

(2014) 12 GAU CK 0013
In the Gauhati High Court
Case No : W.P.(C) Nos. 3572 and 4335 of 2014

Shujit Kumar Mondal

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 15-12-2014

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2015) 1 GLT 269 : (2015) LabIC 1339

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Advocate : A.M. Buzarbaruah, Sr. Advocate, P. Mahanta and B. Ahmed, Advocates for the Appellant; A. Verma, S.C., A.D. Choudhury and B.K. Bhattacharyya, Advocates for the Respondent

Judgement

Ujjal Bhuyan, J.—Both the writ petitions raise identical issues and, accordingly, were heard together. Today is fixed for delivery of judgment. Accordingly, judgment is dictated in the open court.

2. Issue raised in the two writ petitions is whether gradation list of Lecturers serving in the District Institutes of Education and Training (DIET) should be department/branch wise or cadre wise.

3. This issue has arisen in the context of the Assam District Institute of Education and Training Service Rules, 2010 (DIET Service Rules, hereafter). While the petitioners contend that the gradation list of Lecturers has to be department/branch wise, the respondents contend otherwise. This has given rise to the present lis.

4. Background facts may be briefly narrated.

5. Petitioners in both the cases are working as Lecturers in different branches in various DIETs in the State of Assam. To achieve the objective of universalization of elementary education and eradication of adult illiteracy, DIETs have been established in various districts of the country to provide amongst others research

and training to teachers. A DIET comprises of various branches like, District Resource Unit (DRU), Pre-Service Teacher Education (PSTE), in Service Education, Field Interaction and Innovation Co-ordination (IFIC), Curriculum Material Development and Evaluation (CMDE), Education Technology (ET), Planning and Management (P&M), Work Experience etc. Petitioners are serving on regular basis as Lecturers in different branches in various DIETs in Assam on recommendation of Assam Public Service Commission (APSC). Service particulars of the petitioners are mentioned in the writ petitions. However, considering the nature of the controversy, it is considered not necessary for reproduction of the same. In all, there are seven branches in DIET.

6. According to the petitioners, they are eligible for promotion to the post of Senior Lecturer. As per the DIET Service Rules, respondents had, in the past, prepared gradation list of lecturers of DIET branch wise as per recommendation of APSC. After enactment of the DIET Services Rules, similar gradation list was prepared in the year 2013. One Sri Ratul Neog, a Lecturer of DIET, Nagaon had raised objection by filing representation for preparation of gradation list branch wise. He contended that gradation list should be prepared cadre wise irrespective of branches i.e. for the cadre of Lecturer there should be one common gradation list. Contending that his objection was not being considered, he moved this Court by filing WP(C) No. 1386/2014. This Court after noticing the grievance expressed by the said Sri Ratul Neog, disposed of the writ petition vide order dated 12.03.2014 with a direction to the respondents to consider the objection raised and to take a decision thereafter in accordance with law. Petitioners also approached this Court by filing WP(C) No. 2396/2014 contending that the gradation list should be prepared branch/department wise and that there should not be one common gradation list of Lecturer. This Court by order dated 12.05.2014 disposed of the said writ petition by directing the respondents to take into consideration the grievance raised by the petitioners also while attending to the grievance raised by Sri Ratul Neog.

7. Following the same, Secretary to the Govt. of Assam, Education (Ele.) Department passed an order dated 17.06.2014 declaring that gradation list of Senior Lecturers and Lecturers of DIETs in Assam would be prepared cadre wise. The question of Senior Lecturers cropped up as because similar dispute was raised regarding preparation of gradation list in the cadre of Senior Lecturer. This view has been taken by referring to Rule 21 of the DIET Service Rules. In view of the order dated 17.06.2014, draft gradation list of Lecturers of DIETs in Assam was published vide notification dated 26.06.2014, issued by the Under Secretary to the Govt. of Assam, Elementary Education Department. The gradation list so prepared is an amalgamated list of all Lecturers working in the DIETs. In other words, the gradation list has been prepared cadre wise i.e. for the cadre of Lecturer, one common gradation list has been prepared.

8. Aggrieved, the present two writ petitions have been filed for quashing of the order dated 17.06.2014 and the draft gradation list dated 26.06.2014. Further

prayer made is to direct the respondents to prepare gradation list of Lecturers in DIET department/branch wise by determining the inter-se seniority as per order of preference in the recommendation made by APSC.

9. This Court by separate orders dated 22.08.2014 and 03.09.2014 issued notice in the two cases and in the meanwhile, directed the respondents not to act upon the draft common gradation list of Lecturers dated 26.06.2014.

10. State Council of Education Research and Training (SCERT), under whose Directorate the Lecturers of DIETs work, has filed separate applications for vacation of the above stay orders in both the cases. As agreed to by learned counsel representing various parties, instead of hearing the stay vacating applications, the writ petitions itself were taken up for hearing and disposal.

11. Respondent No. 2, i.e., Director of SCERT has also filed affidavit. Stand taken in the said affidavit is that the DIET Service Rules have been framed in order to regulate recruitment and conditions of service of persons appointed to the DIET service. As per the DIET Service Rules, Lecturer is a separate cadre under Class-I service. Cadre of Lecturer comprises of 7 different branches and recruitment to those branches are made by direct recruitment as per Rules 6 to 10 of the DIET Service Rules. Naturally, the eligibility criteria of Lecturers in the different branches are different. Referring to Rule 21 of the DIET Service Rules, it is contended that seniority of a member of the service shall be determined cadre wise in order of preference as per recommendation of APSC; Rule 21 does not provide that seniority will be determined branch wise as claimed by the petitioners. Reference has also been made to Rule 23, which says that every year a gradation list is to be prepared and published containing the names of members of the service cadre wise in order of seniority. Therefore, it is contended that seniority will be determined cadre wise and not branch wise. If branch wise seniority list is prepared, there is every possibility that one may get promotion to the next higher cadre after rendering lesser years of service than the senior most incumbent of some other branch. It has been brought to the notice of the Court that at present 137 posts of Senior Lecturer and 23 posts of Vice Principal are lying vacant in 23 DIETs in the State. Finance (SIU) Department, Govt. of Assam has informed that all vacancies relatable to the years 2011-12, 2012-13 and 2013-14 should be filled up by 31.12.2014 whereafter, approvals granted for filling up the vacancies will automatically lapse.

12. Petitioners in their rejoinder-affidavit have reiterated the contentions advanced in the writ petition. DIET comprises of seven different branches and the eligibility criteria for appointment of Lecturers in different branches are different. Recruitments were made by APSC branch wise. DIET Service Rules provide for determination of seniority as per the order of preference in the recommendation of APSC. All the Lecturers of DIET cannot be clubbed together under a single cadre. Intermixing of the Lecturers belonging to different branches will not only be violative of the DIET Service Rules, but it will also make the said Rules unworkable. If a common gradation list is prepared, then a Lecturer of a

different branch may become Head or Senior Lecturer of another department/branch.

13. Heard Mr. AM Buzarbaruah, learned Senior Counsel for the petitioners in WP(C) No. 3572/2014 and Mr. P Mahanta, learned counsel for the petitioners in WP(C) No. 4335/2014. Also heard Ms. A Verma, learned Standing Counsel, Education (Ele.) Department. Mr. AD Choudhury and Mr. BK Bhattacharyya, learned counsel have also advanced arguments on behalf of some of the Lecturers seeking common gradation list by filing miscellaneous applications for impleadment. It may be mentioned that though impleadment petitions have been filed by them, since the main writ petitions were taken up for hearing, no orders have been passed in those applications.

14. Mr. AM Buzarbaruah, learned Senior Counsel leading the arguments on behalf of the petitioners submits that on a careful and wholesome reading of the DIET Service Rules, it would be evident that the cadre of Lecturer, envisaged under the said Rules, has to be construed department/branch wise. Therefore, branch wise seniority list has to be prepared. Referring to Schedule-II to the DIET Service Rules, learned Senior Counsel submits that qualifications prescribed for Lecturers in the different branches are different. Recruitment was made by the APSC branch wise by preparing branch wise select list in order of merit. A Lecturer working in DRU branch cannot work as a Lecturer in PSTE branch and vice versa. A Lecturer is promoted to the next higher post of Senior Lecturer, which is considered equivalent to the post of Vice Principal. Senior Lecturer is designated as Head of the Department/Branch. If a Lecturer from DRU branch is made Senior Lecturer (Head of Department) in PSTE branch, it will lead to an unworkable situation inasmuch as, he would not have the competence and eligibility to man the said department/branch. He has laid much emphasis on the word "respectively" appearing in Rule 5 (ii) of the DIET Service Rules to contend that select list of Lecturers in DIET will have to be prepared department/branch wise respectively. Therefore, Rule 5(ii) and Schedule-II are suggestive of the legislative intent and lay down the context that Lecturers serving in the different branches belong to different cadres. He argues that a statute has to be read as a whole and if the DIET Service Rules is so read, it would be clearly evident that so far Lecturers are concerned, separate gradation lists have to be prepared branch wise. He further submits that it is a well accepted rule of interpretation that a schedule appended to a statute may be referred or taken aid of for the purpose of throwing light on the construction of a doubtful or ambiguous enactment. Learned Senior Counsel has placed reliance on the following decisions:--

"i) Inland Revenue Commissioners v. Gittus, (1920) 1 KB 563,

ii) M. Pentiah and Others Vs. Muddala Veeramallappa and Others, ,

iii) Gammon India Ltd. and Others Vs. Union of India (UOI) and Others, ,

iv) Union of India Vs. Elphinstone Spinning and Weaving Co. Ltd. and Others etc., ."

15. Submissions made by learned Senior Counsel for the petitioners have been resisted by Ms. A Verma, learned Standing Counsel, Education (Ele.) Department. She has referred to various provisions of the DIET Service Rules to contend that there is no ambiguity at all in the Rules. Lecturer as a whole comprises of one cadre and the seniority list has to be prepared cadre wise. If Lecturer is one common cadre, then common seniority list will have to be prepared for the cadre of Lecturer. Lecturers may be working in different branches, but they all form part of the common cadre of Lecturer. She submits that contentions advanced on behalf of the petitioners are wholly untenable in the face of the express provisions contained in the DIET Service Rules. There is no substance in the contention advanced that gradation list of Lecturers are required to be prepared branch wise as the same is not provided in the DIET Service Rules. She has however, laid stress on the fact that functioning of DIETs have been seriously hampered because of lack of adequate manpower in the rank of Vice-Principal and Senior Lecturer, which are required to be filled up by way of promotion from Lecturers. She submits that in view of the directive of the Finance Department, the vacancies will have to be filled up by 31.12.2014, failing which, approvals granted by the Finance Department for such appointment on promotion will lapse.

16. Submissions advanced by Ms. A Verma, learned Standing Counsel, Education (Ele.) Department have been supported by Mr. Choudhury and Mr. Bhattacharyya. In their separate arguments, they have referred to various provisions appearing in the DIET Service Rules and have contended that there is no ambiguity at all that Lecturer is a separate cadre and gradation list has to be prepared cadre wise, meaning thereby that there has to be a common gradation list for all the Lecturers. Submitting that there is no merit in the two writ petitions, they seek dismissal of the same.

17. Submissions made have been considered.

18. The question for consideration which has arisen in these two cases has already been highlighted at the very beginning. To appreciate the rival contentions and to answer the question which has arisen for consideration, it would be apposite to refer to the relevant provisions of the DIET Service Rules.

19. DIET Service Rules has been framed by the State in exercise of powers conferred by the proviso to Article 309 of the Constitution of India to regulate recruitment and conditions of service of persons appointed to the DIET service. Rule 3 provides that DIET service shall consist of the following cadres in Class-I:--

"i) Principal

ii) Vice Principal,

iii) Senior Lecturer, and

iv) Lecturer."

20. As per Rule 4, the strength of each cadre in the service shall be determined by the Govt., but the strength existing on the date of commencement of the Rules are as per Schedule-I. Rule 5 deals with method of recruitment. Rule 5(ii) provides that the post of Vice-Principal/Senior Lecturer shall be filled up by promotion from the select list of Lecturers in the seven streams respectively on the basis of seniority-cum-merit. In respect of the post of Lecturer [Rule 5 (iii)], 80% is filled up by direct recruitment and 20% by way of promotion from amongst qualified Technicians. Rules 6 to 10 lay down the procedure for direct recruitment. Rule 11 deals with promotion. Under Rule 11(2)(ii), a member of the cadre of Lecturer of any branch shall be eligible for promotion to the cadre of Vice-Principal/Senior Lecturer, if he has rendered minimum five years of service in his cadre. Rule 21 provides that seniority of a member in a cadre appointed by direct recruitment or by promotion shall be determined according to the order of preference in the respective list approved by the APSC. If two persons are appointed on recommendation of APSC in two different batches, than the person who was recommended in the earlier batch shall be senior. If two or more persons are bracketed in the merit list of APSC, the inter-se seniority of the persons shall be determined according to the date of birth. A promotee shall be senior to a direct recruit of that year. Rule 23 provides for preparation and publication of gradation list. It says that every year a gradation list containing the names of all members of the service, cadre wise, in order of seniority and such other particulars, such as date of birth, date of appointment, date of regularization by APSC etc., shall be prepared and published. As per Schedule-I, the strength of each cadre in the service has been mentioned along with the scale of pay. Cadre of Lecturer is mentioned at Sl. No. 4 having pay scale of Rs. 12,000.00-40,000.00 with grade pay of Rs. 5,900.00. Total number of posts (all permanent) is 291. Schedule-II provides for qualifications and experience for direct recruitment to the cadre of Lecturer in the seven different branches.

21. Having noticed the salient features of the DIET Service Rules relevant for adjudication of the present lis, the question or the questions which may require examination to arrive at the correct answer to the issue framed, are, what is a cadre? What is a post? What is the distinction between cadre and post? An endeavour is made to address the above questions so as to enable the Court to answer the issue framed.

22. Fundamental Rule 9(4) defines "cadre" to mean the strength of a service or a part of a service sanctioned as a separate unit. On the other hand, Fundamental Rule 9(22) defines "permanent post" to mean a post carrying a definite rate of pay sanctioned without limit of time while a "temporary post" under Fundamental Rule 9(30) means a post carrying a definite rate of pay sanctioned but for a limited time. From a reading of Fundamental Rules 9(22) and 9(30), it can be said that a post can be permanent or temporary. In both cases, it carries a definite rate of pay sanctioned. As such, "post" can be described as a single unit of service assigned with specific duties and responsibilities carrying a definite rate of pay sanctioned. On the other hand, "cadre" under Fundamental Rule 9 (4)

has been defined to mean the strength of a service or a part of the service sanctioned as a separate unit. Therefore, conceptually cadre is a larger unit of the service and post is a single unit of the service. Viewed in that context, cadre can be said to be the genus and post as species. A cadre may include a number of posts within its fold; post can be permanent or temporary. However, in a given case, a cadre may consist of a single post i.e., there can be a single post cadre. As stated above, a cadre may comprise of a number of posts, but to be part of the common cadre, the posts, when there is plurality of post in a cadre, must meet or fulfill certain essential preconditions. The nature of duties of the posts should be similar. The posts should carry identical or similar responsibilities. The pay scale of the posts must be the same. The content of duty or qualification prescribed for recruitment to different posts may differ, but that will not make any material difference to the inclusion of a post in a particular cadre, if the essential attributes, as indicated above, are fulfilled. Again, within a common cadre, there can be different grades which is within the competence of the Govt. to create.

23. In *Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others*, , the Apex Court described a cadre to be a layer in the service. It was held that holder of a post in a cadre may be the holder of a temporary post or permanent post. In *Chakradhar Paswan Vs. State of Bihar and Ors*, , the Apex Court observed that in service jurisprudence, the term cadre has a definite legal connotation and referred to Fundamental Rule 9(4). Apex Court held that it is open to the Govt. to constitute as many cadres in any particular service as it may choose according to administrative convenience and expediency.

24. In *State of Maharashtra Vs. Purshottam and Others*, , the Apex Court observed that in service jurisprudence, the expression cadre means the unit of strength of a service or a part of it as determined by the employer. Apex Court held in *S. Murugan & Ors. v. Union of India & Anr.*, (2002) 10 SCC 96, that constitution and formation of a cadre is the prerogative of the employer and it is for the employer to decide which unit of service would construe a cadre. In *State of Karnataka and Others Vs. K. Govindappa and Another*, , the Hon"ble Supreme Court held that the expressions "Cadre", "Post" and "Service" cannot be equated with each other. But it was admitted that a single and isolated post can comprise a separate cadre.

25. Having discussed the above and having noticed the fine distinction between cadre and post, the Court may now revert back to the DIET Service Rules, the salient features of which have already been noticed earlier. Rule 3 clearly says that Class-I service shall include the four cadres of Principal, Vice-Principal, Senior Lecturer and Lecturer. Therefore, from a plain reading of Rule 3, it is evident that Lecturer is a separate cadre in the service. Strength in the cadre of Lecturer is mentioned in Schedule-I wherein, it is mentioned that the cadre of Lecturer consists of 291 permanent posts. Under Rule 11(2)(ii), a member of the cadre of Lecturer of any branch (emphasis supplied), shall be eligible for

promotion to the cadre of Vice-Principal/Senior Lecturer, if he fulfills the requisite qualification. This Rule also makes it abundantly clear that a member belonging to a cadre of Lecturer of any branch shall be eligible for promotion to the higher cadre of Vice-Principal/Senior Lecturer. As already noticed, Rule 21 deals with seniority. It clearly provides that seniority of a member in a cadre appointed by direct recruitment or by promotion shall be determined according to the order of preference in the respective list recommended by the APSC. If the persons are appointed on the recommendation of APSC in two different batches, then the person who was recommended in the earlier batch shall be treated as senior. Again, if two or more persons are bracketed in the merit list of APSC, the inter-se seniority shall be determined according to the date of birth. Between a promotee and a direct recruit, the promotee shall be considered as senior. Gradation list is prepared under Rule 23. It provides that there shall be prepared and published every year a gradation list containing the names of all members of the service cadre wise in order of seniority and such other particulars, like date of birth, date of appointment, date of regularization by the APSC etc. From the above, it is clearly evident that there is a common cadre of Lecturer. If there is a common cadre of Lecturer, as per requirement of the DIET Service Rules, there shall have to be a common gradation list of Lecturers. Inter-se seniority within the cadre of Lecturer shall be determined on the basis of the order of preference made by the APSC, date of appointment, date of regularization by the APSC, date of birth etc. A conjoint reading of Rule 3, Schedule-I, Rules 11(2)(ii), 21 & 23 leaves no room for doubt in this regard. Reliance placed by learned counsel for the petitioners on Rule 5(ii) of the DIET Service Rules to contend that the post of Vice-Principal/Senior Lecturer shall be filled up by promotion branch wise from the select list of Lecturers in the different branches respectively on the basis of seniority-cum-merit and therefore Lecturers in the different branches form separate cadres appears to be misplaced and misconceived. The word "respectively" appearing in the Rule 5(ii) has been used in relation to the select list of Lecturers working in the seven different branches. But it has to be understood that Rule 5(ii) speaks about "select list" in the context of promotion from Lecturer to Vice-Principal/Senior Lecturer which has to be on the basis of seniority cum merit. Rule 23 on the other hand speaks about a gradation list of all members of the service, cadre wise in order of seniority. And seniority of a member in a cadre has to be determined in the manner provided in Rule 21. In service jurisprudence, select list and gradation list have different connotations. They cannot be equated. While the former is confined to only selected candidates, the latter contains all members of the cadre in order of seniority.

26. Reference to and reliance placed on Schedule-II to the DIET Service Rules in support of the contention made by the petitioners that Lecturers in the seven different branches constitute different cadres is also misplaced and misconceived. Contention of Mr. Buzarbaruah, learned Senior Counsel for the petitioners that because of the difference in qualification and the contents of teaching material in the different branches, Lecturers working in the different branches cannot be

clubbed together in a single common cadre of Lecturer is untenable. It is because Schedule-II lays down the qualifications and experience prescribed for direct recruitment to the post of Lecturer in the different departments/branches as provided for in Rule 8. Schedule-II has to be read only for the purpose of Rule 8 laying down different qualifications for the post of Lecturer in the different branches. As noticed above, the qualifications may vary for direct recruitment to the post of Lecturer in the different branches, but the nature of recruitment is identical. The content of the subject taught or the content of the duty of the Lecturers in the different branches may differ, but that cannot be the basis to hold that Lecturers, in each branch, forms a distinct and separate cadre. From Schedule-I, it is evident that Lecturers carry the same time scale of pay with the same grade pay. Nature of duties and responsibilities are also similar, though contents may vary. Intention of the rule making authority is clear and unambiguous. The rule making authority did not stipulate that Lecturer DRU, Lecturer PSTE, Lecturer IFIC etc. would be separate cadres. In the absence of such stipulation, there is no way one can hold the view that Lecturer in each of the branches form a separate cadre. Argument advanced in support of the same is clearly fallacious and cannot be accepted. Schedule-II has to be read in conjunction with Rule 8. No expanded meaning can be given to Schedule-II in view of the unambiguity of the enactment. As there is no ambiguity in the DIET Service Rules, the decisions relied upon by learned Senior Counsel for the petitioners are clearly distinguishable and are not at all attracted in the facts and circumstances of the case.

27. Apprehension expressed by learned counsel for the petitioners that if there is a common cadre of Lecturer, it may lead to a situation where Lecture of one branch may become Senior Lecturer/Vice-Principal with the possibility of being Head of the Department of another branch appears to be farfetched. In any view, based on such apprehension, the DIET Service Rules cannot be interpreted in a manner to hold that Lecturers working in different branches form different cadres.

28. In view of the discussions made above, there can be no iota of doubt that Lecturers in DIET form one common cadre and there has to be a common gradation list for all the members in the cadre of Lecturer based on the principles laid down in Rules 21 and 23 of the DIET Service Rules. There is no infirmity in the order dated 17.06.2014 and the draft gradation list dated 26.06.2014. The challenge made thereto lacks merit and is accordingly rejected. Consequently, both the writ petitions are dismissed and the stay orders passed are recalled. No costs.