aspects of the question of procedure in case of Appointment/Promotion of Assistant Teacher serving in Intermediate scale of pay to the post of Graduate teacher, as laid down in Government letter No. EPE. 114/35/12 dtd. 18.9.85 in Item 3(a) is hereby revised and decided to adopt the following procedure in respect of promotion/appointment to the Graduate posts.

For appointment/promotion of teachers in the Graduate scale the teachers having requisite qualifications serving in Intermediate scale of pay in particulars school are to be promoted on the basis of seniority only irrespective of stream when vacancy occurs.

This supersedes the previous norms in Item 3(a) of Government letter No. EPE. 114/85/12 dtd. 18.9.85.

Yours faithfully,

Sd/ B. Bhattacharyya,

Secretary to the Government of Assam"

A consideration of the aforesaid letter reveals that appointment and promotion of Assistant teachers in the Intermediate scale of pay to the post of Graduate Teacher, shall be on the basis of seniority only, irrespective of stream when vacancy occurred on account of a graduate teacher in the Science stream, the promotion to the Graduate Teachers" vacancy need not go to the next Science teacher but if an Arts teacher is the senior most he shall be appointed to the

scale of Graduate teacher. This circular is very clear and it superseded all previous instructions on the subject. It may be noted that the petitioner has not questioned the validity of the circular Annexure12 and accordingly the submission of Sri P. Roy, learned counsel for the petitioner, that since the vacancy was on account of a Science Graduate teacher, the post could be filled up only by the petitioner and that the next senior most Arts teacher, that it, the respondent no. 3 could not be appointed to Graduate scale, is not tenable. On careful consideration, we think that the impugned order dated 9.9.87 is correct.

10. In so far as the objection to the maintainability of this petition is concerned, while we do think that in view of the provisions of subclause (2) of clause (a) of subrule (v) of rule 3 of the Rules, noted earlier any dispute regarding seniority should be referred to the State Government for determination not only because the said rules so provide but also because the State Government in the concerned department, shall be better placed to ascertain and consider the facts involved in such a dispute; however we are not inclined to accept the objection regarding maintainability for the reasons that this petition was entertained and we have heard the learned counsel for the parties on merit. In this view of the matter it is not necessary to consider the various authorities, namely, A. V. Venkateswaran, Collector of Customs Bombay vs. Raichand Sobhraj AIR 1961 SC 1806, M/s Baburam Prakash Chandra Maheshwari vs. Antarlm Zila Parishad AIR 1969 SC 556, Assistant Collector of Central Excise vs. Jainson Hoisery Industries AIR 1979 SC 1889, V. Vellaswamy vs. J. G. P Tamil Nadu (1981) 4 SCC 247, Sanwarmal Purohit vs. The Collector of Central Excise and Land Customs, Shillong, AIR 1964 Assam 121, Rattanlal vs. State of Haryana AIR 1987 SC 478 and Dr. (Smt) Kunteshgupta vs. Management of Hindu Kanya Mahabidiyala Sitapur (UP) (1987) 4 SCC 525, cited by Sri P. Roy, learned counsel for the petitioner to the effect that availability of alternative remedy is no bar to our discretionary jurisdiction under Article 226 of the Constitution. We, however, do wish to say that this case may not be considered as a precedent on the question of maintainability of such a petition in view of the aforesaid provisions of the rules.

11. For the aforesaid reasons, this petition fails and is dismissed. The parties shall bear their own costs.