
(2009) 11 GAU CK 0033
In the Gauhati High Court
Case No : Writ Appeal No. 281 of 2009

Sushen Chandra Das

APPELLANT

Vs

Prafull Kumar Das and Others

RESPONDENT

Date of Decision : 18-11-2009

Acts Referred:

Assam Secondary Education (Provincialised) Service Rules, 2003 — Rule 12, 24(1)

Citation : (2010) 5 GLR 125

Hon'ble Judges : Ranjan Gogoi, J;Hrishikesh Roy, J

Bench : Division Bench

Advocate : B.D. Das and H.K. Sarma, for the Appellant; R. Baruah and M.R. Pathak, for the Respondent

Final Decision : Dismissed

Judgement

Ranjan Gogoi, J.—The challenge in this appeal is against an order dated 11.8.2009 passed by a learned Single Judge of this Court in two separate proceedings registered and numbered as WP(C) Nos. 1130/09 and 2058/ 09. By the aforesaid order, the learned Single Judge has interfered with two orders dated 2.3.2009 and 29.4.2009 by which the appellant, who had been impleaded as respondent No. 6 in the writ petitions, was allowed to hold the charge of the post of Principal of Mayong Higher Secondary School on the basis of his seniority.

2. Ordinarily and in the normal course, challenges against appointments made on in-charge basis are reluctantly entertained by the court. However, in the State of Assam such arrangements normally continue for periods longer than initially expected. The relevant provisions of the statute under which regular appointments are required to be made are presently under challenge in other writ petitions filed before this Court wherein interim orders have been passed, as a result of which, regular appointments in the post of Principal cannot be made. This is the primary reason why the writ petition as well as this appeal had to be heard at considerable length.

3. The relevant facts that will be required to be noticed for the purposes of the present adjudication may be briefly set out hereunder:

The appellant was appointed as a Subject Teacher (Post Graduate Teacher) in the school in question on 15.12.1987. Earlier to that he had worked as an Assistant Teacher in the graduate cadre in Buraburi High School w.e.f 1.10.1983. The aforesaid Buraburi High School was provincialised on and from 1.2.1986. At this stage/notice must also be had to another order dated 8.3.2001 of the Director of Secondary Education by which the service of the appellant rendered in the Buraburi High School had been ordered to be continuous service. As against the aforesaid position, the respondent, writ petitioner was appointed as a Subject Teacher in the Mayong Higher Secondary School on 25.10.1986. The regular incumbent in the post of Principal of the Mayong Higher Secondary School having retired w.e.f 28.2.2009, an order dated 2.3.2009 was passed by the Inspector of Schools allowing the appellant to hold the charge of the post of Principal w.e.f. 1.3.2009. The said order dated 2.3.2009 was challenged in the proceeding registered and numbered as WP(C) No. 1130/09. There was an interim order dated 18.3.2009 passed in the said writ petition staying the operation of the order dated 2.3.2009. The appellant filed Misc. Case No. 704/09 seeking vacation/modification/alteration of the said order. By order dated 23.3.2009 passed in the Miscellaneous Case while the prayer for vacation/modification/alteration was declined, the Director of Secondary Education was left with the option to make appropriate arrangement in so far as the post of Principal is concerned. Thereafter, the impugned order dated 29.4.2009 was passed by the Director of Secondary Education holding the appellant to have a longer tenure of service in the school than the respondent/writ petitioner. Aggrieved by the said order, the second writ petition, i.e., WP(C) No. 2058/09 was instituted. Both the writ petitions having been answered in favour of the respondent/writ petitioner in the manner indicated above, the respondent No. 6 in the writ petitions has instituted the present appeal.

4. We have heard Sri B.D. Das, learned Counsel appearing on behalf of the appellant; Sri M.R. Pathak, learned departmental counsel and Sri R. Baruah, learned Counsel for the respondent No. 1.

5. A perusal of the order dated 11.8.2009 passed by the learned Single Judge indicates that the learned Single Judge, on due consideration of the provisions contained in Rule 24(1) of the Assam Secondary Education (Provincialised) Service Rules, 2003, came to the conclusion that the service rendered by the present appellant in the Mayong Higher Secondary School has to be counted w.e.f. 15.12.1987 and the service rendered by the respondent No. 1 in the appeal w.e.f. 25.10.1986. According to the learned Single Judge, under Rule 24(1) of the 2003 Rules the service rendered either in the Graduate or Post Graduate cadre has to be in the same school. The order dated 8.3.2001 of the Director entitling the appellant to continuous service was understood by the learned Single Judge to be an order conferring benefits other than length of

service for the purposes of seniority. Accordingly, the learned Single Judge took the view that under Rule 24(1) of the 2003 Rules, the appellant cannot be understood to have a longer length of service in the Mayong Higher Secondary School than the respondent No. 1.

6. The learned Single Judge in the impugned order dated 11.8.2009, also recorded the view that as the appointments of the two contesting parties were made in the years 1986 and 1987, the 2003 Rules which did not have any retrospective effect will not apply to the present case and it is the provisions of the Assam Secondary Education (Provincialised) Service Rules, 1982 ("1982 Rules") which will hold the field. Considering the provisions of the 1982 Rules, the learned Single Judge found that under the said Rules a Post Graduate Teacher is included in a higher cadre than a Graduate Teacher. The learned Single Judge also found that the pay scale of the two posts were different. Accordingly, the learned Single Judge came to the conclusion that under the 1982 Rules the service rendered by the appellant in Buraburi High School being in a lower cadre, could not have been counted for the purpose of computation of seniority in the higher cadre of Post Graduate Teacher.

7. Sri B.D. Das, learned Counsel for the appellant has strenuously argued that Rule 24(1) of the 2003 Rules deals with the question of determination of seniority for promotion to the post of Vice-Principal. In the present case, the issue is with regard to the post of Principal and, therefore, Rule 24(1) of the 2003 Rules on the very face of it will not apply to the present case. Sri Das has further contended that the learned Single Judge has committed a manifest error of law in coming to the conclusion that it is the provisions of the 1982 Rules which will govern the instant matter, inasmuch as, the vacancy in the post of Principal having occurred in March 2009, it is the Rules in force as on the date of occurrence of the vacancy which will hold the field. Proceeding further, Sri Das has argued that the post in question being that of the Principal of a Higher Secondary School, it is the provisions of Rule 12 of the 2003 Rules which will govern the matter and in so far as the officiating or in-charge arrangement in the said post of Principal is concerned, the seniority of the incumbent has to be determined on the basis of length of service.

8. The contentions advanced on behalf of the appellant have met with stiff resistance offered by the learned departmental counsel as well as Sri R. Baruah, learned Counsel for the respondent No. 1. According to the learned Counsels for the respondents, there is no provision in the 2003 Rules which provide for determination of seniority for the purpose of officiating appointment in the post of Principal. Rule 12, according to the learned Counsels, deal with direct recruitment to the post of Principal which is the only mode of appointment. In the instant case, according to the learned Counsels, the appellant having joined the Mayong Higher Secondary School later than the respondent No. 1, the length of service of the appellant in the school cannot be considered to be longer than the service rendered in the school by the respondent No. 1. Insofar as the

provisions of the 1982 Rules is concerned, the learned Counsels for the respondents have fairly submitted that it is the provisions of the 2003 Rules which would govern the situation.

9. We have anxiously considered the submissions advanced on behalf of the respective parties. Insofar as the applicability of either of the Rules is concerned, there will be little difficulty in holding that it is the provisions of the Rules in force on the date when the vacancy had occurred which should govern the instant matter. Applying the above settled principle of law, we have no hesitation in coming to the conclusion that it is the provisions of the 2003 Rules and not the 1982 Rules which should have been applied to the instant case.

10. Insofar as the 2003 Rules are concerned, no provision of the said Rules has been brought to our notice neither have we noticed any such provision in the said Rules which lays down any principle for determination of seniority of incumbents working in the school who are eligible for appointment to the post of Principal. Rule 24(1) of the 2003 Rules, however, makes the incumbents in both Graduate as well as Post Graduate cadres eligible for consideration for filling up the post of Vice-Principal on the basis of inter se seniority to be determined, inter alia, on the basis of the length of service. Rule 24(1), however, deals with the post of Vice-Principal and not Principal. Strict applicability of the provisions of the said Rules for determination of inter se seniority for the purpose of appointment to the post of Principal, therefore, will be in serious doubt.

11. Under Rule 12 of the 2003 Rules, appointment in the post of Principal of a Higher Secondary School is to be made by direct recruitment to be conducted by the State Selection Board. Rule 12(d) stipulates the minimum qualifications for appointment to the post of Principal. A Post Graduate Teacher must have at least 15 years of teaching experience whereas a Graduate Teacher is required to have 17 years of teaching experience. Rule 12(d), therefore, makes both Post Graduate and Graduate Teachers eligible for consideration for direct appointment in the post of Principal of a Higher Secondary School in the same manner as Rule 24(1) makes both the categories eligible for consideration for promotion to the post of Vice-Principal. However, what must be noticed in Rule 12(d) is the stipulation that the experience either as a Post Graduate Teacher or as a Graduate Teacher must be in a Higher Secondary School. In other words, Rule 12(d) makes a Graduate Teacher in any other school except a Higher Secondary School ineligible for appointment in the post of Principal.

12. There is no reason why the principle laid down in Rule 12 of the 2003 Rules for direct appointment, particularly with regard to eligibility, should not be followed while making an officiating appointment or in-charge arrangement. Such adherence will give a more credible and firm basis to a otherwise fortuitous arrangement made for a limited duration of time and, therefore, must be preferred.

13. Reverting to the facts of the present case, the appellant joined the Mayong

Higher Secondary School on 15.12.1987 whereas the respondent No. 1 joined the said school in the Post Graduate cadre on 28.10.1986. The appellant had earlier worked as an Assistant Teacher in the graduate scale in the Buraburi High School the effect of which is to be given from the date of provincialisation of the said High School, i.e., 1.2.1986. However, the period of service rendered by the appellant in the Buraburi High School in the graduate scale/cadre is not eligible to be counted for computation of the teaching experience required under Rule 12(d) of the 2003 Rules and, therefore, shall stand excluded. The further question that now has to be addressed in this regard would be the effect of the order dated 8.3.2001 passed by the Director of Secondary Education by which the service rendered by the appellant in the Buraburi High School had been made continuous.

14. There can be no manner of doubt that an administrative order cannot come into direct conflict or be contrary to the expressed provisions of the statutory Rules. In such an event the order that may be in conflict with the statutory provision will have to give way to the expressed provisions of the statute. The learned Single Judge in the impugned order has held that the order dated 8.3.2001 granting continuous service to the appellant could be valid for the purpose of conferment of benefits like pension, continuity in service etc., but not for the purpose of determination of seniority. The principle contained in the aforesaid decision of the learned Single Judge cannot be disagreed with though the said principle may not wholly apply to the facts of the present case. However, what is clear is that the order dated 8.3.2001 cannot be considered to have conferred on the appellant a qualification which he does not have so as to meet the eligibility criteria for appointment to in the post of Principal. If the statutory Rules require a certain number of years of teaching experience as Graduate Teacher in a Higher Secondary School for appointment to the post of Principal, the aforesaid requirement cannot be whittled away by an administrative order treating the service rendered in the Graduate cadre in a High School as equivalent to the service rendered in a Higher Secondary School. Such a legal fiction cannot be introduced by means of an administrative action and, that too, in direct conflict with the provisions of the statutory enactment.

15. Consequently, we have to hold that the service of the appellant for the purpose of eligibility for appointment in the post of Principal has to be counted from the date of his appointment in the Post Graduate cadre in the Mayong Higher Secondary School which being later in point of time than that of the respondent/writ petitioner, this appeal challenging the impugned order of the learned Single judge has to fail.

16. The writ appeal, accordingly, is dismissed. No costs.