
(2012) 07 GAU CK 0003
In the Gauhati High Court
Case No : Writ Petition (C) No. 5990 of 2011

Puspa Kanta Gogoi

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 18-07-2012

Acts Referred:

Citation : (2013) 2 GLT 1107

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : D. Borah, for the Appellant; M.K. Choudhury, Mr. J. Chutia and Mr. J. Roy, for the Respondent

Final Decision : Allowed

Judgement

Biplab Kumar Sharma, J.—The petitioner is aggrieved by Annexure-D order dated 17.11.2011 by which the Inspector of Schools, Karbi Anglong District Circle, Diphu allowed the respondent No. 5 to act as Principal In-Charge of Bokajan Higher Secondary School. The petitioner is aggrieved by the said order because prior to issuance of the same, he was holding the charge of Principal as senior most Assistant Teacher of the School. In fact, presently also he is holding the charge in view of the interim order dated 25.11.2011 operating in this proceeding. Be it stated here that while the petitioner is Assistant Teacher in Graduate Cadre, the respondent No. 5 is a Subject Teacher. As per the requirement of the provisions of the Rules, namely Assam Secondary Education (Provincialised) Service Rules, 2003, recruitment to the post of Principal in Higher Secondary School is to be made from both the cadres of Assistant Teacher (Graduate) and Post Graduate Teacher as the feeder grades. The only distinctive feature is that while for the Assistant Teacher in the Graduate Cadre, the prescribed service experience is 17 years, for a Post Graduate Teacher the service experience is 15 years.

2. In the instant case, going by the length of service, it is the petitioner who is senior to the respondent No. 5. While the petitioner was appointed as Assistant

Teacher in the Graduate Cadre on 24.05.1979, the respondent No. 5 was appointed as Subject/Post Graduate Teacher on 18.07.1988. However, the impugned order dated 17.11.2011 was passed allowing the respondent No. 5 to hold the charge of the Principal on the analogy that he is in higher cadre of Subject/Post Graduate Teacher and in the said cadre he is the senior most teacher. This aspect of the matter has been dealt with by this Court in a batch of writ petitions, first one being W.P.(C) No. 4836/2011 (Trinayan Ch. Dutta Vs. State of Assam and orders) disposed of on 21.03.2012. By the said judgment and order passed in the batch of writ petitions, it has been held that since the Rules do not provide for any distinction in the matter of recruitment to the post of Principal between the two cadres of teacher, namely the Assistant Teacher in the Graduate Cadre and the Subject Teacher, the incumbents of both the cadres are eligible for recruitment to the post of Principal. It has also been held that in the matter of holding charge, irrespective of the cadre to which the incumbents belong to, the seniority will have to be determined on the basis of the provisions of Rule 24. Rule 24(1)(a) provides that in the matter of inter se seniority of the teachers of the Graduate Cadre and Post Graduate Cadre in a school, same shall be considered/determined on the basis of the date of continuation of service in the school irrespective of Graduate and Post Graduate Post on regular basis.

3. The aforesaid notion of the respondents towards passing the impugned order is well reflected in the counter affidavit filed by the respondents, both official as well as private. However, during the course of hearing of this Case, the official and the private respondents have developed a new case of loss of seniority by the petitioner on account of his transfer to the present school about 23 years back. He was so transferred by order dated 4.11.1989. The order does not reflect anything about request transfer and loss of seniority etc. For a ready reference, the order is reproduced below:

GOVT. OF ASSAM OFFICE OF THE ADDL. DIRECTOR OF EDUCATION (HILLS)
ASSAM; HAFLONG ORDER

Shri Puspa Kanta Gogoi, B.Sc. Asstt. Teacher (Science) of Baithalangso Higher Secondary School, Karbi Anglong District is hereby transferred and posted to Bokajan Higher Secondary School, Karbi Anglong District with immediate effect on his same grade and scale of pay. This is against the vacant post of Shri Bhadreswar Baruah, Graduate Science Teacher transferred.

Sd/- Addl. Director of Education (Hills) Assam, Haflong

4. The respondent No. 5 however, has brought on record certain communications prior in point of time than the aforesaid order of transfer. The said communications are dated 10.12.2011, 02.02.2012, 17.08.1989, 06.07.1989, 12.11.1988 and 28.10.1988.

5. By letter dated 28.10.1988, the petitioner had made request to the Education Department for his transfer to the present school categorically showing a vacant post of Science Teacher (Maths) in the school. By letter dated 12.11.1988

addressed to the Inspector of Schools, KADC by the Principal of the earlier school in which the petitioner had worked, conveyed no objection in transferring him from the school. That letter was followed by letter dated 06.07.1989 addressed to the Addl. Director of Education (Higher) Assam by the Inspect of Schools, KADC stating therein that the post to which the petitioner was to be transferred was lying vacant. By further communication dated 17.08.1989, the Inspector of Schools, KADC informed the Addl. Director of Education (Higher), Assam conveying that the post of Science Graduate Teacher (Maths) was required in the school to which the petitioner was transferred.

6. The communications dated 10.12.2011 and 02.02.2012 are addressed to the State Public Information Officer in the Education Department and reply thereto to the respondent No. 5 respectively. By letter dated 10.12.2011, the respondent No. 5 sought for information regarding transfer of the petitioner way back in 1989 to the present school. By letter dated 02.02.2012 the information sought for was furnished to him on the basis of which he has developed a new case that the petitioner cannot count his seniority from the initial date of appointment in 1979, but will get his seniority from 1989 when he was transferred to the school by above quoted order. In support of this collateral plea raised in the counter affidavits, learned counsel for the respondent No. 5 has placed reliance on the Full Bench decision of this Court reported in 2012 (1) GLT 1: Jamal Uddin Ahmed Vs. State of Assam.

7. I have heard Mr. D. Borah, learned counsel for the petitioner as well as Mr. M.K. Choudhury, learned Sr. counsel assisted by Mr. J. Roy, learned counsel for the respondent No. 5. I have also heard Mr. J. Chutia, learned SC, KAAC.

8. While Mr. Borah, learned counsel for the petitioner argued that the settled seniority of the petitioner cannot be disturbed at the instance of the respondent No. 5 and that too, entirely on a wrong notion of the matter and by way of collateral that too belated plea. On the other hand, Mr. M.K. Choudhury, learned Sr. counsel representing the respondent No. 5 placing reliance on the aforesaid Full Bench Decision of this Court while conceding that seniority in both the cadres, i.e. Graduate Cadre and Post Graduate Cadre, is to be determined taking into account both the cadres together and on the basis of the date of joining, however, contended that since the petitioner was transferred to the present school in 1989, his earlier period of service from 1979 stood obliterated so far as the question of seniority is concerned.

9. Mr. J. Chutia, learned SC, KAAC referring to the stand of the Inspect of Schools, KADC in his counter affidavit made submission in the same tune projecting it to be a case of loss of seniority by the petitioner on his transfer to the present school way back in 1989.

10. I have considered the submission made by the learned counsel for the parties and have also considered the entire materials on record and my findings and conclusions are as follows:

11. Never before the official and the private respondents had ever contended that the seniority of the petitioner would be counted from 1989, i.e. the year in which he was transferred to the present school. It is only after the aforesaid Full Bench decision of this Court they have taken the plea in this proceeding that the petitioner is not entitled to count seniority from 1979.

12. The petitioner has brought on record the gradation list of the school that was published on 23.11.2000 (about 12 years back) under the signature of the Principal of the School. In the said seniority list, the name of the petitioner appeared at serial No. 3 and that of the respondent No. 5 at serial No. 11 clearly showing their respective dates of appointment as 24.05.1979 and 18.07.1988. The seniority position finalised by the said gradation list dated 23.11.2000 was never called in question by anyone. The recognition that the petitioner is senior to the respondent No. 5 was well accepted. It was on that basis when the earlier incumbent, i.e. In-Charge Principal, retired from service on attaining the age of superannuation, charge was handed over to him by Annexure-A order dated 31.10.2011. The Managing Committee of the school also adopted a resolution in its meeting held on 11.11.2011 urging upon the Inspector of Schools, KADC to pass formal order appointing the petitioner as Principal In-charge of the school. Alongwith the writ petition, the petitioner has also enclosed another gradation list dated 13.10.2011 in which also his name appears well ahead of the respondent No. 5. While the name of the petitioner appears at serial No. 2 just below the erstwhile Principal of the school, the name of the respondent No. 5 appears at serial No. 10.

13. In spite of the aforesaid position, the Inspector of School, KADC passed the impugned order dated 17.11.2011 allowing the respondent No. 5 to hold the charge of the Principal only in recognition of the fact that he is the senior most Subject Teacher. While passing the impugned order, there was no consideration that the seniority of the incumbents of both the cadres are required to be considered collectively and not in isolation. However, as noted above, during the course of hearing of the instant proceeding the said authority has projected another case of loss of seniority of the petitioner upon his transfer to the present school.

14. I have gone through the records produced by the learned SC, KAAC which are in the form of two files bearing No. KAAC/Edn./W.P.(C) No. 4824/2011 in the department of Education (Higher Secondary), KAAC, Diphu and E-I/43 on the subject of Baithalangso H.S. School. The file contains the aforesaid gradation list dated 23.11.2000. It also contains another gradation list dated 01.08.2011 in which also the petitioner is shown senior to the respondent No. 5. It also contains the gradation list dated 13.10.2011 referred to above in which also the name of the petitioner appears at serial No. 2 as against the respondent No. 5's at serial No. 9. However, there was a complete "U" turn in preparing another gradation list dated 04.11.2011 showing the respondent No. 5 at serial No. 1 and the petitioner at serial No. 8. The same was prepared not on the basis of date of

joining in the service, but on the analogy referred to above that Subject Teacher being in Class-II/Grade-II, would rank senior to the Graduate Teacher in Class-II/Grade-IV.

15. The aforesaid gradation list dated 04.11.2011 was followed by the gradation list dated 07.04.2012 drawn on the same analogy on comparing the Post Graduate Teacher with that of Graduate Teacher and accordingly placing the respondent No. 5 at serial No. 1 as against placing the petitioner at serial No. 6.

16. The aforesaid analogy of the respondents in respect of distinctive feature of Post Graduate Teacher and Graduate Teacher is well reflected in the letter dated 04.11.2011 contained in the file. The letter written by the Inspector of Schools, KADC to the Joint Secretary, Department of Education, KAAC in reference to the Govt. letter dated 29.03.2011 states that the Post Graduate Teacher would rank senior to Graduate Teacher.

17. On perusal of the second file, what is found is that having regard to the particular vacancy in the present school, the petitioner had requested for his transfer to the school. The matter was processed after observing all the formalities and eventually it was in the requirement of the school (Post being lying vacant), the petitioner was transferred to the present school by the above quoted order which also does not speak of any loss of seniority. That position having continued for years together, the Education Department in the KAAC, i.e. the respondent No. 4, and the private respondent (respondent No. 5) cannot be permitted to build up another story so as to contend that the petitioner will rank junior to the respondent No. 5 because of his transfer way back in 1989 to the present school.

18. Much have been debated about the aforesaid Full Bench decision of this case. In the said decision the concerned issue was as to whether Rule 24(2)(v) of the Assam Secondary Education (Provincialised) Services Rule, 2003 providing for loss of seniority on request transfer would have retrospective effect or not. There was conflicting decisions in reference to the earlier set of Rules, namely Assam Secondary Education (Provincialised) Services Rules, 1982 vis-a-vis the Rules of 2003. While in some decisions it was held that in absence of any clear indication about the loss of seniority on request transfer coupled with the fact that there was also no provision of such loss of seniority in 1982 Rules, loss of seniority would not entail, however, in some other decisions it was held that irrespective of any explicit provision regarding loss of seniority in 1982 Rules, an incumbent upon a request transfer would forfeit his past service in respect of seniority.

19. The Full Bench decision while holding (deciding the particular issue) that the provision made in 2003 Rules for loss of seniority would have retrospective application, however, has made it clear that the issue of own request in school transfer after 1982 which has attained its finality should not be reopened. Operating part of the said conclusion is quoted below:

73. We are, thus, of the unhesitant opinion that own request inter-school

transfers were not contemplated under the 1982 Rules either in public interest or in administrative exigency. The 2003 Rules carries the same mandate explicitly enjoining the consequence of loss of past services for seniority of the incumbent concerned in such an eventuality. A perceptible continuum of this legislative ordainment persists to effectuate the retrospectively of the 2003 Rules to remedy the purported state of ambiguity, indeterminability and the consequential inconsistency in approach of the State authorities on the issue opposed to the letter and spirit of the 1982 Rules. The 2003 Rules essentially is thus a clarificatory law and is held to be retrospective in operation on and from the date of enactment of the 1982 Rules.

This determination, notwithstanding, as we are conscious that as on date, the issue of own request inter-school transfer after the 1982 Rules, has meanwhile been finally settled in many cases including those of several incumbents who since retired from service with their entitlements accordingly computed, we order that such cases would not be reopened on the basis of this verdict. In other words, cases where departmental orders securing seniority even on such inter-school transfers have attained finality and no challenge thereto has been made before any judicial forum as on date as well as cases finally determined by a Court of law sustaining such seniority the same would not be reopened on the basis of this verdict.

74. To reiterate, this adjudication has been made without reference to any particular fact situation and would be limited to the incumbents of the Assam Secondary Education (Provincialised) Service and at all relevant times governed by the provisions of the two Rules dealt with as above.

20. In the instant case, the petitioner was transferred to the present school about 23 years back, i.e. in 1989. It is not the case of the petitioner that upon such transfer he was made to understand that he would forfeit his past seniority. He was all along recognised to be senior to the respondent No. 5, a fact well reflected in the aforementioned gradation list dated 23.11.2000 followed by the other gradation lists and aforementioned resolution of the Managing Committee of the school. It is in this background, the above observation in the Full Bench decision will have to be understood in the touchstone of the letter and spirit of the judgment and not for reopening long settled seniority position. The respondent No. 5 never at any point of time over the last 23 years questioned the settled seniority of the petitioner above him, but has only raised the issue collaterally in this proceeding initiated by the petitioner.

21. As noted above, the whole basis of the claim of the respondent Nos. 4 and 5 towards projecting a new case is the aforesaid Full Bench decision of this Court. Needless to say that a judgment on a particular issue cannot clothe a person to reopen a long settled matter. The benefit of a judgment is not extended to a case automatically. It is not the case of the respondents Nos. 4 and 5 that ever since the petitioner was transferred to the present school, they had been agitating their grievance in respect of conferring seniority on the petitioner above the

respondent No. 5. Even if such a plea was available, then also in absence of any explanation in respect of delay and latches, merely placing reliance on the aforesaid Full Bench decision, the respondent No. 5 cannot be permitted to unsettle the settled position.

22. It has been held in a number of decisions that in the matter of seniority and promotion long settled matter should not be allowed to unsettle and that too, on the basis of a judgment. A judgment cannot give rise to a cause of action for a person to reopen a settled matter in respect of which no grievance was made earlier. Never before, the respondents both official and private had questioned the settled seniority of the petitioner. It is only after the judgment in Jamaludin Ahmed (supra), they have projected altogether a new case of loss of seniority of the petitioner way back in 1989. The respondent No. 5 has raised the issue that too collaterally in the present proceeding initiated against the impugned order by the petitioner. Dealing with the question as to whether a judgment can give rise to a cause of action and in what circumstances, the Division Bench of this Court in President, Manipur Pradesh Congress Committee Vs. Speaker, Manipur Legislative Assembly, reported in 1997 (2) GLT 441, observed thus:

40. It needs to be noted that the judgment dated 22.01.97 (Annexure-16) is not being cited as a precedent but is relied upon as a source and base of accrual of cause of action...

49. It is in the light of the above findings that the concluding observation as contained in paragraph 19 already quoted above is to be viewed and appreciated. A judgment or decision which is pronounced, must be a declaration of the mind of the Court as it is at the time of pronouncement (See Surendra Singh and Others Vs. The State of Uttar Pradesh,). Howsoever liberally read and construed, the judgment dated 22.01.97, Annexure-16 as seen above, does not confer any cause of action even or otherwise, on principle a judgment seldom confers or creates any cause of action for institution of fresh proceedings save in exceptional cases where adverse findings or remarks are made in a judgment behind the back of the party. In deed, as defined in Black's Law Dictionary to sustain action and seek judicial redress and relief or a declaration of one's rights the party seeking a judgment must have a cause of action for institution of proceedings or suit. It is not as if cause of action follows judgment.

23. As regards the principle laid down in various decisions not to unsettle the settled position, I may gainfully refer to the decisions of the Apex Court cited below:

- 1) Government of Andhra Pradesh and Others Vs. M.A. Kareem and Others,
- 2) B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc.,
- 3) R.S. Makashi and Others Vs. I.M. Menon and Others,
- 4) Ratan Chandra Sammanta and others Vs. Union of India and others,

- 5) P.S. Sadasivaswamy Vs. State of Tamil Nadu,
- 6) State of Rajasthan and Others Vs. D.R. Laxmi and Others,
- 7) B.S. Bajwa and Another Vs. State of Punjab and Others,
- 8) Central Bank of India Vs. S. Satyam and others,
- 9) S.S. Balu and Another Vs. State of Kerala and Others,
- 10) Krishi Utpadan Mandi Samity, Manglor Vs. Pahal Singh,

24. Above apart, the impugned order will have to be judged on the basis of the materials which forming the foundation of the said order. As noted above, the whole basis of the said order is the analogy that the teachers belonging to Post Graduate Cadre will score a march over the teachers belonging to the Graduate Cadre. It has already been held that appointment to the post of Principal being from the both the cadres as a feeder cadre, irrespective of the stream to which the teachers belong to, as per the provision of 2003 Rules, the incumbents belonging to both the cadres are entitled to get appointment to the said post counting their seniority on the basis of the date of their initial appointment. However, the respondents in their wisdom determined the seniority of the respondent No. 5 in reference to the petitioner on the analogy that the Post Graduate Cadre being in a higher class, the incumbents belonging to the said cadre would rank senior to the teachers belonging to the Graduate cadre.

25. As has been held by the Apex Court in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, and Municipal Committee, Sirsa Vs. Munshi Ram, , a case cannot be developed by filing affidavit. A case will have to be considered on the basis of the material which form the impugned decision. In the instant case, both the respondent Nos. 4 and 5 after taking the impugned decision on the aforesaid analogy have now tried to develop altogether a new case by falling back on the aforesaid Full Bench decision so as to go back to 1989 claiming that the petitioner cannot count his seniority prior to 1989, i.e. from the date of his initial appointment in 1979.

26. The fact of the matter is otherwise. The seniority of the petitioner was all along recognised w.e.f. the initial date of appointment in 1979 and thus, irrespective of his transfer to the present school in 1989, the said position cannot be allowed to be altered after more than two decades. This is coupled with the fact that it cannot be said to be a pure case of request transfer as contemplated and envisaged in 2003 Rules and as discussed in the aforesaid Full Bench decision. While it is true that the petitioner made a request for transfer, but the authority in consideration of the fact that there was requirement of a Science (Maths) teacher in the school, transferred the petitioner to meet the said requirement. Thus the petitioner was transferred in public interest and the transfer order quoted above, going by its nature and tenor depicts only public interest, nothing else. This being the position, a settled matter apart, the petitioner cannot be meted out with loss of seniority on the basis of a plea not

forming the impugned order, but on a collateral and belated plea.

27. For all the aforesaid reasons, the writ petition deserves to be allowed and accordingly the writ petition is allowed by setting aside and quashing of the impugned order dated 17.11.2011 (Annexure-D) with a further direction that the writ petitioner will continue to hold the charge of Principal of the school till the post is filled up by regular selection. The authority shall pass necessary order in this regard immediately. The writ petition is allowed, without, however, any order as to costs.