

GAHC010026342019



2024:GAU-AS:9360

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

Case No. : WA/106/2019

SMTI MINA DEVI
D/O- LATE ACHINTA BHAGAWATI, R/O- VILL. AND P.O.- GHARMORA, P.S.
AND DIST.- LAKHIMPUR, ASSAM, PIN- 787032.

VERSUS

THE STATE OF ASSAM AND 3 ORS
TO BE REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF
ASSAM, EDUCATION DEPARTMENT, DISPUR, GUWAHATI- 06.

2:THE DIRECTOR OF ELEMENTARY EDUCATION

ASSAM
KAHILIPARA
GUWAHATI- 19.

3:THE DEPUTY INSPECTOR OF SCHOOLS
NORTH LAKHIMPUR
DIST.- LAKHIMPUR
ASSAM
PIN- 787031.

4:THE BLOCK ELEMENTARY EDUCATION OFFICER

NORTH LAKHIMPUR
DIST.- LAKHIMPUR
ASSAM
PIN- 787031

Advocate for the Petitioner : MR. R P KAKOTI SR. ADV., MS. L WAJEEEDA,MR. N ISLAM

Advocate for the Respondent : SC, EDU,

:::BEFORE:::

**HON'BLE MR. JUSTICE LANUSUNGKUM JAMIR
HON'BLE MR. JUSTICE N. UNNI KRISHNAN NAIR**

**Date of hearing : 13.09.2024
Date of Judgment: 19.09.2024**

Judgment & Order(CAV)

[N. Unni Krishnan Nair, J.]

Heard Mr. R. P. Kakoti, learned senior counsel, assisted by Mr. S. Sutradhar, learned counsel, appearing on behalf of the appellant. Also heard Mr. Nayanjyoti Khataniar, learned standing counsel, Elementary Education Department, Government of Assam, appearing on behalf of all the respondents.

2. The present appeal has been so preferred by the appellant, herein, presenting a challenge to the order, dated 17.07.2018, passed by the learned single Judge in WP(c)5492/2012, rejecting the claim of the petitioner so made therein.

3. The aforesaid writ petition was so instituted by the present appellant as petitioner, praying for a direction upon the respondent authorities for releasing her arrear salary from the date of her initial appointment as a stipendary teacher in Mohaijan Lower Primary School, North Lakhimpur.

4. The appellant as petitioner in the said writ petition being WP(c)5492/2012, had contended that she was so selected by the Sub-Divisional Advisory Board for Elementary Education, North Lakhimpur, and her

name was placed at Serial No. 15 of the select list so prepared. The appellant not being issued with a formal order of appointment, she had approached this Court along with similarly situated candidates by way of instituting a writ petition being Civil Rule No. 283/1995. The said writ petition was disposed of by this Court, vide an order, dated 14.02.1996, with a direction to the District Elementary Education Officer (DEEO), North Lakhimpur, Assam, to make an inquiry with regard to the averments made by the petitioners in the said writ petition and if the same are found to be correct; to consider the cases of the petitioners, therein, in a just and fair manner for appointment as Assistant Teachers.

5. The appellant has further contended that in terms of the directions passed by this Court; the Deputy Inspector of Schools, North Lakhimpur, vide order, dated 08.03.2001, proceeded to appoint her as a stipendary teacher against a retirement vacancy of one Smt. Dimbeswari Changmai of Aziz Baruah Lower Primary School and posted her in such capacity at Mohaijan Lower Primary School. The said order of appointment of the appellant, authorized to her, a stipend of Rs. 1,800/- p.m. with effect from the date of her joining. The appellant had joined her service on 13.03.2001.

6. It is seen that vide an order, dated 19.07.2001, the services of the appellant along with other similarly situated teachers, came to be so cancelled. However, the said order of cancellation in respect of the appellant and another stipendary teacher was reviewed and vide order, dated 08.08.2001, they were held to be entitled to their monthly salary as usual. The appellant has further contended that in terms of her initial order of appointment, she continued to render her service in Mohaijan Lower Primary School.

7. The salary of the appellant not being released since the date of her initial appointment; the appellant had approached this Court by way of instituting a writ petition being WP(c)1322/2002, praying for release of her salary. This Court, vide order, dated, 04.03.2002, was pleased to dispose of the said writ petition, with a direction to the Director, Elementary Education Department, Assam, to examine the matter and to release the salary of the appellant, herein, if she was found eligible for the same. However, the salary of the appellant not being released; she had approached this Court again by way of instituting writ petition being WP(c)5492/2012, with the prayers as noticed hereinabove. The learned single Judge on consideration of the matter and by holding that the initial appointment of the appellant being so effected against a non-existent post; her such appointment would be deemed to be an illegal one and accordingly, she was held to be not entitled to any salary. This Court, further in the facts so involved; proceeded to hold that the Court cannot issue a writ of mandamus, directing the respondents to pay the salary of the appellant even if she had rendered her service against a non-existent post.

8. Being aggrieved, the appellant has instituted the present proceeding before this Court.

9. The writ petition being so instituted by the appellant, herein, for release of her salary since the date of her initial appointment as a stipendary teacher; this Court for consideration of the said issue, would be called upon to examine the nature of the appointment of the appellant, herein.

10. The materials brought on record, would go to reveal that the appellant, herein, was selected by the Sub-Divisional Advisory Board and her name was so included in the select list against the quota of 10 per cent so reserved at

the relevant point of time for the purpose of appointment of the sons/daughters and dependents of the retired school teachers.

11. The name of the appellant was placed at Serial No. 15 in the said select list. The appellant along with others had, thereafter, approached this Court by way of instituting a writ petition being Civil Rule No. 283/1995, which was disposed of by this Court vide order, dated 14.02.1996, with a direction upon the respondent authorities to consider the contentions of the petitioners, therein, in a just and fair manner for their appointment.

12. It is seen that the Director, Elementary Education Department, Assam, vide a communication, dated 19.03.1999, in reference to the directions passed by this Court in Civil Rule No. 283/1995, had directed the Deputy Inspector of Schools, North Lakhimpur, to comply with the directions so passed by this Court in respect of the appellant, herein, and another teacher, as well as to intimate the authorities about the action so taken. Accordingly, it is seen that the Deputy Inspector of Schools, North Lakhimpur, vide order, dated 08.03.2001; proceeded to appoint the appellant, herein, as a stipendary teacher against the post falling vacant on retirement of Smt. Dimbeswari Changmai of Aziz Baruah Lower Primary School.

13. The appellant was so appointed against the said vacant post and posted at Mohaijan Lower Primary School. The appellant, accordingly, joined her service on 13.03.2001. It is further seen that the appointment order of the appellant as a stipendary teacher, was cancelled vide order, dated 19.07.2001. However, vide order, dated 08.08.2001; the Deputy Inspector of Schools, North Lakhimpur, by holding that the appellant, herein, was so appointed in terms of the directions passed by this Court and also in terms of the

requirement so made by the Director, Elementary Education Department, Assam, vide communication, dated 19.03.2001, the petitioners, therein, were held to be entitled to continue in their services and draw their monthly salaries as usual.

14. The appellant being aggrieved by the non-payment of her stipend so authorized to her, had approached this Court by way of instituting the writ petition being WP(c)1322/2002. This Court vide order, dated 04.03.2002, had disposed of the said writ petition with a direction to the Director, Elementary Education Department, Assam, to examine the matter and release the salary of the appellant if she was found to be so eligible.

15. It is seen that the appellant, herein, vide the order, dated 08.03.2001, was appointed as an Assistant Teacher on stipendary basis against the retirement vacancy of one Smt. Dimbeswari Changmai of Aziz Baruah Lower Primary School and was posted in such capacity to Mohaijan Lower Primary School. However, the said post at the relevant point of time, was not a vacant post in-as-much as vide an order, dated 01.03.1999; the retirement vacancy of Smt. Dimbeswari Changmai in Aziz Baruah Lower Primary School, was already filled-up by transferring one Smti. Dipali Gogoi against the said post. Accordingly, the appellant came to be so appointed against a non-existent post.

16. It is also seen that the case of the appellant, herein, was contended by the respondent authorities to have been duly considered by the respondent authorities in terms of the directions passed by this Court vide order, dated 04.03.2002, in WP(c)1322/2002, and the authorities had come to a conclusion that the appellant having been so appointed against a non-existent post; she

would not be entitled to any salary.

17. It is also evident from the materials brought on record that the appellant, herein, was so selected by the Sub-Divisional Advisory Board and placed in the select list against the 10 per cent reservation quota for the wards and dependents of the retired school teachers. The select list was so prepared on 29.12.1993.

18. The respondent authorities have categorically contended that the appellant was placed at Serial No. 15 of the select list under the quota so mandated for the wards of the retired teachers. However, the 10 per cent reservation quota was further contended to have been fulfilled with the appointment of 13 candidates above the appellant in the year 1996 itself. Accordingly, it is contended that the said select list was not called upon to be so acted upon after the appointments were so made therefrom against the 10 per cent quota so reserved for the wards/dependents of the retired school teachers.

19. We have also noticed, on perusal of the order, dated 14.02.1996, passed by this Court in Civil Rule No. 283/1995, that this Court had not passed any direction for the appointment of the appellant, herein. Even if it is so construed that the appellant was, vide the order, dated 14.02.1996, directed to be so appointed in terms of her selection for the post, in question; such direction for appointment of the appellant has to be so construed to be one so made by requiring the respondent authorities to appoint the appellant by following the procedure so mandated by law. It is to be noted that no material has been brought on record to demonstrate that the vacancy against which the petitioner was appointed, existed prior to 29.12.1993.

20. It is seen that the appellant while being appointed vide order, dated 08.03.2001, came to be so appointed against a post which was not vacant at the relevant point of time and was already occupied with effect from the year 1999 by another teacher viz. Smti. Dipali Gogoi, who was so transferred against the said post by an authority competent to pass such orders. Further, it is contended by the respondent authorities, during the hearing of the present proceeding, that in terms of the policy of the Government for subjecting the teachers whose initial appointment were held to be either irregular and/or illegal to a process of screening by a constituted committee; the appellant would also not be eligible to the said benefit in-as-much as, in the list of teachers recommended by the Committee concerned for being so appointed against the vacant sanctioned posts, whose initial appointments were held to be either irregular and/or illegal; the name of the appellant does not find mention. It is also contended that the appellant has not challenged the said position.

21. It is seen that the respondent authorities in the writ petition, had filed their affidavit-in-opposition as far back as in the month of June, 2014. However, inspite of the fact that initial appointment of the appellant was highlighted therein, to have been so effected against a non-existent post; the appellant had not taken any steps to dispute the above position and/or to challenge her appointment in a non-existent post. Further, no material was brought on record to demonstrate that the post against which the petitioner was so appointed, existed on the date, the Advertisement, in question, was so published.

22. In view of the above discussions; we are of the considered view that the appellant, herein, was so appointed against a non-existent post and

accordingly, the appointment so effected in the case of the appellant, was an illegal appointment.

23. The learned single Judge on consideration of the materials coming on record, had, vide judgment & order, dated 17.07.2018, passed in the writ petition being WP(c)5492/2012, drawn the following conclusions:

“3. The respondent No.2 has filed counter affidavit in this case, inter alia, stating that the post against which the writ petitioner had been shown to have been appointed was filled up by appointing another person, viz., Smti Dipali Gogoi who was appointed as an Assistant Teacher of Kadam Balijan L.P. School and transferred to Aziz Baruah L.P. School vice Dimbeswari Changmai retired. Since the post in question was filled up by appointing Smti Dipali Gogoi prior to the appointment of the petitioner in Aziz Baruah L. P. School, hence, the appointment of the writ petitioner was against a non-existent post as a result of which no salary could be paid to her.

4. The learned counsel for the petitioner has not been able to dispute the stand taken in the affidavit filed by the respondent No.2 but submits that it is not the fault of his client that the post in question was already filled up by appointing another person. Be that as it may, the law is fairly settled that an appointment made against a non-existent post would be illegal. In that view of the matter, this Court cannot issue a writ of mandamus directing the respondents to pay the salary to the petitioner even if she has rendered services against a non-existent post. Under the circumstances, the prayer made in the writ petition cannot be entertained by this Court.”

24. In view of the conclusions reached by us hereinabove; we are of the considered view that the conclusions reached by the learned single Judge in the matter, would not call for any interference.

25. It is a settled position of law that a claim for salary is contingent upon the legality of the appointment. If the appointment is found to be illegal or against statutory provisions; the individual so appointed, would have no legal right to claim salary. The claim for salary can arise only from a valid appointment.

26. As in the present case; the appellant, herein, being appointed against a non-existent post; she would not be entitled to claim her salary.

27. Mr. Kakoti, learned senior counsel appearing for the appellant; by placing reliance on the decision of a Division Bench of this Court rendered in WA No. 19/2017[*Mrs. Beauty Deka v. State of Assam & ors.*], has contended that the appellant being permitted to continue in her service by application of the principle of ***quantum meruit***; she would be entitled to be authorized, at least, the stipend for the period, she had so served in the school, in question. It is also contended by the learned senior counsel that the appellant, as on date, was continuing in her service in the said school.

28. Per contra, Mr. Khataniar, learned standing counsel, Elementary Education Department, has contended that the departmental authorities had never permitted the appellant to continue in her service and in the event, the Headmaster of the said school had so permitted her to continue in the school; the departmental authorities cannot be saddled with the responsibility of releasing to the appellant, herein, the stipend for the period of such continuance in her service in the said school in-as-much as the appellant was, admittedly, appointed against a non-existent post.

29. We have considered the above submissions made by the learned counsels appearing for the parties and are of the considered view that the right to salary, pension and other service benefits, are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, would spring only from a valid and legal appointment to a post.

30. This Court having already concluded that the initial appointment of the appellant, herein, being illegal; would be *non est* in the eye of law and accordingly, no statutory entitlement for salary, can be said to arise in the matter in favour of the appellant, herein.

31. In support of the conclusions reached by us; reliance is placed on a decision of the Hon'ble Supreme Court in the case of ***State of Bihar & ors. v. Devendra Sharma***, reported in **(2020) 15 SCC 466**. The conclusions of the Hon'ble Supreme Court in the matter, being found to be relevant to the present case; is extracted hereinbelow:

"36. We do not find any merit in the said argument. A Full Bench of the High Court in Rita Mishra v. Director, Primary Education while dealing with appointment in the Education Department claiming salary despite the fact that letter of appointment was forged, fraudulent or illegal, declined such claim. It was held that the right to salary *stricto sensu* springs from a legal right to validly hold the post for which salary is claimed. It is a right consequential to a valid appointment to such post. Therefore, where the very root is non-existent, there cannot subsist a branch thereof in the shape of a claim to salary. The rights to salary, pension and other service benefits are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of the law, no statutory entitlement for salary or consequential rights of pension and other monetary benefits can arise."

37. Such judgment of the Full Bench was approved by the three-Judge Bench of this Court in R. Vishwanatha Pillai v. State of Kerala. This Court held as under: (SCC p. 116. paras 17-18)

"17. The point was again examined by a Full Bench of the Patna High Court in Rita Mishra v. Director, Primary Education. The question posed before the Full Bench was whether a public servant was entitled to payment of salary to him for the work done despite the fact that his letter of appointment was forged, fraudulent or illegal. The Full Bench held: (SCC OnLine Pat para 13: AIR p. 32, para 13)

'13. It is manifest from the above that the rights to salary, pension and other service benefits are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of the law, no statutory entitlement for salary or consequential rights of pension and other monetary benefits can arise. In particular, if the very appointment is rested on forgery, no statutory right can flow from it.'

18. We agree with the view taken by the Patna High Court in the aforesaid cases.”

32. In view of the above discussions; we are of the considered view that the judgment & order, dated 17.07.2018, passed by the learned single Judge in WP(c)5492/2012, would not call for any interference and accordingly, the present writ appeal stands dismissed. However, there shall be no order as to costs.

JUDGE

JUDGE

Comparing Assistant