
(2007) 06 GAU CK 0056
In the Gauhati High Court

Trailakya Nath Saloi

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 11-06-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2007) 3 GLT 318

Hon'ble Judges : J. Chelameswar, C.J;A. Hazarika, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. Chelameswar, C.J.—These two writ appeals have been preferred by the contesting private respondents in W.P. (C) Nos. 1241/07 and 1256/07, which came to be disposed of by a common order dated 20.03.07. In both the writ petitions, the appointment of the appellant herein as the Principal of the Nalbari College, Assam, who is one of the respondents in these two appeals was the subject matter.

2. The appellant herein was appointed by proceeding dated 10.3.07 of the abovementioned respondent-Nalbari College. The abovementioned College is, admittedly, an "Aided College" within the meaning of the said expression as defined under Rule 2(5) of the Assam Education Department Selection Rules, 1981 which regulate the selection process of Lecturers and Principals of Aided Colleges in the State of Assam.

3. A Selection Board is contemplated under Rule 3 with a composition as indicated in Sub-rule 2 thereof. Under Rule 6 the Director of Higher Education is required to ascertain the number of the existing vacancies and probable vacancies of the posts of Lecturers and Principals--both for the current and the next year. Such identification is required to be made at the commencement of every academic year. Thereafter, the Director of Higher Education is required to notify the total number of vacancies to the Selection Board referred to above. On

receipt of the said information, the Selection Board is required to advertise the various posts in the official gazette within the period stipulated under Rule 7. Under Rule 8, the Board is also required to fix the last date for receipt of applications from the interested candidates. Under Rule 9 the Board is required to conduct the selection process, the details of which may not be necessary for the present purpose as the process followed in the instant case is not under challenge. Under Rule 10, on completion of the selection process, the Board is required to prepare a list of selected candidates both for the posts of Lecturers and Principals under the Rules the Board is required to select at least thrice the number of candidates as there are vacancies. The said list is required to be forwarded to the State Government. The State Government is required to approve the list after verification of the character and antecedents of the candidates, whose names figured in the select list. Thereafter, a list of such approved candidates is to be published in the official gazette. It is also the requirement of Rule 10 that the Director of Higher Education should communicate such a finally approved list to the Governing Bodies of the Aided Colleges. Under Rule 11 the appointing authority of the various Aided Colleges are authorized to appoint any one of the candidates from out of the abovementioned approved select list.

4. An advertisement as contemplated under Rule 7 of the above mentioned Rules was published on 2.3.03 in the local news papers. Pursuant to the said Notification, the appellant as well as Respondent/writ petitioner also applied for the post of Principal along with number of other candidates. In due course, a list of selected candidates for the posts of Principal came to be published in the official gazette of Assam dated 22.6.04 containing the names of 287 candidates, who were found fit to be appointed as Principal of the Aided Colleges. Admittedly, both the appellant and the respondent/writ petitioner are among the selected candidates covered by the above Notification.

5. The selection process triggered of a spate of litigation. Initially a batch of writ petitions i.e. W.P. (C) No. 2833/03 etc. came to be filed challenging the selection process, the details of which are not necessary for the present purpose, except a mention that by a judgment dated 28.9.2005, the said batch of writ petitions were dismissed and the said judgment became final.

6. Another W.P. (C) No. 819/06 came to be filed challenging the said selection process by somebody, who is not a party to either of the present two appeals or connected writ petitions. The said writ petition also was dismissed on 19.6.06. While dismissing the said writ petition, a learned Judge of this Court directed that the Select List published in the official Gazette on 22.6.04 should remain operative for a period of four months from the date of the order (admittedly up to 18.10.2006). Such a direction was given in view of the fact that under Rule 10(3) of the above mentioned Rules, the Select List published in the official Gazette would be operative normally for one year only unless extended by the Government for a further period not exceeding one more year. In substance, the

select list published in the official gazette shall not be operative beyond a period exceeding two years from the date of its publication in the official gazette. The learned Judge issued the above-mentioned direction on the ground that the selection process stood intercepted by the various interim orders of this Court, thereby, preventing the selection process to reach its logical culmination and, therefore, it would be just and proper that the period so lost by virtue of the interim orders of this court should be added to the normal period of the validity of the select list. The relevant portion of the said judgment of the learned Single Judge is as follows:

This Court as noted hereinabove by order dated 15.2.2006 restrained the official respondents from acting on the Select List which then was in force. Its expiry is round the corner i.e. 21.6.2006. The Select List significantly has been challenged in part with the prayer to direct the respondents not to act thereon further. The challenge thereto having failed for the reason aforementioned, I am of the considered opinion, that the Select List ought to be allowed to remain operative for the period for which, the interim order has been in force. Having regard to the enormity of the exercise undertaken, it would be in fitness of things that the Select List be operative for a period of four (4) months from the date of this order. Ordered accordingly.

7. Aggrieved by the above decision, the unsuccessful writ petitioner carried the matter in WA No. 261/06. By an order dated 31.7.06, a Division Bench of this Court stayed the operation of the order of the learned Single Judge. The relevant portion of the said order reads as follows:

We have heard learned senior counsel, Mr. P.K. Goswami, appearing on behalf of the appellant and as well as Mr. M.K. Choudhury, learned Senior counsel, appearing on behalf of Respondent Nos. 1, 3 and 4.

There shall be an interim stay as prayed for.

Notice.

8. The said writ appeal finally stood disposed of on 15.2.07, the details and the effect of the said order would be discussed later.

9. On 28th August, 2006, the Respondent-Nalbari College, it appears, issued an advertisement calling upon the interested candidates out of the gazetted select list dated 22.6.04 to make application for the post of Principal of the said College.

10. It appears that the College also proposed to hold the interview for those candidates responding the advertisement on 28.8.06. We are informed that the said interview was not conducted, apparently, on the belief that in view of the order dated 31.7.06 made in WA No. 261/06 that the Nalbari College is also prohibited from proceeding with the selection process of the appointment of the Principals. Subsequently, it appears that the interview was conducted on 18.9.06 by the Nalbari College, wherein the appellant herein was selected for the post of Principal of the said College.

11. WP (C) No. 4852/06 was filed by respondent No. 6 in WA No. 151/06, who is one of the candidates in the select list prepared earlier, challenging the selection of the appellant herein by the management of the respondent-Nalbari College. On 27.9.06, a learned Judge of this Court made an interim order, the relevant portion of which reads as follows:

In the meantime, in view of the interim order dated 31.7.06 passed in Misc. Case No. 2638/06 in Writ Appeal No. 261/2006, further proceedings of the selection held on 18.9.2006 for the post of Principal of Nalbari College shall remain suspended.

12. It appears from the record that subsequently the management of the Nalbari College moved an application for vacation of the abovementioned interim order dated 27.9.06, but, when the said application was taken up on 8.3.07, the management of the Nalbari College did not press the application, but chose to withdraw the same. The said writ petition, we are informed, is still pending.

13. However, the factum of selection of the appellant was communicated by the Management of the Nalbari College to the Director of Higher Education for his approval as required under Rule 18 of the Assam Non-Government College Management Rules, 2001. The Director of Higher Education (Respondent No. 2 in these two appeals), in turn, provisionally approved the decision of the Management of Nalbari College by proceeding dated 9.3.07. The relevant portion of the proceeding reads as follows:

In pursuance of the Govt. letter No. B (2) H. 327/2000/?Dated Dispur, the 8th March, 2007 and as per Resolution No. 30 dated?of the Governing Body of Nalbari College, Nalbari, P.O. Nalbari, Dist. Nalbari, the appointment of Dr. Trailokya Nath Saloi as the Principal vice Shri Khagen Ch. Deka retired is hereby provisionally approved in the Scale of Pay of Rs. 12,000/- 420/18,300/- P.M. plus other allowances as admissible under Rules.

This approval of appointment is made in compliance with the Judgment and Order dated 15.02.07 passed by the Hon"ble Gauhati High Court in W.A. No. 261/2006 (Dr. Mani Ram Kalita v. State of Assam and Ors.).

14. Consequently, on 10.3.07, the Management of Respondent-Nalbari College issued a proceeding by which the appellant herein was appointed as a Principal of the said College.

15. The appointment of the appellant was promptly challenged in two writ petitions from out of which the present appeals arise.

16. Challenging the approval granted on 9.3.06 by the Director of Higher Education for the selection of the appellant herein to be the Principal of Nalbari College and the consequential order of appointment dated 10.3.06, the abovementioned Respondent No. 6, who was the petitioner also in WP (C) No. 4852/06 mentioned earlier, filed WP (C) No. 1241/07.

17. By an order dated 15.3.07, a learned Judge of this Court suspended the proceedings dated 9.3.06 and 10.3.06 referred to earlier. Eventually, when the matter came up for final hearing, the writ petition came to be allowed along with WP (C) No. 1256/07 by a common order dated 20.3.07. For the sake of completion of the narration of the facts, it is to be mentioned that the said writ petition was filed by the Acting Principal of the Nalbari College.

18. It may be mentioned herein that while passing the final order, no specific reasons are assigned for the conclusion reached by the learned Judge except stating that for the reasons assigned in the interim order dated 15.3.07 the writ petition is allowed.

19. It becomes necessary for us to examine the reasons assigned for passing interim order dated 15.3.07 keeping the approval of the Director of Higher Education and the consequential appointment order of the appellant herein under suspension. The learned Judge assigned two reasons for granting the interim order dated 15.3.07, namely, (i) that in view of the interim order dated 27.9.2006 passed in WP (C) No. 4852/2006 the impugned proceedings i.e., proceedings dated 9.3.06 and 10.3.06 from out of which these two present appeals arise could not be processed; (ii) that in view of the interim order dated 31.7.06 by a Division Bench of this Court in Misc. Case No. 2638/2006 in Writ Appeal No. 261/2006 also the Respondent/Nalbari College could not process the matter relating to appointment of the appellant herein.

20. The relevant portion of the interim order dated 15.3.07 reads as follows:

Prima facie, in view of the stay order of this Court passed in W.P. (C) No. 4852/2006 (the order dated 27.9.2006) about which a mention has been made above, the process for selection which has now culminated in the impugned orders could not have been processed any further. Further, in view of the stay order passed on 31.7.2006 by the Division Bench of this Court in Misc. Case No. 2638/2006 in Writ Appeal No. 261/2006 by which extension of the selection granted by the learned Single Judge was stayed, the college authority could not have processed the matter relating to selection of Principal. As per the final judgment also, the exception made is not applicable to the college in question.

21. It becomes necessary for us to examine the purport of the interim order passed on 31.7.06 referred to above.

22. It must be mentioned, at the outset, that neither the appellant herein nor the management of the Nalbari College nor any one of the respondent/writ petitioner from out of which these two writ appeals arise were parties to the above mentioned WA No. 261/06. True, it is a case, where the appointment procedure pursuant to the gazette notification dated 21.6.04 was under challenge in the said writ appeal also.

23. Though various issues were raised in the said writ appeal, we find from the order dated 15.3.07 that the only submission which was pressed in the appeal

was that as per Rule 10(3) of the 1981 Rules referred to earlier the gazette notification dated 26.2.04 ought to lapse on 21.6.06. It is to be mentioned herein that undisputedly the Government under Rule 10(3) has the power to extend the validity period of the list so published for a period of one year from its original validity period of one year. We have already noticed that the learned Single Judge while disposing of the WP (C) No. 819/06, which led to filing of WA No. 261/06, directed that the validity of the select list be extended by four more months from the date of the judgment for the reasons recorded by him. Unfortunately, the Division Bench while disposing of WANO. 261/06 did not decide the legality of the direction given by the learned Single Judge. However, the Division Bench took note of the submission made by the State that at least 17 Aided Colleges made a selection of the Principals from out of the gazetted list dated 22.6.04 and sought the approval of the Director of Higher Education on or before 18.10.06 (the date on which the validity of the list would expire pursuant to the direction of the learned Single Judge in WP (C) No. 819/06) and the State, therefore, submitted before the Division Bench that at least the cases of those 17 Colleges, the selection process may not be interfered with. Taking note of the said submission of the State, the Division bench, at paragraph 10 of the judgment, held as follows:

Considering the facts and circumstances of the entire matter and considering that in absence of appointment of regular Principal, the education of the students in the colleges is hampered and considering that the appointment could not be made because of the interim order passed by this Court, we provide that the concerned authority i.e., the Director of Higher Education, shall consider these applications for approval in accordance with Rules and Regulations in respect of sixteen colleges (as approval for Damdama College has already been issued).

24. In other words, the Division Bench by necessary implication accepted the legality of the direction given in WP (C) No. 819/06 that the validity of the gazetted select list dated 22.6.04 be extended up to 18.10.06.

25. One of the considerations that led the Division Bench in reaching such a conclusion is that the selection process was intercepted by various interim orders of this Court. In paragraph 10 itself the Division Bench did make a categorical mention of the same. If that is a conclusion reached by the Division bench in WA No. 261/06 at the final hearing and disposal of the appeal, we do not see any justification in the learned Single Judge's conclusion in the order under appeal that in view of the interim order passed on 31.7.06 in the abovementioned WA No. 261 /06 staying the extension of the validity period of the list dated 22.6.04, the appointment process of the appellant herein is vitiated. We are of the opinion that notwithstanding the interim order dated 31.7.06, the Division bench, while disposing of the WA No. 261/06, itself came to the conclusion that the consideration of the candidates from out of the gazetted select list dated 22.6.04 on or before 18.10.06 for the purpose of appointment as Principal would be a legally permissible procedure, in Which case, the existence of such an interim

order in another writ petition, wherein the present appellant is not a party, in our view, would be a wholly unjust consideration for finding fault with the selection process of the appellant herein.

26. However, the learned senior counsel, Mr. A.K. Goswami, appearing for the 6th respondent/writ petitioner, argued that the interim order dated 31.7.06 was an order in the nature of rem and, therefore, the State of Assam, which was a party to the proceeding in the abovementioned WA No. 261/06, is equally bound in all the cases insofar as it pertains granting of approval for selection of Principal from out of the select list dated 21.6.04.

27. We regret our inability to accept the submission made by the learned senior counsel, Mr. Goswami. Interim orders or arrangements are made by the Court to protect the interest of the parties to the litigation having regard to the various factors in the context of the facts and law applicable to the lis before the Court pending examination of the legality of the issues involved in the lis. Interim orders merge with the final orders as and when the issue is finally decided by the Court. Interim orders do not create or destroy any rights created by law. In fact, in the case of *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, where an undertaking was given to preempt the passing of any interim order not to collect the cess levied under the law impugned therein before the Supreme Court at the admission of the appeals by the State of Orissa that in the event of the appellant succeeding before the Supreme Court, the respondent/State would refund the amount collected. The Supreme Court though upheld the challenge to the constitutionality of the enactment levying cess declined to grant a direction to refund the cess collected under the authority of the impugned enactment which was eventually found unconstitutional on the ground that it would amount to enable the appellant to unjust enrichment itself. When the appellant sought to press the undertaking given by the State into service to get over the objection of "unjust enrichment", the Supreme Court at paragraph 75 held as follows:

Another point that was raised, was that in many of these cases the State or the Coalfield Companies had given an undertaking that in case the levy is held to be invalid by this Court, they would refund the amount collected with interest. It is submitted that the condition imposed, or undertakings given, to this effect and recorded at the time of passing interim orders in the various cases should be implemented. The interim undertakings or directions cannot be understood in such a manner as to conflict with our final decisions on the writ petitions set out above. But we agree that, to the extent refunds of amounts of cess collected after the relevant dates are permissible on the basis indicated by us, the State should refund those amounts to the assesses directly or to the Coalfields from whom they were collected, with interest at the rate directed by this Court or mentioned in the undertaking from the date of the relevant judgment to the actual date of repayment. The Coalfields, when they get the refunds, should pass on the same to their customers, the assesses.

28. In *Prabodh Verma and Others Vs. State of Uttar Pradesh and Others*, , the Allahabad High Court declared an Ordinance of the State of U.P. unconstitutional. By virtue of the said declaration of law the services of some teachers of the Secondary Schools and Lecturers of Intermediate Colleges were terminated. Therefore, the question before the Supreme Court was whether such termination was valid and if not what would be the relief to which such teachers are entitled. Even among that class of teachers called "Reserved Pool Teachers" some were appointed prior to the judgment of the Allahabad High Court but their services were terminated consequent upon the judgment of the Allahabad High Court. Others, though entitled to be appointed under the impugned law, could not be appointed by virtue of the various interim orders passed by the Allahabad High Court during the pendency of the litigation before it.

On coming to the conclusion that the decision of the Allahabad High Court under appeal was wrong, the Supreme Court was confronted with the question as to the relief that was required to be granted to the "Reserved Pool? teachers.

Insofar as the first of the above mentioned categories is concerned, at paragraph 46 of the judgment the Supreme Court held as follows:

46. The question which remains to be considered is the relief to which the reserve pool teachers are entitled. No difficulty arises in the case of those reserve pool teachers who were already appointed prior to the judgment of the High Court in the Sangh's case and whose services were thereafter terminated and who have continued to be in service by reason of the stay orders passed by the High Court or this Court. They are entitled to continue in service. They were, however, appointed on probation for a period of one year and in the ordinary course they would have been confirmed long back. No such confirmation has, however, taken place by reason of the judgment of the High Court in the Sangh's case. We have held that the Sangh's case was wrongly decided. These reserve pool teachers have, therefore, suffered by reason of a wrong judgment given by the High Court and they are entitled to have the wrong done to them rectified. It has not be alleged that any of them was or is unfit to be confirmed. In our opinion, each of them should, therefore, be deemed to be confirmed in the post to which he or she was appointed from the date of which he or she would have completed his or her period of probation in the normal and usual course.

Insofar as the second of the above mentioned categories, i.e. those who could not be appointed by virtue of interim orders of the High Court, are concerned the Supreme Court at paragraph 48 of the judgment held:

48?But for the orders of the High Court, all reserve pool teachers would, therefore, have been appointed in accordance with the provisions of either U.P. Ordinance No. 10 of 1978 or U.P. Ordinate No. 22 of 1978. They could not be so appointed by reason of the interim orders passed by the Allahabad High Court and the judgment of that High Court in the Sangh's case. Where a Court has passed an interim order which has resulted in an injustice, it is found at the time

of the passing of the final order, if it takes a different view at that time, to undo that injustice as far as it lies within its power. Similarly, where an injustice has been done by the final order of a court, the superior Court, if it takes a different view, must, as far as lies within its power, seek to undo that injustice. Great prejudice has been suffered and injustice done to those reserve pool teachers who had not been appointed to substantive vacancies which had occurred in the posts requiring to be filled by direct recruitment. Since we have held that the Sangh's case was wrongly decided, it is our duty to undo this injustice. There are, however, certain difficulties in directing these teachers to be appointed from the dates on which they would have been respectively appointed but for the orders of the High Court because those vacancies have already been filled and in all likelihood those so appointed have been confirmed in their posts and ought not to be now thrown out there from for no fault of their. In view of this fact we feel that it would be in consonance with justice and equity and fair to all parties concerned if the remaining teachers in the reserve pool are appointed in accordance with the provisions of U.P. Ordinance No.22 of 1978 to substantive vacancies in the posts of teachers in recognized institutions which are required to be filled by direct recruitment as and when each such vacancy occurs.

In substance, the Supreme Court came to the conclusion that the injustice resulting from an interim order, which was passed on the basis of tentative views of the court, is required to be rectified at the time of passing the final order. The tentative conclusion, which led to the passing of the interim order, if resulted in injustice, the court is required to undo the injustice as far as it lies within its power.

29. That is what happened in the present case. The interim order in W.P. (C) No. 4852/07, to which the appellant was a party respondent, was made solely on the ground that there was an interim order dated 31.7.06 in Misc. Case No. 2638/06 in WA No. 261/06. So far as the interim order in the instant writ petition, from out of which this writ appeal arise, is concerned once again the interim order made in WA No. 261/06 and the interim order made in WP (C) No. 4852/06, which itself was based on the interim order in WA No. 261/06, formed the basis. In substance all these interim orders were based upon the interim orders passed in WA No. 261/06. We have also noticed earlier in this judgment that the Division Bench while disposing of the WA No. 261/06 by necessary implication approved the extension of the validity period of the gazetted select list as directed by the learned Single Judge. Therefore, prevention of the appointment of the Principals like the appellant herein by virtue of the interim orders in these various writ petitions was in effect found not called for. Therefore, the Division Bench at the time of final disposal of the WA No. 261/06 directed that appointment process of the Principals of the 16 colleges for which the appointment process was said to have been initiated within the extended period of the validity of the gazetted select list be finalized. It appears from the record, i.e. the proceedings of the Director of Higher Education dated 20.2.07 that Nalbari College is one of the 16 colleges mentioned above. If only the said final order were to brought to the

notice of this Court this Court would have had no option but to vacate the interim orders passed in WP (C) No. 4852/06 and the instant writ petitions from out of which these appeals arise. The judgment in WA No. 261/06 is dated 15.2.07. The impugned orders in the instant writ petitions came to be passed exactly one month thereafter, i.e. on 15.3.07. We, therefore, are of the opinion that to interfere with the order of appointment of the appellant herein on the ground that such an appointment is made in violation of the interim orders of this Court would be wholly unjust. It is not the case, at any rate no submission is made, that the appellant is not otherwise eligible for being chosen as the Principal of Nalbari College.

30. This litigation, in our view, is a classic illustration of the unwarranted consequences which flow from ignoring the principle laid down in the various decisions of the Supreme Court including the above mentioned decision in Prabodh Verma, i.e.:

28. ...A High Court ought not to decide a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large, and, therefore, the Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh's writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being made respondents in a representative capacity, and had the petitioners refused to do so, ought to have dismissed that petition for non-joinder of necessary parties.

When the validity of the gazetted select list was in question before this Court in various writ petitions without impleading the persons, whose names are included in the select list, as party respondents or at least some of them in the representative capacity, the High Court ought not to have proceeded with the adjudication of the issues not it was justified in passing interim orders which resulted in the kind of necessary litigations such as the one demonstrated in this case.

The Nalbari College, which is a respondent in W.P. (C) No. 4852/06, is bound to obey the interim directions made against it in the said writ petition on 27.9.06 would, perhaps, be found guilty of contempt of this Court in making the appointment of the appellant, if only appropriate proceedings at the right time were initiated against the said college.

31. However, no part of the guilt, in our view, can be attributed to the appellant, (as there was no specific interim direction injuncting him from accepting the appointment) warranting to interference by this Court with his employment.

We, therefore, set aside the judgment under appeal. Both the appeals are allowed.