
(2002) 02 GAU CK 0038
In the Gauhati High Court
Case No : WP (C) No. 4236 of 2003

Rewati Bala Sahariah

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 25-02-2002

Acts Referred:

Assam Elementary Education (Provincialisation) Services and Conduct Rules, 1981 — Rule 5

Citation : (2005) 1 GLR 185

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : N. Saikia, A. Borah, R. Goswami, S. Sarmah and S. Kalita, for the Appellant; G.A., S.P. Deka and N. Choudhury, for the Respondent

Judgement

B.K. Sharma, J.—By this writ petition the challenge has been made to the order dated 5.5.2003 (Annexure-6), by which the respondent No. 4 has been transferred to Bangagarh M.V. School in the District of Darrang against the vacant post of Headmaster which has occurred due to retirement of the earlier incumbent on attaining the age of superannuation.

2. Shortly stated the facts leading to filing of the instant writ petition is that the petitioner was appointed as Assistant Mistress in the year 1967. She has been serving in the present school from 1983. It is the case of the petitioner that she is the senior most Assistant Teacher in the school aspiring for her promotion as Head Mistress. According to the petitioner during the year 2000-01 a selection was conducted for appointment/promotion as Headmaster/Headmistress in M.V. School and the select list was published in March, 2001. The petitioner was selected and her name found place in the select list at serial No. 6. When the petitioner was aspiring with the legitimate expectation for her promotion as Headmistress in the school, she was allowed to deal with financial matters regarding monthly bills of teachers and Grade-IV employees of the school until appointment of the Headmaster. That was so done by an order dated 11.7.2000.

When the matter stood thus, the impugned order was issued on 5.5.2003 transferring the respondent No. 4 to the school in which the petitioner has been serving. Such transfer of the respondent No. 4 was on his own request as will be evident from the said order dated 5.5.2003.

3. This Court while entertaining the writ petition passed an interim order suspending the operation of the impugned order. In view of such interim order the respondent No. 4 could not join in the school and it is the petitioner who has been discharging her duties as were assigned to her by Annexure-4 order dated 11.7.2000. The legality and validity of the said order dated 5.5.2003 has been assailed in this writ petition.

4. An affidavit in opposition has been filed on behalf of respondent No. 4. The case of the respondent No. 4 is that he was appointed as Headmaster of Arlongwati M.E. School by the Managing Committee of the school and his such appointment was provisionally approved by the D.I. of Schools, Diphu w.e.f. the date of joining of the post. The respondent No. 4 joined the post of Headmaster on 26.6.1986. By an order dated 5.2.1992 the school in which the respondent No. 4 was appointed as Headmaster, was provincialised. It is the case of the respondent No. 4 that the post of Headmaster being held by him was also provincialised by the said order dated 5.2.1992. The respondent No. 4 has been released from his earlier school pursuant to the impugned order of transfer enabling him to join in the school in which the petitioner has been serving.

5. I have heard Ms. N. Saikia, learned counsel appearing for the petitioner and Mr. S.P. Deka, learned counsel appearing for the respondent No. 4. Mr. Thomas, learned State counsel made submissions on behalf of the State respondents.

6. According to Ms. Saikia, the documents annexed to the affidavit in opposition filed by the respondent No. 4 does not reflect that the respondent No. 4 is a regular Headmaster. She also submits that there was no sanction behind the transfer of the respondent No. 4 as required under the rules. The respondent No. 4 having served within the jurisdiction of the Karbi Anglong District Council, the transfer was required to be made with the approval of said council. In respect of the issuance of the impugned order her submissions is that since the petitioner was selected for appointment as Headmaster, the petitioner has got legitimate right for appointment as such. Referring to Rule 5 of the Assam Elementary Education (Provincialisation) Service and Conduct Rules, 1981, Ms. Saikia submitted that as per provisions of the said rule, the appointment to the post of Headmaster is required to be made on promotion and not by way of transfer as in the instant case. The respondent No. 4 having been transferred on the basis of his own request, he can not jeopardise the promotion prospect of the teachers of the school more particularly the petitioner who is the senior most teacher of the school. Ms. Saikia placed reliance on few decisions, such as :

1. Purushottam Vs. Chairman, M.S.E.B. and Another, .

2. Badrinath Vs. Government of Tamil Nadu and Others, .

3. Dadhi Kalita Vs. State of Assam and Others, .

7. On the other hand Mr. S. P. Deka, learned counsel appearing for the respondent No. 4 submitted that there is no question of equation of the post being held by the petitioner and the respondent No. 4. The respondent No. 4 is in the cadre of Headmaster while the petitioner is in the cadre of Assistant teacher. The respondent No. 4 having been appointed as Headmaster and eventually his services having been provincialised as Headmaster, there is nothing wrong towards issuance of the impugned order transferring him from one school to another, Mr. Deka submitted. Regarding alleged selection of the writ petition Mr. Deka submitted that the select list in question has already expired and even if the select list is held to be valid and in operation, the petitioner will get her chance for appointment as Headmaster in any school and she can not claim as a matter of right for her appointment/promotion as Headmistress in the particular school. As regards clearance required to be given by the District Council, Mr. Deka, the learned counsel submitted that the process for his transfer was initiated and completed through the District Council and it was on that basis and the recommendation of the District Council, Govt. of Assam, the Education Department, Govt. of Assam eventually issued the impugned order of transfer, Mr. Deka further submitted that there was no fault on the part of the respondent No. 4 but in view of the interim order passed by this Court, the respondent No. 4 has been sitting idle for the last 6 months and he has also not received his salaries which has led to financial hardship. Mr. Deka further submitted that the petitioner was not appointed as full fledged Headmistress of the school but she was only assigned with certain duties which does not vest her with any right whatsoever.

8. Mr. Thomas, learned State counsel appearing for the State respondents submitted that the petitioner was allowed to perform certain duties towards smooth functioning of the school till the regular appointment of Headmaster was made. It is for the authority concerned to decide whether the regular appointment of Headmaster is made by way of promotion or by way of transfer. He has also submitted that the select list in question has already expired and the petitioner can not be appointed from the said select list.

9. Referring to the decision reported in Sreedam Chandra Ghosh Vs. State of Assam and others, Mr. Thomas, learned State counsel submitted that under similar circumstances, the Apex Court did not find any fault with the order of transfer by which a regular Headmaster was transferred to an Ors. school. According to him (Mr. Thomas), the said decision of the Apex Court squarely covers the disputes raised in this writ petition.

10. Replying to the aforesaid argument advanced on behalf of the official and private respondent Ms. Saikia learned counsel appearing for the petitioner referred to a decision of this court as reported in Dadhi Kalita Vs. State of Assam and Others, to bring home her argument that as per provisions of Rule 5 of the aforesaid rules, the post of Headmaster in M.V. School being promotional post is

required to be filled up by way of promotion and not by transfer as has been done in the instant case. She has also submitted referring to the affidavit-in-opposition that there is another select list of M.V. School teachers for appointment as Headmaster/Headmistress and the name of the petitioner in the said select list appeared at serial No. 1. In a nutshell, her submission is that the regular incumbents of the school should not be allowed to be disturbed by resorting to transfer and that too on the basis of request made, as has been done in the instant case.

11. I have considered the rival submissions made on behalf of the parties. As per the own assertion of the petitioner, the earlier select list was published in March, 2001. If that be so, by operation of Clause 6 of the procedure for promotion to the post of Headmaster, as framed by the Government of Assam vide notification dated 30.8.1986 the select list ceases to be in operation. The said clause provided that a select list shall remain valid for a period of one year. The select list in question having been published in March, 2001 got expired in March, 2002.

12. Mr. Saikia, however, submits that a further select list has been prepared in December, 2003, in which her (petitioner's) name appeared at serial No. 1. In this connection, she has referred to Annexure-B document annexed to the Addl. Affidavit filed on behalf of the petitioner. I have perused the said document. I find that the said document is a list of teachers in order of seniority basis for promotion to the posts of Headmaster in M.V. Schools under Mangaldoi/Udalguri Sub-Division. It appears that the said document contains the name of the assistant teachers of different schools on the basis of their seniority positions and not a select list although the said list has been certified to be a select list for promotion by Block Elementary Education Officer, Kalaigaon Block by his certificate dated 16.2.2004, I find that the same is a list of teachers prepared on seniority basis.

13. In the case of Purushottam (supra) the Apex Court held that a duly select candidate could not be denied appointment on the pretext of the plea that the penal has expired and the post has been filled up by someone else. In that case the appellant was selected against the post reserved for scheduled tribe candidate. However, he was not appointed doubting his status as S.T. candidate and someone else was appointed in his place. Later on a plea was taken by the respondents that the select list in question has already expired and that the case of the appellant could not be considered. It was, in that context, the Apex Court pointed out that the respondents could not have taken the plea of expiry of the select list.

14. In the case of Badrinath (supra) the Supreme Court considered the case of an I.A.S. Officer who was deprived of his promotion on the ground of adverse confidential report. Upon evaluation of record, the Apex Court found that the grounds so taken by the respondents towards denial of promotion to the appellant were totally uncalled for. In that context the Apex Court pointed out that the right of promotion is a valuable right and the appellant could not have

been denied his promotion. However, same is not the case in hand inasmuch as it is not the case that the official respondents have not considered the case of the petitioner for promotion or that the petitioner has been deprived of her promotion because of the impugned transfer order. In the case of Dadhi Kalita (supra) this court on perusal of Rule 5 of the aforesaid rules held that the post of Headmaster is required to be filled up by way of promotion. There is no dispute regarding Rule 5 and the procedure to be adopted towards promotion of assistant teachers as Headmaster. There is no proposition of law laid down in this case that the post of Headmaster can not be filled up by way of transfer.

15. In the case of Sreedam Chandra Ghosh (supra) the Apex Court had occasion to deal with the similar situation and in that case also there was no order of appointment in favour of the petitioner as a regular Headmaster and the private respondent was transferred to his school as the regular Headmaster. The Apex Court having regard to such situation observed as follows :-

"Admittedly, there was no order of appointment made to the petitioner. As having been seen from the record, it was only a stop gap arrangement made to the petitioner to officiate as Headmaster till the regular incumbent assumes office as Headmaster. Therefore, he does not have any right to the post to hang on after the regular incumbent has been transferred to the post."

16. A similar situation had arisen in the case of Smt. B.H. Kakati v. State of Assam and Ors. Under similar circumstances said Smt. Kakati filed a writ petition being W.P.(C) No. 4310/2000. In that case also the private respondent was transferred to her school on mutual consent with the Headmaster of the school. According to the petitioner such transfer of the private respondent to her school deprived the petitioner from the benefit of being considered for promotion as Headmistress. In that case also it was the assertion of the petitioner that she was the senior most teacher of the school and was aspiring for promotion as Headmistress.

17. This court upon consideration of the rival contentions made on behalf of the parties held that as the private respondent therein was appointed as Headmaster, it was axiomatic that such an incumbent can be transferred and such transfer may be at the request of the incumbent and if the authority takes the view that the mutual transfer should be allowed in the exigencies of the work no fault can be found with the same.

18. In the instant case the petitioner could not show any rule or order pertaining to prohibition of mutual transfer or transfer on own request. In any case the petitioner being only assistant teacher and the respondent No. 4 being a Headmaster there is no question of inter-se seniority between the two. Thus it cannot be held as claimed by the petitioner on the basis of her seniority in the cadre of Assistant Teacher that her right has been infringed by the transfer of the respondent No. 4.

19. Ms. Saikia learned counsel for the petitioner strenuously argued that the very

induction of the respondent No. 4 as Headmaster in his earlier school was illegal inasmuch as the approval accorded by the D.I. of Schools by order dated 29.10.1987, in respect of respondent No. 4 as Headmaster of the school was only provisional and the order relating to provincialisation of the school dated 5.2.1992 also does not indicate as to whether it was the respondent No. 4 whose appointment as Headmaster in the school in which he was working was provincialised.

20. Learned counsel papering for the respondent No. 4 pointed out that although such an order relating to provincialisation of the school in question does not reflect the name of respondent No. 4 but a copy of the same was endorsed to the respondent No. 4 as "the Headmaster concerned". The admitted position is that the respondent No. 4 was appointed as Headmaster in the school in question which was also provisionally approved by the D.I. of Schools as will be evident from the order dated 29.10.1987. In the impugned order of transfer dated 5.5.2003 also the respondent No. 4 has been shown to be the Headmaster of Arlongwati M.E. School and he has been transferred in that capacity to the present school. There is no reason to dis-believe the position of the respondent No. 4 as Headmaster.

21. In view of the above discussion and on perusal of the materials on record I do not find any infirmity in the impugned order of transfer dated 5.5.2003. Pursuant thereof the respondent No. 4 has also been released from his earlier school by an order dated 28.5.2003 enabling him to join in the Banglagarh M.V. School to which he has been transferred. Accordingly the respondent No. 4 should be allowed to join in the school to which he has been transferred without any further delay. The earlier interim order stands vacated. The respondent No. 4 shall be entitled to this regular salary as Headmaster for the period of his absence during which the impugned order was suspended by this Court.

22. After having held that the impugned order dated 5.5.2003 does not suffer from any infirmity and should be acted upon, we may now examine the case of the petitioner relating to her contention that she is a selected candidate. In this connection Ms. Saikia has placed reliance on the select list prepared in March, 2001. It is her specific case that though her name appeared in the select list she could not be appointed by the government itself. Even after expiry of the said select list another select list as reflected in the additional affidavit has been prepared in December, 2003 which has also been certified by the Block Elementary Education Officer, Kalaigaon Block, Magaldoi. In the said list her name appears at Sl. No. 1. Although a view has been expressed that the said list is not a select list but a seniority list containing the names of assistant teachers of different schools, but there is no denial of the fact that the petitioner was selected for appointment as Headmistress pursuant to the inclusion of her name in the select list of March, 2001. It was her cheer misfortune that she could not be appointed due to the ban imposed by the Govt. of Assam on appointment and promotion but for which perhaps her temporary assignment as Headmistress

would have resulted into a permanent one by way of her appointment as Headmistress. It will be for the Govt. of Assam in the Education Department to consider that aspect of the matter and extend relaxation regarding validity of the select list published in March, 2001, if admissible under the rules. It will also for the Govt. of Assam, Education Department to take into account the categorical statement made by the petitioner that her name got included in the fresh select list prepared in December, 2003 and in pursuance thereto it is her legitimate expectation to get appointment on promotion as Headmistress. The State respondents shall consider the case of the petitioner with all its earnestness and as expeditiously as possible keeping in mind that the petitioner is going to retire on attaining her age of superannuation in the year 2006.

23. With the above observation the writ petition is disposed of in terms of the order and direction as indicated above.

24. No order as to costs.