

(2018) 04 GAU CK 0079

In the Gauhati High Court

Case No : WP(C) 5073 of 2014, 4820, 2369, 3811, 2937, 3799, 6624, 4029, 2371 of 2013

RAJKUMAR BELDAR and 133 ORS

APPELLANT

Vs

THE STATE OF ASSAM AND 3 ORS

RESPONDENT

Date of Decision : 12-04-2018

Acts Referred:

Assam Elementary Education (Provincialisation) Rules, 1977 — Rule 3(vi)(b) (C), (D)
Constitution of India, 1950 — Article 14

Citation : (2018) 04 GAU CK 0079

Hon'ble Judges : ACHINTYA MALLA BUJOR BARUA

Bench : Single Bench

Final Decision : Disposed Of

Judgement

1. Heard Mr. S Kataki, learned counsel for the petitioners in WP(C) No. 3658/2013
Mr. SS Dey, learned Senior counsel for the petitioners in WP(C)

No. 2369/2013 and WP(C) 2371/2013, Mr. SS Goswami, learned counsel for the
petitioner in WP(C) No. 5073/2014 and WP(C) No.5076/2014, Mr.

BD Konwar, learned Senior counsel for the petitioners in WP(C) No.5559/2014
and WP(C) 3999/2014, Mr. DK Saikia, learned counsel for the

petitioners in WP(C) No. 2937/2013, WP(C) No. 3799/2013, WP(C) No.
3807/2017, WP(C) No. 3811/2013, WP(C) No. 3895/2013, WP(C) No.

4029/2013 and WP(C) No.4820/2013. Also heard Mr. D Saikia, learned Senior
Additional Advocate General assisted by Mr. P. Nayak, learned

Standing Counsel for the Finance Department and Mr. N. Sarma as well as Mr.
S.P. Bhattacharjee, learned Standing Counsel for the Education

Department.

2. The learned counsel for the writ petitioners in the other writ petition had

adopted the arguments led by the aforementioned counsel and have not made any independent or distinct submission of their own.

3. The core facts leading to this batch of writ petitions can be culled out from the various writ petitions as well as the submissions of different learned

counsel for either parties is that an advertisement dated 28.12.1996 was issued by the Director of Elementary Education Assam, inter alia, inviting

applications for participating in a selection process in respect of 7500 posts of teachers spread over the entire State of Assam. Most of the present

petitioners have participated in the said selection process and are stated to have been selected. Although neither side could provide a definite

information, but what can be inferred is that perhaps some appointments were made pursuant to the said selection, although such appointments, if

made, are not connected with the dispute raised in the present petitions. But, however, none of the present petitioners, who claim that they were also

selected in the said selection process were so appointed.

4. A further factual aspect that is required to be taken note of is that the selection process for 7500 posts of teachers initiated by the advertisement

dated 28.12.1996 was not brought to its complete logical end, except that some appointments may have been made. It is stated that the reason for not

bringing the same to its logical end and not making the appointments is that at the relevant point of time there was a ban being imposed by the

Government of Assam on appointment of teachers. Mr. D Saikia, learned Senior Additional Advocate General for the State respondents makes a

statement that the ban on appointments was imposed, inasmuch as, the financial condition of the Government of Assam at that time was not good

enough to support the appointments of all the 7500 posts that were advertised

5. Be that as it may, in the year 1998, the Government of Assam had undertaken to implement a Central Government Scheme which goes by the

nomenclature of Operation Black Board (in short, OBB). Mr. D Saikia, learned Senior Additional Advocate General contends that the OBB Scheme

of the Central Government was, in fact, a precursor to the present day legislation of Right to Free and Compulsory Education Act (in short RTE Act).

In fact by the OBB scheme, it was the endeavour of the Central Government to provide education for all which in turn, necessitated the

appointment/engagement of more number of teachers all over the country.

6. The OBB scheme, in general, provided that during the currency of the Ninth Plan the financial requirement for sustaining the OBB scheme

appointed teachers would be sustained by the Central Government, but thereafter, it would be the responsibility of the respective State Governments to bear the financial burden for continuing with the OBB scheme appointed teachers.

7. In the aforesaid premises, the Government of Assam in the Education Department had acted upon the OBB scheme in two stages. In the first

stage, by the communication dated 24.04.1998 of the Commissioner & Secretary to the Government of Assam in the Education Department, it was

informed that 4040 number of posts of teachers for being appointed under the OBB Scheme had been created and that these posts were created

against the regular scale of pay. In the second stage, by the communication dated 08.03.2001 another 7066 posts were created by the Government of

Assam for further acting upon the OBB Scheme and the said posts were created against a fixed pay of Rs.1800 per month for LP Schools and

Rs.2000/- per month for Middle Schools.

8. In the aforesaid manner, 4040 number of teachers were appointed under the OBB scheme in the year 1998 and a further 7066 number of teachers

were appointed in the year 2001. It is also an admitted position of the State respondent authorities that these appointments of the 4040 and 7066

numbers of teacher under the OBB Scheme were made by utilizing the select list prepared pursuant to the advertisement dated 28.12.1996. The

correctness of such a stand could not be independently verified as no such records of the selection made pursuant to the said advertisement is

available, nor any records could be produced as regards how the 4040 and 7066 number of teachers were appointed. Another relevant factor would

also be as to whether any such select list pursuant to the advertisement of 1996 could have been acted upon or further as to whether any such select

list continued to remain a valid select list when the appointments were made.

9. As already taken note of, the OBB scheme had provided that up to the end of the Ninth Plan, the financial burden for payment of salary to the

teachers appointed under the scheme would be borne by the Central Government, but thereafter, it would be the responsibility of the State

Governments. A difficulty had arisen at that stage, when the Ninth Plan came to an end, as the salary and allowances of the teachers appointed under

the OBB scheme were not paid by the Government of Assam. On the other hand, materials are being produced to indicate that around the year 2002,

the Government of Assam had terminated and had not continued the further engagement of the teachers appointed under the OBB Scheme.

10. In the aforesaid premises, various writ petitions were filed, both by the teachers, who were appointed under the OBB Scheme in respect of 4040

posts as well as under the OBB Scheme in respect of 7066 posts, and the purport of such writ petitions were for assailing the decision of the

authorities to terminate the services of the OBB teachers, as well as for the purpose of being regularized in their services.

11. Although all such writ petitions that were preferred cannot be referred, but it would suffice to take note of two leading writ petitions pertaining to

the 4040 group of OBB teachers and the 7066 group of OBB teachers, respectively. WP(C) No.8239/2002, where the All Assam Operation Black

Board (4040) ME/MEM/MV Teachers Association was the writ petitioner pertains to the claim of such OBB teachers, who belong to the 4040 group,

and WP(C) No.8764/2001, where Nirmali Bora and others were the petitioners, pertains to the claim of the OBB teachers who belong to the 7066

group.

12. WP(C) No.8239/2002 of the OBB teachers belonging to the 4040 group was given a final consideration by the judgment and order dated

09.10.2007, by which a factual situation was taken note of that at the end of the Ninth Plan, the Government of Assam with the concurrence of the

Finance Department had retained 2378 number of posts out of the 4040 created earlier and that all the petitioners involved therein were allowed to

continue in service and accordingly, it was directed that the respondent authorities would adjust/regularize 2378 number of OBB teachers out of 4040

OBB teachers.

13. On the other hand, WP(C) No.8764/2001 and other similar writ petitions pertaining to the OBB teachers of the 7066 group were given a final

consideration by the judgment and order dated 08.04.2002, wherein it was concluded that although the respondent authorities were in the process of

regularizing the OBB teachers of the 4040 group, but a similar process was not adopted for the OBB teachers of the 7066 group, which by itself

would amount to giving a differential treatment resulting in violation of

Article-14, and accordingly, a direction was issued to regularize the services of the OBB teachers of the 7066 group in a phased manner and not to terminate their services by allowing them to continue in service beyond

31.03.2003, with further direction to pay the monthly salary along with arrears for the period they have actually rendered their service.

14. Against the judgment and order dated 08.04.2002 in WP(C) No.8764/2001 and other writ petitions, an appeal was preferred by the State

respondent authorities resulting in Writ Appeal No.376/2002. By the judgment and order dated 01.07.2008, a final consideration was given to the said

writ appeal, by which the appeal preferred by the State respondent authorities was rejected and the judgment and order dated 08.04.2002 was upheld

by concluding that the said judgment was a well reasoned one. In paragraph-39 of the appellate judgment, the Division Bench had observed that

although the appeal was filed on 01.07.2002 and no interim relief whatsoever was granted at the time of admission of the appeal, but nothing was done

by the State respondent authorities to comply with the directions of the judgment and order dated 08.04.2002, except for payment of salaries up to

28.02.2006. Accordingly, the Division Bench had ordered that the directions contained in paragraph-25 and 26 of the judgment and order dated

08.04.2002 be implemented as expeditiously as possible, with all consequential relief, preferably within a period of six months thereof.

15. In the aforesaid circumstance, both the OBB teachers of the 4040 group as well as of the 7066 group were regularized by various orders issued

sometime in the year 2010. In respect of the OBB teachers of the 7066 group, it is stated that in the year 2010, they were regularized in service, but

were paid a fixed salary of Rs.2000/- per month and thereupon after successful completion of the Junior Basic Training Course, they were given the

scale of pay applicable to similarly situated teachers.

16. In this batch of writ petitions, the said regularization of the OBB teachers of the 7066 group with prospective effect have been assailed by claiming

the regular pay scale from the date of their initial appointment which was sometime in the year 2001.

17. Mr. S. Kataki, learned counsel who has initiated the presentation of the argument on behalf of the petitioners in WP(C) No.3658/2013 has raised

the contention that the Division Bench in its judgment and order dated

01.07.2008 having deprecated the conduct of the State respondent authorities in not complying with the direction of the learned Single Judge in its order dated 08.04.2002, in spite of no interim order being passed in the appeal and

also having provided that the petitioners therein be regularized with all consequential benefits, the present petitioners are entitled to be paid their salary in the regular scale of pay with effect from the date of their initial appointments.

18. Mr. S.S Dey, learned senior counsel appearing for the writ petitioners in WP(C) No.2369/2013 and another writ petition has raised the contention

that there being no intelligible differentia between the OBB teachers of the 4040 group and that of the 7066 group and further the OBB teachers of

the 4040 group having been given the benefit of the regular scale of pay from the date of their initial appointments, the OBB teachers of the 7066

group are also entitled to a similar treatment. Mr. Dey, learned senior counsel by referring to the provisions of Rule 3(vi) (b) (C) & (D) of the Assam

Elementary Education (Provincialisation) Rules, 1977, also raises a contention that these writ petitioners having been appointed pursuant to a selection

in respect of the advertisement dated 28.12.1996 are, under the Rules, entitled to receive their regular sale of pay from date of their initial

appointments.

19. Mr. S.S. Goswami, learned counsel appearing in WP(C) No.5073/2014 and WP(C) No.5076/2014 has raised the contention that the service book

of the petitioners having reflected an unblemished career, are entitled to a regular scale of pay from the date of their initial appointment. A further

contention has also been raised that the judgment and order of the learned Single Judge in WP(C) No.8764/2001 and other writ petitions having been

delivered in the year 2002 itself, and there being a requirement of the respondent authorities to regularize the petitioners pursuant to such judgment, the

petitioners are entitled to the regular scale of pay at least from the date of the judgment in WP(C) 8764/2001 and other writ petitions.

20. Mr. B.D. Konwar, learned senior counsel appearing in WP(C) No.559/2014 and WP(C) NO.3999/2014 by referring to the judgment and order of

the Honâ??ble Supreme Court rendered in State of Punjab & Ors. -vs- Jagjit Singh & Ors., reported in (2017) 1 SCC 148 in paragraph- 42 has

raised a contention that by applying the principle of equal pay for equal work, the

petitioners are entitled to the regular scale of pay from the date of their initial appointment inasmuch as, the petitioners have also been rendering the same service as rendered by the other regularly appointed teachers.

21. Mr. D.K. Saikia, learned counsel appearing in WP(C) No.2937/2014 has submitted a written submission wherein, various orders passed by this

Courts from time to time in respect of the claim of the OBB teachers have been quoted. A perusal of the written submission gives the indication that

Mr. D.K. Saikia has raised the contention that the OBB teachers of the 7066 group are also entitled to a regular scale of pay from the date of their

initial appointment by indicating a similarity with that of the OBB teachers of the 4040 group.

22. Mr. D. Saikia, learned Senior Addl. Advocate General appearing for the State of Assam on the other hand has raised the contention that there is a

substantial difference between the OBB teachers of the 4040 group and that of the 7066 group to the extent that in respect of the OBB teachers of

the 4040 group the concerned posts were created by the Office Memorandum dated 24.04.1998, wherein it was specifically provided that the 4040

number of posts were created against the regular scale of pay, whereas on the other hand in respect of the OBB teachers of the 7066 group, the

concerned posts were created by the Office Memorandum dated 08.03.2001, wherein it was provided that the 7066 number of posts were created

against the fixed pay of Rs.1800/- per-month for LP Schools and Rs.2000/- per month for ME Schools. Accordingly, it is the contention of Mr. Saikia

that the OBB teachers of the 7066 group cannot draw a comparison with the 4040 group inasmuch as, the posts against which they were appointed

itself carried a fixed pay of Rs.1800/- and Rs.2000/- respectively, and not the regular scale of pay, and therefore, no claim can be made for payment

of the regular scale of pay from the date of initial appointment. Mr. Saikia by referring to the provisions of Rule 3(vi) (b) (C) & (D) of the Assam

Elementary Education (Provincialisation) Rules, 1977 contends that the Rule providing for the regular scale of pay was brought in by the amendment

of 20.10.2012, whereas on the other hand, the relevant Rule that prevailed at the time when the appointment of the petitioners were made provided for

a fixed pay of Rs.1800/- only. Therefore, the reliance of S.S. Dey, learned senior counsel on the provision of the aforesaid Rules to raise the

contention of the entitlement of a regular scale of pay from the date of initial appointment is not sustainable.

23. Mr. D. Saikia, learned Senior Addl. Advocate General also raises the contention that the claim of the petitioners for a regularization having been raised and adjudicated in WP(C) 8764/2001 and other writ petitions, the plea of being entitled to a regular scale of pay from the date of initial appointment ought to have been raised in such writ petitions. Therefore, the claim of the petitioners in the present writ petitions for a regular scale of pay with effect from the date of the initial appointment is barred by the principles of constructive resjudicata. Mr. Saikia has also raised a contention that in WP(C) 8764/2001 and other writ petitions, the prayer was for a direction to the respondent authorities to pay the salary at the rate of Rs.2000/- per month. The said claim of the petitioners having been adjudicated and also allowed, the petitioners now cannot prefer a subsequent writ petition claiming the regular scale of pay from the date of their initial appointment.

24. In the aforesaid premises, the question for determination in this batch of writ petitions would be whether the petitioners are entitled to a regular scale of pay from the date of their initial appointment, although they have been regularized in service in the year 2010 and subsequently paid the regular scale of pay from the year 2012 after completion of the Junior Basic Training course. As a corollary to such question a further question would arise as to whether in order to mitigate such claim the regularization of the petitioners ought to be given a retrospective effect from the date of their initial appointments.

25. In order to appreciate the rival contention as regards the claim for payment of salary in the regular scale of pay from the date of initial appointment, which would also have the effect of providing the regularization given to the petitioners with retrospective effect, an examination of the provisions in the judgment and order dated 08.04.2002 of the learned Single Judge in WP(C) No.8764/2001 and other writ petitions, as well as the Appellate judgment and order dated 01.07.2008 in the resultant Writ Appeal No.376/2002 would be of great relevance.

26. In its judgment and order dated 08.04.2002 in WP(C) 8764/2001 & other writ petitions, hereinafter referred as the Nirmali Bora's case, the question that has arisen before the learned Single Judge was whether the 7066

number of OBB school teachers appointed in the year 2001 are entitled to continue in service after the end of the Ninth Plan. The said question had arisen in view of the stand of the State Government authorities that the said posts were created as required under the OBB scheme where the salary to the appointees were to be paid by the Central Government under the Ninth Plan. According to the State Government authorities once the Ninth Plan came to an end, the Central Government was no longer the authority to pay the salaries and therefore, the posts so created also came to an end and as a consequence the 7066 number of appointees were no longer in service. The State Government authorities also took the stand that due to precarious financial condition as it prevailed at the relevant point of time, it was not in a position to continue further with the service of the 7066 number of appointees. The learned Single Judge after deliberating upon such stand of the State Government authorities and upon perusal of the materials produced in support thereof and also considering the submission of the learned Senior counsel for the petitioners therein and further by drawing an inter se comparison with the OBB teachers of the 4040 group, who were adjusted against regularly sanctioned post after the cutoff date of 31.03.2002, was of the view that there is no basis for such differential treatment between the teachers appointed against the 4040 OBB posts and those against the 7066 OBB posts, on the ground that both set of posts were created for a limited period till the end of the Ninth Plan. Accordingly, the learned Single Judge took the view that when the teachers appointed against the 4040 posts are being regularized against regularly sanctioned post, the other set of teachers appointed against the 7066 pots cannot be ousted from service after 31.03.2002 and such differential treatment violates Article 14 of the Constitution of India. The learned Single Judge was also of the view that the plea of the State respondents as regards financial difficulties or economic incapacity is not available as the posts were created under the OBB scheme for universalisation of elementary education, where the right to elementary education is a fundamental right and not subject to the limit of the economic capacity of the State. Accordingly, a direction was issued to the State respondent authorities to regularize the services of the OBB teachers of the 7066 group by adjusting/absorbing them in regularly sanctioned posts/ vacancies in a phased manner and not to terminate their services pending

such regularization, by allowing them to continue in service beyond 31.03.2002 till completion of the process of such regularization. A further direction

was issued to pay the monthly salaries along with arrears for the period the concerned teachers have actually rendered their service as teachers in the respective schools.

27. What is noticeable from the said judgment and order of the learned Single Judge was that the issue that was decided was whether the OBB

teachers of 7066 groups are entitled under the law to continue in service and as to whether they are to be regularized. The decision of the learned

Single Judge was that, firstly, they are entitled to remain in service secondly, be regularized in their services in a phased manner against posts to be

sanctioned or available vacant posts and thirdly, their monthly salary for the period they have actually rendered their service be paid.

28. The very decision that the 7066 group of teachers are to be regularized in a phased manner against posts to be sanctioned or available vacant

posts is itself an indication that what the learned Single Judge provided was that they would continue to remain in service in the same manner in which

they were appointed in the year 2001 till their services are regularized as provided therein. The further direction of the Court to pay the salary of the

7066 group of teachers within three months for the period they had rendered their service is also to be construed to be a direction to pay their salary in

the same manner as they were paid upon their appointment, of course up to the point they are regularized in service as indicated therein.

29. It is also noticeable that the inter-se comparison the learned Single Judge had made with that of the 4040 group of OBB teachers was limited to

the extent of making the comparison as to whether the 7066 group of OBB teachers are to be retained in service or not. No such comparison is

discernible as regards as to what salary should be paid to the 7066 group of teachers upon being retained in service and to that extent no such

comparison was made that the salary being paid to the 4040 group of OBB teachers be also paid to the 7066 group of OBB teachers. From the said

point of view also it cannot be inferred that the learned Single Judge in the judgment and order dated 08.04.2002 had also provided that group of 7066

OBB teachers be also paid the regular scale of pay, as may be paid to the 4040 group of OBB teachers.

30. Further it has also been taken into consideration that by the Office Memorandum dated 24.04.1998, the 4040 posts for the purpose of appointment under the OBB scheme were created against the scale of pay prescribed therein, whereas, by the Office Memorandum dated 08.03.2001, the 7066 posts also for the purpose of appointment under the OBB scheme were created against the fixed pay of Rs.1800/- per month and Rs.2000/- per month, as the case may be. In other words the 7066 number of posts were created against the fixed of pay of Rs.1800/- and Rs.2000/- per month and not against the scale of pay.

31. Also it has to be taken into consideration that the Rules that were in force at the time when the appointment of the 7066 group of OBB teachers were made provided for a fixed pay of Rs.1800/- per month till such time the concerned teacher successfully undergoes the Basic Training course.

No material has been produced that any of such OBB teachers of the 7066 groups had during their tenure had successfully undergone the Basic Training course.

32. Accordingly, from the point of view of creation of the posts and also from the point of view of the provision of the Rules prevailing at the time

when the appointments were made also do not support the contention of the petitioners that they are entitled to a regular scale of pay from the date of

their initial appointment. Further the direction of the learned Single Judge in the judgment and order dated 08.04.2002 to pay the salary to the

petitioners for the period for which they worked till they are regularized, would also have to be construed from the aforementioned perspective.

Accordingly, the direction of the learned Single Judge to pay the salary would have to be the salary that they were earlier paid when in service i.e. @

Rs.1800/- or Rs.2000/- per month.

33. The said judgment and order dated 08.04.2002 of the learned Single Judge was carried to a writ appeal being WA No.376/2002, resulting in the

judgment and order dated 01.07.2008. The Appellate Court by discussing the factual circumstance in which the group of 7066 OBB teachers were

appointed, and also considering the OBB scheme as well as the stand of the State respondents, arrived at a conclusion that the judgment and order

dated 08.04.2002 is a well reasoned judgment and accordingly, the same was approved.

34. The deliberation, conclusion and the decision of the Appellate Court would necessarily lead to a conclusion that all the provisions of the judgment and order dated 08.04.2002 of the learned Single Judge, as indicated above, were wholly approved. The only factor, as contended by Mr. S. Katakya, learned counsel for some of the petitioners is that the Division Bench in one of the concluding paragraphs had deprecated the conduct of the State respondents to the extent that although the judgment and order requiring regularization was delivered in the year 2002 and there was no interim order in the writ appeal, the State respondents had failed to take forward the process of regularization as ordered by the learned Single Judge. Based upon such deprecation by the Appellate Court, Mr. Katakya raises a contention that the purport thereof would be that the regularization of the petitioners would have to be given an effect at least from the date of the judgment of the learned Single Judge.

35. But however when the relevant paragraph where such deprecation is made is looked into, it is also noticed that the Appellate Court had accepted the situation that the salary of the petitioners were paid up to 28.02.2006. In such view of the matter, the very fact that non-implementation of the order to regularize was deprecated cannot by itself lead to a conclusion that in the present circumstance, where in compliance thereof the group of 7066 OBB teachers were regularized sometime in the year 2010, would now have to be paid their regular scale of pay either from the date of their initial appointment or from the date of the order of the learned Single Judge. Further it is also to be taken note of that the Appellate Court while deprecating the delay in the regularization had also accepted the situation that the group of 7066 OBB teachers were paid their salary up to 28.02.2006, understandably in the fixed pay as provided earlier and there being no indication that they were entitled to a salary in the regular scale of pay either from the date of initial appointment or from the date of the judgment and order dated 08.04.2002, it now cannot be accepted that the Appellate Court had viewed that the 7066 group of OBB teachers are entitled to their salary in the regular scale of pay from the date of initial appointment or from the date of the judgment.

36. Mr. S. Katakya, learned counsel also relies upon the provision of the judgment and order of 01.07.2008, wherein in one of the concluding

paragraphs it was provided that the directions given in paragraph 25 and 26 of the judgment and order dated 08.04.2002 be implemented as

expeditiously as possible with all consequential reliefs and contends that the very provision of requiring to provide the consequential relief is itself an

indication that the salary in the regular scale of pay is to be paid from the date of initial appointment or from the date of the judgment of the learned

Single Judge.

37. In the absence of any other specific provision in the Appellate Court judgment and order as regards payment of salary in the regular scale of pay

from the date of initial appointment or from the date of the judgment of the learned Single Judge, the provision for consequential relief would have to

be understood to be the consequential benefits that may accrue upon being regularized i.e the regular scale of pay and the other service benefits as

applicable under the Rules to be paid upon being regularized. But the expression consequential relief cannot be stretched to the extent that it also

includes the payment of a regular scale of pay from a period prior to the date of being regularized. Ordinarily in service jurisprudence, unless

specifically provided due to any peculiar facts and circumstance of a given case, the concept of retrospective regularization or payment of regular

scale of pay from a date prior to the regularization is unacceptable. From the said point of view the provision of the Appellate order to give

consequential relief would also have to be understood as such, meaning thereby that the requirement of giving consequential relief by itself does not

include payment of regular scale of pay from the date of initial appointment or from the date of the judgment of the learned Single Judge.

38. Mr. B.D. Konwar, learned senior counsel appearing for some of the petitioners has raised a contention by relying upon the Honâ??ble Supreme

Courtâ??s judgment in State of Punjab Ors., â??Vs-Jagjit Singh & Ors., reported in (2017) 1 SCC 148 that the 7066 group of OBB teachers having

performed the same duty as that of the regularly appointed teachers are also entitled to a regular scale of pay from the date of initial appointment

based upon the principle of â??equal pay for equal work.â?? For the purpose Mr. B. D. Konwar, learned senior counsel refers to paragraph 5 of the

said judgment and submits that all such daily wage employees, ad-hoc appointees, employees appointed on casual basis, contractual employees are

also entitled to a minimum of the regular pay scale on account of their performing the same duties which are discharged by those engaged on regular basis against sanctioned posts.

39. But however it is noticed that in paragraph 42 of the said judgment and order of the Honâ??ble Supreme Court, the circumstances under which the principle of â??equal pay for equal workâ?? can be invoked had been enumerated.

Paragraph 42.6 is as follows:

â??For placement in a regular pay scale, the claimant has to be a regular appointee. The claimant should have been selected on the basis of a regular process of recruitment. An employee appointed on a temporary basis cannot claim to be placed in the regular pay scale.â??

Paragraph 42.12 of the said judgment is as follows:-

â??The priority given to different types of posts under the prevailing policies of the Government can also be a relevant factor for placing different posts under different pay scales. Herein also the principle of â??equal pay for equal workâ?? would not be applicable.â??

40. When the aforesaid two principles are given a consideration in the facts and circumstances of the present case, it would be noticeable that the

7066 group of OBB teachers were not appointed on a regular basis, nor there is any material to indicate that they were selected on the basis of a

regular process of recruitment. The manner in which the 7066 group of OBB teachers were appointed, from the point of view of the State respondent

authorities as indicated in the judgment and order dated 08.04.2002, would be that they were more or less appointed on a temporary basis. From the

said perspective, as regards paragraph-4.6 of the judgment in Jagjit Singhâ??s case, the petitioners who belong to the 7066 group of OBB teachers

would not be entitled to a regular scale of pay from the date of their initial appointment.

41. Further, it would also be apposite to recall that the 7066 number of posts were created through the Office Memorandum dated 08.03.2001 against

the fixed salary of Rs.1800/- and Rs.2000/- per month, respectively. The said creation of posts of the year 2001 has not been assailed in any

proceeding, including the present proceeding, requiring the Court to give a finding on any such question of arbitrariness in creating the posts against the

fixed salary of Rs.1800/- and Rs.2000/- per month. In the circumstance, more so as the posts were created for the purpose of implementing the OBB

Scheme in the subsequent stage, it would not be incorrect on the part of the Court to accept a situation that the 7066 number of posts were created

against the fixed pay of Rs.1800/- and Rs.2000/- with a deliberate intention. Accordingly, such creation at a fixed pay can also be construed to be in

the nature of a policy of the Government, which would be more so considering the factor that there is no such challenge at any stage against the

manner in which they were created. In the circumstance, it can be concluded that it being in the nature of a policy of the Government of Assam to

create the posts at a fixed pay of Rs.1800/- and Rs.2000/- per month, it would be inappropriate, in terms of paragraph-42.12 of the Jagjit Singh's

judgment to hold that the 7066 group of OBB teachers are entitled to a regular scale of pay from the date of their initial appointment.

42. In view of the aforesaid conclusions arrived at, the claim of the petitioners put-forth for a regular scale of pay from the date of initial appointment

on the basis of the principle of "equal pay for equal work" is found to be unacceptable.

43. Another factor to be taken note of would be that the petitioners in WP(C) No.8764/2001 i.e. Nirmali Bora's case and other writ petitions had

made a prayer, as recorded in the judgment and order dated 01.07.2008 of the Appellate Court, which is as follows:-

(i) direct the respondents to regularize the services of your petitioners in regularly sanctioned posts of Assistant Teachers of M.E./M.V./M.E.M.

Schools;

(ii) direct the respondents not to terminate the services of your petitioners at the end of March, 2002 pending regularization of your petitioners

services; and

(iii) direct the respondents to pay the monthly salary of your petitioners with effect from the date of joining at the rate of Rs.2000/- per month.

44. From the aforesaid three prayers made in the earlier writ petitions of the 7066 group of OBB teachers, it is noticed that three kinds of reliefs were

sought for, firstly, to regularize their services, secondly not to terminate them from their services and thirdly, to pay their monthly salary @ Rs.2000/-

per month from the date of their initial appointments. In fact, the judgment and

order dated 08.04.2002 clearly allows all the three prayers inasmuch as, the directions of this Court were to regularize the petitioners therein, and in doing so allow them to continue in service and for payment of their salary.

When the direction for payment of salary is considered, it is to be understood that it was a direction to pay the salary as claimed for in the writ

petitions, i.e. @ Rs.2000/- per month.

45. Accordingly, as in the earlier writ petitions the 7066 group of OBB teachers had claimed a salary from the date of initial appointment @ Rs.2000/-

per month and the same upon deliberation was duly allowed, a question for deliberation would be as to whether by filing the subsequent writ petitions,

the same group of 7066 OBB teachers can now claim for a direction that they be paid the regular scale of pay from the date of their initial

appointments.

46. The claim of the petitioners for a direction for payment of their salary @ Rs.2000/- per month from the date of their initial appointments having

been decided and adjudicated between the same set of parties and there being no interference by the Appellate Court, it has to be construed that the

said issue had been conclusively decided between the parties. Secondly, in the alternative, even if any such claim for payment of salary @ Rs.2000/-

per month from the date of their initial appointments was not decided earlier, but under the law of constructive resjudicata, the claim for a regular

scale of pay from the date of initial appointment ought to have been made in the earlier writ petitions preferred by the same set of petitioners.

47. The law as regards constructive resjudicata has been elucidated by the Honâ??ble Supreme Court in plethora of decisions which are as follows:-

(i) The Supreme Court in its judgment and order rendered in M. Nagabhushana â??vs- State of Karnataka and others, reported in (2011) 3 SCC 408,

in paragraphs-19, 20, 21 and 22 has held thus:-

19. A Constitution Bench of this Court in Devilal Modi Vs. Sales Tax Officer, Ratlam & Ors. - AIR 1965 SC 1150, has explained this principle in very

clear terms: ""But the question as to whether a citizen should be allowed to challenge the validity of the same order by successive petitions under Art.

226, cannot be answered merely in the light of the significance and importance of the citizens' fundamental rights. The general principle underlying the

doctrine of res judicata is ultimately based on considerations of public policy. One

important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice, vide : *Daryao Vs. State of U.P.*, 1962-1 SCR 575; (AIR 1961 SC 1457).

20. This Court in *All India Manufacturers Organisation (supra)* explained in clear terms that principle behind the doctrine of *Res Judicata* is to prevent an abuse of the process of Court. In explaining the said principle the Bench in *All India Manufacturers Organisation (supra)* relied on the following formulation of Lord Justice Somervell in *Greenhalgh Vs. Mallard* - (1947) 2 All ER 255 (CA):

â??39. "I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them." The Bench also noted that the judgment of the Court of Appeal in "*Greenhalgh*" was approved by this Court in *State of U.P. Vs. Nawab Hussain* - (1977) 2 SCC 806 at page 809, para 4.

21. Following all these principles a Constitution Bench of this Court in *Direct Recruit Class II Engg. Officers' Assn. Vs. State of Maharashtra* - (1990) 2 SCC 715 laid down the following principle:

â??35. ".....an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive *res judicata* underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of *res judicata*

22. In view of such authoritative pronouncement of the Constitution Bench of this Court, there can be no doubt that the principles of Constructive *Res*

Judicata, as explained in explanation IV to Section 11 of the CPC, are also applicable to writ petitions.

(ii) Also the Supreme Court in its judgment and order rendered in Shiv Chander More and

others â?vs- Lieutenant Governor and others, reported in (2014) 11 SCC 744, in paragraphs-22 and 23 has held as follows:-

22. The Principles of constructive res judicata which are also a part of the very same doctrine have been held to be applicable to writ proceedings, by

another Constitution Bench decision of this Court in Devilal Modi v. STO [AIR 1965 SC 1150] where this Court observed: ""It may be conceded in

favour of Mr. Trivedi that the rule of constructive res judicata which is pleaded against him in the present appeal is in a sense a somewhat technical or

artificial rule prescribed by the Code of Civil Procedure. This rule postulates that if a plea could have been taken by a party in a proceeding between

him and his opponent, he would not be permitted to take that plea against the same party in a subsequent proceeding which is based on the same

cause of action; but basically, even this view is founded on the same considerations of public policy, because if the doctrine of constructive res judicata

is not applied to writ proceedings, it would be open to the party to take one proceeding after another and urge new grounds every time; and that plainly

is inconsistent with considerations of public policy to which we have just referred.

23. Reference may also be made to the Constitution Bench decision in Direct Recruit Class-II Engineering Officers Assn. v. State of Maharashtra [JT

1990 (2) SC 264 : 1992 (2) SCC 715] where this Court once again reiterated that the principles of constructive res judicata apply not only to what is

actually adjudicated or determined in a case but every other matter which the parties might and ought to have litigated or which was incidental to or

essentially connected with the subject matter of the litigation. This Court observed:

..an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to

have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the

legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying

Explanation IV of Section 11 of the CPC was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata.

48. Further, the law of resjudicata is also settled to the extent that if an issue which was directly and substantially was an issue in a formal litigation between the same parties and such issue had been heard and finally decided by the Court, a subsequent litigation raising the same issue would not be maintainable. In the instant case, in Nirmali Boarâ??s case and the other writ petitions, one of the issue directly and substantially involved was whether the petitioners are entitled to salary from the date of initial appointment and if yes, at what rate and the same having been finally decided by the Court, a further litigation raising the same issue claiming the salary from the date of initial appointment at a regular scale of pay would not be maintainable.

49. In such view of the matter, the present set of litigations claiming for a regular scale of pay from the date of initial appointment would be hit by the principles of resjudicata inasmuch as, in Nirmali Boraâ??s case, the claim for salary from the date of initial appointment was an issue directly and substantially involved and the same had been finally decided. In the alternative, even if it is to be construed that the claim for salary from the date of initial appointment was not an issue directly and substantially involved in Nirmali Boraâ??s case and the other writ petitions, still it has to be construed that the said claim ought to have been raised by the petitioners in Nirmali Boraâ??s case and the other writ petitions and the same having not been done, such claim for regular scale of pay from the date of initial appointment in the year 2001 would also be barred by the principles of constructive resjudicata.

50. As regards the other claims of the petitioners that their regularization is to be construed with retrospective effect from the date of their initial appointment, reference is made to the law laid down by the Honâ??ble Supreme Court in respect of a claim for regularization with retrospective effect. In Union of India and others â??vs- Sheela Rani, reported in (2007) 15 SCC 230, the Honâ??ble Supreme Court in paragraph-11 of the judgment had held as follows:-

â??If the ad hoc service is regularized from the back date in this manner, it will

disturb the seniority of regularly appointed employees in the cadre and, therefore, ordinarily the regularization must take effect prospectively and not retrospectively. This Court ordered that care must be taken to see that regularization does not upset the seniorities of regular appointees. In Registrar General of India and another vs- Thippa Setty and others, reported in (1998) 8 SCC 690, the Hon'ble Supreme Court had held thus:-

If the ad hoc service is regularized from the back date in this manner, it will disturb the seniority of regularly appointed employees in the cadre and, therefore, ordinarily the regularization must take effect prospectively and not retrospectively. It must also be borne in mind that ad hoc appointees, casual labour and daily rated persons are not subject to strict discipline of service and it is a matter of common experience that their attendance is very often not regular and at times they do not even meet the qualification for appointment since they are taken on ad hoc basis. These deficiencies are overlooked by way of granting of relaxation and, therefore, care must be taken to see that they do not upset the seniorities of regular appointees.

Whether they qualify in a given case or not is not relevant but what is relevant is that regularization should be prospective and not retrospective as the chances of their upsetting the seniorities cannot be overlooked.

51. In view of the aforesaid propositions laid down by the Supreme Court in respect of regularization from a retrospective date, the facts and circumstances in the present case wherein a right of the petitioners to continue in service had been determined and as a consequence to regularize them in service, do not warrant for a direction that the regularization granted to them pursuant to the Court's order be now construed to be a regularization with retrospective effect from the date of their initial appointment. A further aspect would also have to be taken into consideration that in the event the petitioners seek for a regularization with retrospective effect from the date of their initial appointment, under the law of constructive resjudicata, such plea ought to have been taken in the earlier litigations between the same parties when a direction for regularization was sought for.

52. In view of the aforesaid discussions and conclusions arrived at, this Court is of the view that the petitioners have failed to make out any case for a direction to pay the regular scale of pay from the date of their initial appointment, nor a case could be made out for a direction for grant of

regularization with retrospective effect from the date of initial appointment or from the date of the judgment and order in the earlier writ petitions i.e.

WP(C) No.8764/2001.

53. In some of the writ petitions, an additional issue was raised that the petitioners having been regularized in the aforesaid manner as indicated above, would now be covered by the Assam Services Pension Rules, 1969 or they would be covered by the New Pension Scheme as formulated by the

authorities in the Govt. of Assam by the notification dated 02.05.2015, which was implemented by the notification of 2009 w.e.f. 01.02.2005.

54. The new defined Contribution Pension Scheme as introduced by the Office Memorandum dated 06.10.2009 provides that the Finance Department

of the Govt. of Assam had decided to introduce the Contributory Pension Scheme for the employees joining the State Government service on or after

01.02.2005. The guidelines to the New Defined Contributory Pension Scheme provides that the scheme shall be applicable to all new employees

joining the State Government service on a regular basis against the sanctioned vacant post after 01.02.2005 and that it shall also be applicable to those

government servant, whose service will be regularized against the regular post after 01.02.2005. The said provision gives an indication that the persons

who were appointed or regularized after 01.02.2005 shall be governed by the New Defined Contributory Pension Scheme. From the said point of

view, it is apparently clear that the class of persons, who were either appointed or regularized prior to 01.02.2005 would be governed by the Assam

Service Pension Rules, 1969, whereas those employees who were appointed or regularized after 01.02.2005 shall be governed by the New Defined

Pension Scheme.

55. But in between, another class of employees are also in existence like those of the present petitioners. This class of employees had a legal right to

be appointed or to be regularized prior to 01.02.2005 and had the said legal right to be appointed or regularized been honoured by the State respondent

authorities, they would have otherwise come within the class of people who were appointed or regularized prior to 01.02.2005 and as such, would have

been governed by the Assam Service Pension Rules, 1969. But in spite of having such legal right, the respondent authorities had neither appointed nor

regularized them prior to 01.02.2005, and on the other hand they were

regularized subsequently. Neither the Assam Service Pension Rules, 1969 nor the New Defined Contribution Pension Scheme makes any provision for such category of employees. Although occasionally we have the instruction from the appropriate authorities in the Finance Department that such category of employees will be covered by the New Defined Pension Scheme, but such instructions are more of a view expressed by the concerned official rather than, a decision itself by the Finance Department in the Govt. of Assam.

56. In a legal parlance, a decision means a determination by the authorities by taking into account all such relevant parameters that are required to be taken into consideration to arrive at a definite conclusion. Accordingly, it is deemed appropriate that interest of justice will be satisfied if the highest authority in the Finance Department of the Govt. of Assam which is stated to be Addl. Chief Secretary in the Finance Department, takes a wholesome decision on the aforesaid factor as to whether the class of employees, who had a legal right to be appointed or regularized prior to 01.02.2005 but because of certain other intervening circumstance, such right of regularization was not effected prior to such date are to be convened by the Assam Service (Pension) Rules, 1969 or by the New Contributory Pension Scheme. In arriving at the decision, the authority shall state in detail the relevant parameters that they would take into consideration and the reasons thereof as to why the authority arrives at the decision that it would take.

57. In terms of the above, as regards the claim for salary in the scale of pay or for a regularization from the date of initial appointment, the same stands rejected and as regards the issue as to whether the petitioners would be covered by the Assam Services Pension Rules, 1969 or the New Pension Scheme, the same is disposed of in terms as indicated above.