

GAHC010119732017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WA/131/2018

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE COMMISSIONER AND SECY. TO THE GOVT. OF
ASSAM, EDUCATION (ELEMENTARY) DEPTT., DISPUR, GUWAHATI-6

2: THE DIRECTOR OF ELEMENTARY EDUCATION

ASSAM KAHILIPARA
GUWAHATI-1

VERSUS

MRS. USHA RANI GOSWAMI and 5 ORS,
W/O DEVENDER SARMA R/O PRAFULLA BORA PATH BYE LANE NO. 2,
RUPNAGAR, GUWAHATI 22

2:SMTI PRANITA KALITA
W/O SRI PRADIP SENAPATI
R/O SANTIPUR HILS SIDE MATHURA NAGAR
BHARALUMUKH GUWAHATI-9

3:SMTI ANIMA HANDIQUE PHUKAN
W/O DHARMA RANJAN PATHAK
R/O HOUSE NO. 38
UDAYAPUR BIRUBARI
P.O. GOPINATH NAGAR
GUWAHATI 781016

4:SMTI NIRMALI CHAKRABORTY
W/O ASHOK KUMAR SARMA
R/O VILL. AND P.O. GOTANAGAR GAPAL THAN NEAR N.H.37 GUWAHATI
781033

5:SMTI RULA BARUAH
W/O SHRI MUKUT GOSWAMI ASSAM ENGINEERING COLLEGE NIZAPAR

GUWAHATI 781014

6:SMTI KAMINI DAS
W/O SRI PRAMOD CHOUDHURY ASSAM ENGINEERING COLLEGE
CAMPUS GUWAHATI-1

Advocate for the Petitioner : Mr. R. Mazumdar, Id. Standing Counsel

Advocate for the Respondent : Mr. I. Choudhury Sr.Adv.

Mr. S. Biswakarma, Adv.

BEFORE

HON'BLE THE CHIEF JUSTICE

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 29.03.2023

Date of Judgment & Order :24.05.2023

JUDGMENT & ORDER (CAV)

(M Thakuria, J)

Heard Mr. R. Mazumdar, learned Standing counsel, Education Department, representing the appellants. Also heard Mr. I. Choudhury, learned Senior Advocate assisted by Mr. S. Biswakarma, learned counsel for the respondents.

2. This writ appeal is filed challenging the Judgment & Order dated 16.05.2017, passed in Review petition 81/16 and Judgment & Order dated 10.03.2011 passed in WP(C)No.5286/2004.

3. The brief facts leading to the filing of the present appeal are that;

3.1. The case of the writ petitioners (present respondents) are that, they were duly selected as teachers in M.E. Schools of Guwahati. They claim that the posts against which they were selected were sanctioned by the Government on 16.11.1991 and that their names appeared in the select list prepared by the board in its meeting held on 17.02.1994. Based on such appointment the writ petitioner Nos.1, 2, 3 and 5 were receiving salaries till May 1995, and the writ petitioner Nos.4 & 6 received salaries till June 1995.

3.2. At the time of appointment many controversies arose and for that reason one Committee was formed headed by Shri S. to enquire into the controversies.

3.3. The Committee classified the appointments into three classes;

- I. Regular or legal/valid.
- II. Irregular appointees
- III. Illegal appointees.

3.4. Accordingly, the Committee recommended regularization of first two categories and termination of the third category. Pursuant to the recommendation, the cabinet decision was taken on 21.02.2000, and the Government decided to regularize 3511 numbers of CP/Senior Basic/Junior Basic/ME/MEM/H.S. School teachers in Kamrup District, who were appointed irregularly during the period of 01.03.1991 to 30.11.1996. A task force and screening committee was formed to execute the decision. The writ petitioners/present respondents claimed that the screening Committee approved their regularization.

3.5. On 18.08.2000, the Government issued another circular withdrawing the circular dated 10.08.2000. The services of the said petitioners were regularized on 05.03.2001 w.e.f. 01.08.2000, in contravention of the circular dated 10.08.2000. Subsequently, by virtue of the directions of the Government the District Elementary Education Officer finally adjusted the services of the petitioners on 25.11.2002 & 30.11.2002 against the posts lying vacant in various schools.

3.6. However, disbursal of salaries of the writ petitioners/respondents were stopped, and on enquiry they had come to know that their salary had been stopped at the instance of the Finance Department. Hence, they preferred the writ petition numbered as WP(C) No.5286/2004, for setting aside the notification dated 06.06.2003 and for a direction to release their salary regularly along with arrears, which was allowed by the Single Judge.

4. Thus, the State respondents/present appellants being highly aggrieved and dissatisfied of the judgment & order passed in WP(C)No.5286/04, dated 10.03.2011, preferred an appeal before the Division Bench, which was numbered as WA.No.46/13. The said Writ Appeal was disposed of, by this Court on 10.05.2016, by granting liberty to the State to file a Review petition being Review Petition No.81/16. The said Review Petition was taken up by the learned Single Judge, and was finally disposed of, by the order dated 16.05.2017, declining to interfere with the impugned judgment. Hence, the present Appeal is filed challenging the orders dated 10.03.2011 & 16.05.2017.

5. The contention of the present respondents/writ petitioners before the

learned Single Judge was that;

5.1. The petitioners claimed salary challenging the notification of the Finance Department dated 06.06.2003, on the ground that they were adjusted against the vacant posts, pursuant to the cabinet decision dated 21.02.2000, and the circular dated 10.08.2000. The subsequent W.T. message dated 27.08.2001 does not have any application or implication upon the petitioners' case.

5.2. The petitioners having been appointed in the year 1993-1994, and their service books were duly opened, received salaries, and were recommended for regularization by the Manaharan Committee followed/approved by Cabinet decision dated 21.02.2000. Thus, the impugned notification of Finance Department was in violation of the constitutional mandate.

5.3 That few of the similarly situated persons from amongst irregular appointees have been duly regularized/adjusted against vacant posts and are receiving salaries with effect from the date of their regularization.

5.4. The WP(C)No.999/2000 filed by 54 such persons was disposed of, with a direction to regularize their services and that order was never challenged by the respondents/present appellants and hence, has attained finality.

5.5. The petitioners had put in more than 10 years of service and this is the only source of their livelihood. They have bonafide rightful claim towards salary. Thus, before issuing the notice dated 06.06.2003, it was incumbent upon the Finance Department to allow the writ petitioners to present their case.

6. The contention of the respondents/present appellants before the single Judge was that;

6.1. The writ petitioners/present respondents are not entitled to challenge the circular dated 06.06.2003 or claim arrear salary from the date of their initial appointments or salary etc., solely on the basis of circular dated 10.08.2000, in as much as the said circular was superseded by circular No.425/95/Pt-11 dated 25.11.2002, by which the State had decided to regularize the irregular appointees.

6.2. The writ petitioners/present respondents' claims are not *bonafide* in as much as they could not produce any advertisement or place anything on record regarding their interview etc. to justify their selection and appointment. Even their appointment letters does not disclose any advertisement or selection.

6.3. The claim of the writ petitioners/present respondents as based on circular dated 10.08.2000, is not maintainable on another count that the said circular itself specifies to carry out the exercise within a period of seven days. The said circular did not contemplate anything regarding giving retrospective effect.

6.4. During regularization, the petitioners had given undertaking not to claim any arrear salary. Therefore, they are not entitled to claim the arrear salary.

7. The points, which arose from decision before the learned Single Judge are as follows;

7.1. Since, the writ petitioners/present respondents were receiving current salaries by virtue of the interim orders, the only issue left to be determined was regarding arrear salary of the writ petitioners/present respondents from the retrospective dates of their appointment from the years 1993-1994.

8. The conclusion and decision of the learned Single Judge, as follows; "the learned Single Judge while deciding the writ petition held that the undertaking given by the teachers were on the count that they were not in equal bargaining position with the State. At that point of time the writ petitioners were so constrained that they hardly could resist the State action. They had no choice, but to relinquish their claim towards arrear salary, despite of rendering services for long years. Thus, the learned Single Judge has held that the undertaking given by the writ petitioners at time of regularization amounts to unconscionable contract as has been held by the ***Apex Court in 1986(3) SCC 156, Central Inland Water Transport Corporation vs. Brojonath Ganguly***. With this conclusion, the learned Single Judge directed payment of arrear salaries to the writ petitioners within a period of six months from the date of receipt of this order."

09. Arguments of State appellant:-

The learned counsel for the present appellants/ respondents has prayed for setting aside the impugned Judgments and Orders dated 10.03.2011 and 16.05.2017 and the same being unsustainable in the eye of law, the present respondents/writ petitioners being illegal appointees were appointed without any valid selection and against non-existent posts.

10. While deciding the matter, the learned Single Judge, had not gone through the following facts, therefore, it is liable to be set aside and quashed;

10.1. The impugned order dated 16.05.2017 & 10.03.2011 are not sustainable in the eye of law. As the writ petitioners/present respondents do not have enforceable rights to claim arrear salary, while they failed to prove their initial selection as legal and valid.

10.2. The learned Single Judge did not take into consideration the most vital aspect of the matter that the writ petitioners having accepted the terms of regularization could not have claimed arrear salary at the belated stage under the settled law of the land.

10.3. The learned Single Judge had granted relief to the writ petitioners/present respondents on equitable grounds. However, in the instant case in hand equity will not override the settled principles of law regarding legality of appointments, valid selection and the rights accruing there from. In the instant case, in hand admittedly, there was no advertisement, no selection, and the writ petitioners/present respondents were appointed against non-existent posts to grant them relief under equitable principles overriding the settled principles of law in this regard.

10.4. The orders of regularization do not refer to anything as to the arrear salary for the service rendered by the writ petitioners/present respondents having accepted the terms of regularization writ petitioners are estopped from

challenging the same. Therefore, their claim towards arrear salary should have been rejected.

10.5. The State exchequer cannot be overburdened to benefit the illegal appointees. The regularization of the writ petitioners/present respondents were made as one time measure and could not have questioned by them. Hence, they do not have any enforceable legal right.

10.6. The writ petitioners/present respondents were regularized as a part of policy decisions, which had financial implication on the State exchequer. Thus, the same should not have been interfered by the Court directing payment of arrear salary, while the policy adopted by the State had no such provision and the said policy was neither under challenge nor was interfered with by the Court. In view of the above, the impugned judgments may be set aside and quashed.

11. Further, Mr. Mazumdar, learned Standing counsel, Education Department appearing on behalf of the present appellants/respondents has submitted that the learned Single Judge erred in holding that the undertaking given by the present respondents/writ petitioners at time of regularization amounts to unconscionable contract as they had no option. He contended that the gross delay in approaching the Court so as to challenge the validity of the said undertaking is in itself sufficient to oust the petitioners' claim.

12. He also submitted that the learned Single Judge passed the Judgment relying on the decision of the ***Central Inland Water Transport Corporation (Supra)***. As per the order of the Government, the present respondents/writ

petitioners have accepted the terms and conditions for regularization, wherein, it has been already mentioned that the present respondents/writ petitioners shall not claim their arrear salary. However, the services rendered by them, will be counted for the purpose of the pensionary benefits. In the notification, it was also held that regular time pay scale would be provided to them as per the existence Rules.

13. Further, he also submitted that the present respondents/writ petitioners were selected and accordingly, the select list was prepared by the Board in its meeting held on 17.02.1994. On the basis of the said appointment, the petitioners No.1, 2, 3 & 5 were receiving salary up-to May 1995, and petitioners Nos. 4 & 6 received their salary till June 1995. After, consideration of the Committee's recommendations these appointments were classified into three categories and accordingly, I & II categories were considered entitled and third category which was of illegal appointments against the non-existent posts was directed to be terminated. The writ petitioners/present respondents were under I & II categories, i.e. the irregular appointees and accordingly, their services were regularized on 05.03.2001 with effect from 01.08.2000. The District Elementary Education Officer had finally adjusted their services on 25.11.2002 and 30.11.2002, against the vacant posts lying in different schools. The writ petitioners/present respondents were regularized on basis of the recommendation of the Manaharan Committee, and as per the Govt. notification, and thus, they cannot claim for arrear salary, though, their past services will be counted for their pensionary benefits. Thus, at this belated stage they cannot claim for arrear salary and the said circular did not contemplate anything regarding giving retrospective effect, and consequentially, they are not entitled to claim for arrear salary.

14. In this context, the learned Senior Advocate, Mr. I. Choudhury has submitted that the learned Single Judge had rightly passed the Judgment in the previously mentioned cases, and there is no necessity of any interference of this Court. He also submitted that the writ petitioners/present respondents were declared as irregular appointees by the Manaharan Committee and as per the cabinet decision, their services were regularized. More so, it is also submitted that the Government has utilized the services of the writ petitioners/present respondents since 1995 till date, without any break. Hence, they cannot deny arrear salary of the present respondents/writ petitioners. He accordingly, submits that the Judgment and order passed by the learned Single Judge in Writ Petition(C) No.5286/2004 and Review Petition No. 81/16, needs no interference of this Court at this stage.

15. After hearing the submissions made by the learned Advocates of both sides, as well as perusing the case records, it is seen that the present respondents/ writ petitioners were appointed irregularly against the non-existing posts and also received salary. Due to some controversies, the Manaharan Committee was formed, where the appointments of the present respondents/writ petitioners were considered and were recommended for regularization. Accordingly, in the cabinet decision, the services of the present respondents/writ petitioners were regularized on 05.03.2001 with effect from 01.08.2000, and finally adjusted against the posts lying vacant in various schools.

16. The learned Single Judge, while, deciding the WP(C)No.5286/2004, wherein the arrear salary claim of the present respondents/writ petitioners was allowed by considering the decision passed in ***Central Inland Water Transport Corporation*** (*Supra*). The facts of the said case were totally different, as the

issue was, as to the meaning of Government Company as defined in the Section 617 of the Company's Act to be "State" within the meaning of the Article of the Constitution of India and whether an unconscionable term in a contract is void. The matter was in respect the clause in the contract for termination of service on three months' notice to either sides or service of the permanent employee to be terminated on the ground of services no longer required in the interest of the company."

17. The Hon'ble Supreme Court in ***Sukhdeo Pandey vs. Union of India*** reported in 2007 (7) SCC 455, held that "*in a situation where the appellant having worked as a postman illegally and irregularly detected after longtime, was held to have no right to hold the said post and the authorities were right in reverting him back to the substantive post. He was given the benefit of calculation of the period not as a postman but as his substantive post as EDBPM (Extra Departmental Branch Post master)*".

18. In the case of ***Shrawan Kr. Jha vs. State of Bihar***, reported in ***AIR 1991 SCC 309***, the issue was the cancellation of appointment without notice. The Hon'ble Supreme Court did not go into the merit of the appointment and simply discussed the point of cancellation without any opportunity to the appellants and set aside the impugned order and asked the State Govt. to afford an opportunity of hearing to the appellants and then to give findings as to whether the appointment was valid. The ***Hon'ble Madras High Court in W.P.No.1904/2018***, while passing the Judgment dated ***12.02.2019***, in the case of ***T. Porkodi vs. the Commissioner (Education) & Anr.***, took into consideration, various Judgments of the Hon'ble Supreme Court, wherein, it is held in para 7 & 8 as under;

“7. It is useful to cite the judgment of the Supreme Court in the case of *Secretary to Government, School Education Department, Chennai vs. R.Govindasamy* reported in (2014) 4 SCC 769 also reiterated the principles in Paragraph No.8:

8. This Court in [State of Rajasthan v. Daya Lal \[State of Rajasthan v. Daya Lal, \(2011\) 2 SCC 429 : \(2011\) 1 SCC \(L&S\) 340 : AIR 2011 SC 1193\]](#) has considered the scope of regularization of irregular or part-time appointments in all possible eventualities and laid down well-settled principles relating to regularization and parity in pay relevant in the context of the issues involved therein. The same are as under: (SCC p. 435, para 12)

“(i) The High Courts, in exercising power under [Article 226](#) of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularisation had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularization of services of an employee which would be violative of the constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized.

(ii) Mere continuation of service by a temporary or ad hoc or daily-

wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be 'litigious employment'. Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme

should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part-time temporary employees.

(v) Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute."

8. Though the Consolidated Pay Employees / Contract Employees / Daily Wages Employees are not entitled for regularization and permanent absorption contrary to the Recruitment Rules in force, the case of the writ petitioner was considered by the Competent Authorities as a special case and accordingly, an order of regularization was passed in Proceedings dated 10.10.2016, granting retrospective regularization with effect from 10.06.2009 onwards. However, the writ petitioner is not satisfied with the retrospective regularization granted with effect from 10.06.2009 and now, they are seeking further retrospective regularization from the date of their initial appointment during the year 1998."

19. Here in the instant case, it is seen that the present respondents/writ petitioners were irregularly appointed against non-existent posts and accordingly, their services were regularized vide order dated 05.03.2001 w.e.f. 01.08.2000, and their past services were considered for pensionary benefits. Apart from that, they were given regular time pay scale as per the existing Rules and were also adjusted in the vacant posts as per the notification.

20. It is a fact that, as per the said notification, the present respondents/writ petitioners had undertaken not to claim any arrear salary as their initial appointment was regularized on 05.03.2001 w.e.f. 01.08.2000. Their services

were regularized, in terms of the cabinet decision taken on 21.02.2000. Instead of removal for appointment against the nonexistent post without any advertisement and no selection process the Government was magnanimous in taking decision to hold their appointment as irregular and regularized them, of course with undertaking from them for no back wages. The writ petitioners/present respondents instead of being content with regularization and adjustment against the vacant posts, come up with a highly belated claim for back wages towards past services, which they gave after having been irregularly appointed on posts which were not in existence.

21. In WP(C)172/2017, along with batch of other 9 cases, the issue raised was for getting pension under old Rules, after regularization of service. The petitioners in those cases were appointed on various posts but appointment after 1st day of February' 2005, was relevant. They were not allowed the pensionary benefits under the old Rules, 1969, and the learned Single Bench of this Court asked the Department to give the pensionary benefits under provisions of the Assam Services (Pension) Rules, 1969, to persons similarly situated, considering the past service prior to regularization. In number of subsequent cases this Court held the regularization of service to be prospective, and the period of services rendered from initial appointment would be counted for pensionary benefits only. Earlier also similar issue was there before this Court in WP(C)597/2002, and against the order dated 13.05.2004, the State preferred W.A. 145/2009, which was decided against the State on 24.03.2010 and SLP(Civil)19351-19360/2010 of the State before Supreme Court was dismissed on 02.08.2010. In that case, the past service was counted for the purpose of pension only.

22. In the instant writ appeal, the present respondents/writ petitioners were

not only regularized but also were adjusted in posts lying vacant in various schools and were also given the regular time pay scale along with the pensionary benefits, as applicable and being so, their regularization of service had a prospective effect of gaining entry into the cadre and getting regular scale of pay.

23. In view of the above observations, we find that the learned Single Judge ought not to have allowed the claim of the respondents for arrear salary. There are sufficient and justifiable grounds to interfere in the Judgment & Order dated 10.03.2011, passed in WP(C)No.5286/2004 as well as order dated 16.05.2017 passed in Review Petition No.81/16, and accordingly, the same are reversed and set aside.

24. With above observations, this writ appeal stands allowed. No order as to cost.

JUDGE

CHIEF JUSTICE

Comparing Assistant