
(2019) 11 GAU CK 0029
In the Gauhati High Court
Case No : Writ Appeal No. 283 Of 2019

Purnabati Brahma

APPELLANT

Vs

State Of Assam And 6 Ors

RESPONDENT

Date of Decision : 13-11-2019

Acts Referred:

Citation : (2019) 11 GAU CK 0029

Hon'ble Judges : Ajai Lamba, CJ; Achintya Malla Bujor Barua, J

Bench : Division Bench

Advocate : Rc Saikia, B Talukdar, B Bhuyan, B Gogoi

Final Decision : Dismissed

Judgement

Ajai Lamba, CJ

1. This writ appeal/intra-Court appeal has been filed by Smti Purnabati Brahma challenging decision dated 6.5.2019 rendered in WP(C) 6378/2015

titled Purnabati Brahma v. State of Assam and others.

2. The facts in brief are required to be considered before adjudicating the issue raised by the appellant.

It appears that the appellant filed the abovenoted writ petition with the prayer that order dated 21.8.2013 appended with the writ petition as Annexure-

6 issued by Director of Secondary Education, Assam, Kahilipara be quashed.

It was further prayed that services of the petitioner as Language Teacher in Alari Bodo Medium High School in Kokrajhar District be provincialised

w.e.f. 01.01.2013 and to release arrear salary accordingly w.e.f. 01.01.2013.

3. Vide the order (Annexure-6) dated 21.8.2013 which was impugned by virtue of the writ petition, no provision was made for Language Teacher.

Since the petitioner claims to be a Teacher teaching Assamese language, the appellant/writ petitioner felt aggrieved and therefore, challenged the order (Annexure-6).

4. We have heard learned counsel Sri RC Saikia for the appellant. The contention of learned counsel for the appellant/writ petitioner essentially is that

in law the respondents are required to provide a Teacher to teach Assamese language in every school. The said law has been violated by virtue of

issuing order dated 21.8.2013. It was pleaded in the writ petition that the petitioner has always been treated as Language Teacher in Alari Bodo

Medium High School. Particulars of eligible employees serving in Alari Bodo Medium High School for provincialisation of the services of teaching and

non-teaching staff as per Assam Venture Educational Institutions (Provincialisation of Services) Act, 2011 (for short, the Act of 2011) had

been sent to respondent No.2 (Director, Secondary Education, Assam) by District Scrutiny Committee of Kokrajhar district showing the date of

recommendation of Alari Bodo Medium High School as 1.1.1992 having total number of enrolled students as 230; and the name of the petitioner as

Language Teacher for Bodo Medium School. Designation of the petitioner as Language Teacher and date of joining w.e.f. 9.5.2001 and degree of

qualification as graduate in Arts had been furnished. Despite such recommendation by District Scrutiny Committee, the petitioner had been taken out

of purview for provincialisation of services under the Act of 2011. It has been pleaded that the school had been provincialised by the Government of

Assam, Education Department as communicated by Deputy Director, Secondary Department, but the name of the petitioner has been dropped in the

said impugned order so far as it relates to the service of the petitioner. Consequently it is evident that the Act of 2011 has been violated.

We need not go into the other intricate details in regard to case of the petitioner because the Act of 2011 was held constitutionally invalid vide the

judgment reported as 2016 (5) GLT 296 titled Chandan Kumar Neog and others v. State of Assam and others.

5. Contention of the learned counsel for appellant/writ petitioner is to the effect that though the Act of 2011 had been struck down as constitutionally

invalid, however, review petition was filed in context of the judgment. The review petition bearing No.167/2016 titled State of Assam v. Sri Bimal

Kutum and 5 others was decided vide the judgment dated 02.01.2017. It has been pleaded on behalf of the appellant that at the point in time, when judgment in Chandan Kumar Neog (supra) was rendered, right had already been vested in the appellant and therefore, she is entitled to benefit flowing from order rendered on the review petition.

6. The contention of the appellant has been rebutted by the learned counsel for respondent State on the ground that at the point in time, when the judgment was rendered in Chandan Kumar Neog (supra), order dated 21.8.2013 (supra) was in vogue. It is, therefore, evident that no right had been created in favour of the appellant. Services of the appellant had not been provincialised. The appellant was not drawing salary as a provincialised servant. In such circumstance, neither in facts nor in law it can be construed that right was vested in the appellant and therefore, be given the benefit of the order passed in review petition (supra).

7. We, having considered the rival contentions, deem it proper to extract the relevant portion from judgment rendered in Chandan Kumar Neog (supra). Relevant portion of the judgment is contained in paragraphs 34, 35, 36, 37, 38 and 39.

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34. But this litigation reveals the total non-application of mind and it is all pervading in the state enactment. The discriminatory impact of the Provincialisation Act is found to be glaring here. In order to avoid impermissible discrimination, the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from other left out of the group, and also the differentia must have a rational relation to the object sought to be achieved by the statute in question. The petitioners here project that the teachers whose services are provincialized and those who have been left out are at par in all aspects. In most cases, both categories have been rendering service in the school since inception and are similarly qualified as well as rendering similar duties. There is nothing on the face of the statute or the surrounding circumstances to show any distinguishing factor. Also no rational relation of such differentia with the object of the Act is discernible from reading of the provision. In fact the object of the Act is to provincialise the services of teachers in

venture educational institutions and prevent further growth of such institutions. However, the object of provincializing the services of the

required teachers in the institutions established bonafide stands negated by the enactment in its present shape.

35. The venture schools which were set up bonafide on need basis, in our perception, do serve the students in remote places and it may not

be wrong to say that due to the inability of the State to discharge its constitutional obligations, the venture educational institutions were

allowed to function. We may also say that the State has been discharging its constitutional obligation through these venture educational

institutions. In this backdrop, when the venture schools are taken over, the government in a sense is taking steps towards discharging is

constitutional obligations. However the action of the State in taking over such schools with only a given number of teachers, when the

number is not commensurate with the prescribed requirements of the RTE Act (the law framed for implementation of Article 21A), the

relevant prescription is absolutely arbitrary. The spirit of Article 21A stands defeated in our perception if the mechanism prescribed under

the RTE Act is not conformed to encourage those bonafide elements who have aided the State in discharging its constitutional obligation.

36. It is also questionable whether the mode of entry into government service facilitated by the Provincialisation Act can ignore the

applicable reservation laws relating to SC/ST category, women and disabled groups. The role of the authorities in the field of education in

the Sixth Schedule areas of Assam is also undermined by the 2011 Act.

37. The appointment of teachers in the venture institutions is not competition based and is opaque and therefore quality of education is

bound to suffer if this is allowed to continue. This naturally will negatively impact the next generation of our State. Moreover, the norms

and qualification prescribed by the competent authorities like the UGC, NCTE, SEBA, etc. is the major casualty in application of the

Provincialisation Act.

38. When such substantial defects are perceived, in a given context, the court can strike down only the offending provisions. However when

unconstitutionality is noticed in the major provisions starting from the Preamble

to the Schedule of the Provincialisation Act, striking down the offending portion will practically de-capacitate the 2011 Act. In other words, the statute itself will become inoperable although the ultra vires declaration is limited to some segments of the Act.

39. Therefore, we feel that a piecemeal exercise will not serve the purpose. But at the same time, to suggest how the Provincialisation Act

should be re-shaped would be intruding into the domain of the legislature. Moreover amendment exercise might have to be preceded by a

consultative process with all the stakeholders and this is surely the responsibility of the State. That apart it is certainly difficult to separate

the bad from the good portion of the Provincialisation Act. Under these compulsions, being convinced with the arguments of the petitioners,

we declare that the Assam Venture Educational Institutions (Provincialization of Services) Act, 2011 is constitutionally invalid. As the State

has decided to bring in a fresh legislation, considering the likely time needed for the process, we direct the State to do their exercise as

committed in the additional affidavit, expeditiously and preferably in the next 6 (six) months. It is ordered accordingly.

xxxxxxâ?? (emphasised by us)

8. On perusal of the judgment rendered on the Review Petition No.167 of 2016 (supra), it becomes evident that the Court was required to consider

rights of the persons who had already been given service benefits under the Act of 2011; who is getting salary as provincialised employee or who had

retired and drawing pension. Considering the said peculiar facts and circumstances, the Court decided in the following terms in paragraphs 18 and 19

of the order passed on the review petition.

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18. The State in their application have stated that the group they are concerned with are those who have retired and are drawing pension,

another category who are now govt. employees and are receiving regular scale of pay and people of same class, who have moved on in

their careers and in life. There are around 41,634 employees for whom vested rights are already created under the 2011 enactment but

through retrospective application of our 23rd September, 2016 judgment, they may not only lose their govt. jobs but will also be disentitled

to pension and salary. Moreover, the question of recovery of the already disbursed salary and pension may emerge. The harsh impact of

the retrospective application will be crippling for the already provincialized group and their livelihood and in turn life itself, will be

adversely impacted. All such debilitating consequences will occur without any opportunity or hearing to this category. Many families,

dependant on the earnings of the provincialised staff are enjoying a measure of social and economic security, and they all will be thrown to

the streets, without any fault on their part.

19. In the above circumstances, we are of the considered view that the rights of the employees who have been benefited under the struck

down statute can be taken care of by giving retrospective effect to the proposed legislation, if the legislature so decides. Till then it is

ordered that the services of the provincialised category and their status as govt. employees shall not be disturbed and they will continue to

receive all the benefits which they are getting under the Provincialisation Act, 2011, since struck down by the judgment under Review. With

this observation and direction, the matter stands disposed of.â??

(emphasised by us)

Bare reading of the above extracted portion from the decision rendered on the review petition would indicate that the Court showed indulgence only in

the cases where it found that the right had already been vested under the Act of 2011.

9. The case as projected by learned counsel for appellant to the effect that the appellant was vested with rights under the Act of 2011 on the date

when judgment was rendered in Chandan Kumar Neog (supra), cannot be accepted. The very fact that the services of the petitioner had not been

provincialised and therefore, the writ petition was filed, makes it clear that the case of the petitioner would not be covered within the four corners of

the decision rendered on the review petition. Admittedly, the petitioner was not getting salary as provincialised employee. Therefore, it would be a

fallacy in law and facts to consider that right had already been vested in the writ petitioner under the Act of 2011, which admittedly has been struck

down as constitutionally invalid. The Review Court has held that doctrine of prospective overruling would not apply as the said power is vested only

with the Supreme Court of India. It is in such circumstances it has been provided in Para 19(supra) of judgment rendered by the Review court that

“the rights of the employees who have been benefited under the struck down statute can be taken care of by giving retrospective effect to the

proposed legislation, if the legislature so decides. Till then it is ordered that the services of the provincialised category and their status as govt.

employees shall not be disturbed and they will continue to receive all the benefits which they are getting under the Provincialisation Act, 2011, since

struck down by the judgment under Review.”

10. We are conscious of the fact that subsequently the Assam Education (Provincialisation of Services of Teachers and Re-Organisation of

Educational Institutions) Act, 2017 (for short, the Act of 2017) was brought in place w.e.f. 11th April, 2017. In the impugned order passed by learned

Single Judge, it has been said that no writ of mandamus can be issued in view of the fact that the Act of 2011 is not in force. However, liberty was

given to the writ petitioner (appellant) to approach appropriate Educational Tribunal for consideration of her case for provincialisation as per law in

force. The respondents from the Education department were also asked to consider the case of the writ petitioner for provincialisation under the Act

of 2017, if she is entitled for the same in terms of provisions of the Act of 2017.

11. Since the Act of 2011 was held constitutionally invalid, as noted above, we find no reason to differ with the view taken by the learned Single

Judge.

12. For all the reasons given above, this writ appeal is hereby dismissed, however, with liberty to the appellant to approach the appropriate authority

under the Act of 2017 to claim relief, if so advised.