

GAHC010063672021



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

Case No. : WP(C)/3770/2021

DIBYAJYOTI BORAH AND 4 ORS
S/O SRI KAMAL CHANDRA BORAH
RESIDENT OF VILLAGE KHANGIA
PS PULIBOR, DIST JORHAT ASSAM

2: DR. GOURI GOUTAM BORTHAKUR
S/O BUDHINDRA NATH BORTHAKUR

RESIDENT OF VILLAGE RAJOTIA GOAN
MALOU ALI
PS JORHAT
ASSAM

3: DR. RUPAM JYOTI NATH
S/O LATE UTSHAV NATH
RESIDENT OF BARPARA
BONGAIGAON
ASSAM

4: DR. JYOTISHMOY BORAH
S/O LATE DINA KANTA BORAH
RESIDENT OF VILLAGE AND PO HATBOR
PS JAKHALABANDHA
DIST NAGAON
ASSAM

5: SMTI DHIRU BARMAN
W/O DIPANKAR MEDHI

RESIDENT OF KAKOIJANA
BONGAIGAON
PS ABHAYAPURI
ASSA

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, HIGHER EDUCATION TECHNICAL DEPT. SACHIVALAYA,
DISPUR, GUWAHATI 06

2:THE DIRECTOR OF TECHNICAL EDUCATION

ASSAM
KAHILIPARA
GUWAHATI 19

3:THE JORHAT INSTITUTE OF SCIENCE AND TECHNOLOGY
REPRESENTED HEREIN BY ITS PRINCIPAL
SOTAI
PO CHENIJAN
DIST JORHAT
ASSAM
785010

4:THE BINESWAR BRAHMA ENGINEERING COLLEGE

REPRESENTED HEREIN BY ITS PRINCIPAL
BIJULEEBARI
PO CHANDRAPARA
DIST KOKRAJHAR
ASSAM
78337

Advocate for the Petitioner : MR S BORTHAKUR

Advocate for the Respondent : SC, HIGHER EDU

Linked Case : **WP(C)/5610/2022**

JYOTISHMOY BORAH AND 2 ORS.
S/O LATE DINA KANTA BORAH

VILL. AND P.O.- HATBOR

P.S.- JAKHALABANDHA

DIST.- NAGAON
ASSAM.

2: DR. RUPAM JYOTI NATH
S/O LATE UTSHAV NATH

R/O BARPARA
BONGAIGAON

P.S.- BONGAIGAON

DIST.- BONGAIGAON
ASSAM.

3: DHIRU BARMAN
W/O DIPANKAR MEDHI

R/O KAKOIJANA
BONGAIGAON

P.S.- ABHAYAPURI

DIST.- BONGAIGAON
ASSAM.
VERSUS

THE STATE OF ASSAM AND 2 ORS.

REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HIGHER EDUCATION TECHNICAL DEPTT.

SACHIVALAYA
DISPUR
GUWAHATI- 06.

2:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HIGHER EDUCATION (TECHNICAL) DEPTT.

DISPUR
GUWAHATI- 781006.

3:THE DIRECTOR OF TECHNICAL EDUCATION
ASSAM
KAHILIPARA
GUWAHATI- 19.

Advocate for : MR S BORTHAKUR
Advocate for : SC
HIGHER EDU appearing for THE STATE OF ASSAM AND 2 ORS.

Linked Case : **WP(C)/1162/2023**

DR. BHASKAR JYOTI SARMAH AND 5 ORS.

SON OF JITENDRA NATH SARMAH

BHAGAWATIPARA
TITABAR

JORHAT- 785630.

2: BARNALI DAS
DAUGHTER OF LATE BIMAL KANTI DAS

SOUTH HAIBAR GAON

LMD ROAD
P.O.- HAIBARGAON

NAGAON- 782002.

3: DR. PARASA HAZARIKA
DAUGHTER OF ARUN CH. HAZARIKA

E-7
CSIR NEIST COLONY

PULIBOR
JORHAT- 785001.

4: MD. IMTIAZ ALAM
SON OF MAHAMMAD ALI

SUNDARBARI NEAR MASJID

HOUSE NO. 22
WARD NO. 2

ASSAM SISHU KALYAN ROAS
JALUKBARI
GUWAHATI- 781014.

5: ANGSHUMAN GOSWAMI
SON OF MANOJ KUMAR GOSWAMI

TULSI SHARMA PATH

NEAR JONAKI SANGHA SCHOOL

DHALAR SATRA JAIL ROAD

JORHAT- 785001.

6: DR. PRATIBHA BORAH
DAUGHTER OF LATE TULARAM BORAH

FLAT NO. 4A
DIAMOND PLAZA

MALOCUALI TINALI

JORHAT- 785001.
VERSUS

THE STATE OF ASSAM AND 3 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM
HIGHER EDUCATION DEPARTMENT
TECHNICAL DEPARTMENT
ASSAM SACHIVALAYA
DISPUR
GUWAHATI-6.

2:THE DIRECTOR OF TECHNICAL EDUCATION
ASSAM
KAHILIPARA
GUWAHATI-19.

3:THE JORHAT INSTITUTE OF SCIENCE AND TECHNOLOGY
REPRESENTED HEREIN BY ITS PRINCIPAL
SOTAI
P.O.- CHENIJAN
DIST.- JORHAT
ASSAM
PIN- 785010.

4:THE ACCOUNTANT GENERAL (A AND E)
ASSAM
BELTOLA
GUWAHATI- 29.

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the petitioners : Shri S. S. Goswami, Advocate.
Shri S. Borthakur, Advocate.

Advocates for the respondents : Shri A. R. Tahbildar, SC, Higher Education.
Shri R. Boro, Advocate, AG,
Shri R. Sensua, Advocate (R-4)

Date of hearing : **16.05.2024**

Date of Judgment : **16.05.2024**

JUDGMENT & ORDER

All these three writ petitions being connected, are taken up for an analogous hearing and are being disposed of by this common judgment and order.

2. The issue is primarily related to a protection of pay of the petitioners owing to certain developments in the management of the establishments where they were employed. The establishments in question are two educational institutions namely the Jorhat Institute of Science and Technology, Jorhat (erstwhile Jorhat Science College) and the Bineswar Brahma Engineering College in the district of Kokrajhar. For the sake of convenience, the background of the two establishments which would be relevant for the adjudication of these cases are separately mentioned as hereunder.

3. The erstwhile Jorhat Science College was converted to the Jorhat Institute

of Science and Technology (JIST) vide a notification dated 18.11.2008 issued by the Higher Education (Technical) Department, Govt. of Assam. Subsequently, a Society was formed through a Memorandum of Association (MoA) called the Jorhat Institute of Science and Technology dated 20.07.2009. The aforesaid Society was registered under the ***Societies Registration Act, 1860***. The petitioners have highlighted Clause 3 (iv) whereby the action to appoint employee/personnel in the Society was to be done after prior approval of the State Government. As per Clause-4, General Body and the membership was notified, in which out of 10 members, 5 are senior personnel of the Government, two Heads of Department of the College, two eminent social workers and one Principal of the Institute as Member Secretary. The Chief Secretary of the State of Assam was to be the Chairman of the Governing Body and as per Clause-6, the Chairman would preside over all the meetings of the Governing Body. Attention of the Court has also been drawn to Clause 9 (iii) whereby the duties, salaries, allowances and other service conditions of the officers and employees of the Society are to be fixed with the prior approval of the State Government. Under Clause-17, the names of the Members of the First Governing Body of the Society have also been given which is as per Clause-4 mentioned above.

4. After formation of the Society, the Higher Education Department had created various posts vide Communication dated 20.08.2009 addressed to the Accountant General, Assam which includes 37 numbers of posts of Lecturers and one post of Librarian in the same pay scale. The Governing Body, in its meeting held on 09.10.2009 had adopted the most of the Rules and Regulations of the State Government along with the AICTE and UGC Norms and Guidelines. The said meeting had also constituted and approved a Selection Committee for

holding a recruitment process for filling up the post which were created vide the notification dated 20.08.2009. It has been stated that the said Selection Committee would be for selection to posts equivalent to Gazetted posts in the Government. Pursuant thereto, an advertisement was issued on 12.12.2009 for various posts including the post of Lecturers in various disciplines. The said advertisement was issued by none other than the Director of Technical Education, Assam. The petitioners pertaining to the JIST who had offered their candidatures were selected and accordingly appointed vide order dated 04.08.2010 issued by the Additional Chief Secretary to the Government of Assam, Education Higher (Technical) Department on behalf of the JIST Society. It is the contention of the petitioners that all benefits under the AICTE, UGC including increments were given to the petitioners from the date of their appointments.

5. The controversy however had started with a notification dated 30.12.2016 issued by the Higher Education (Technical) Department, whereby the administrative control of the JIST was brought under the Government of Assam, Higher Education (Technical) Department. It has been notified that the College will thereafter come under the category of full-fledged Government Engineering College. By the said notification, it may be noted that the Society was dissolved in terms of paragraph 16 of the MoA. It was further stipulated that the affairs of the College would henceforth be conducted as per the Rules and Regulations of the State of Assam. The Governing Body of the JIST had accordingly resolved that on such administrative taking over of control, the Government will incorporate all the decisions in various meetings to take the liabilities of the JIST Society in the interest of public.

6. Before such taking over, another advertisement was issued on 26.07.2012 by the APSC for filling up of the remaining vacancies which were initially created by the Communication dated 20.08.2009 and accordingly in the year 2014, certain appointments were made. However, a communication was issued by the Higher Education (Technical) Department on 02.01.2018 to the Accountant General, Assam stating thereby that the services of the incumbents in the JIST were regularized with effect from 30.12.2016. It is contended that such decision or the factors considered were not informed to the petitioners. It has also been informed that on the aforesaid issue the APSC selected candidates had filed WP(C) No. 6238/2015. Be that as it may, vide a Communication dated 21.09.2018, the candidates who were selected through APSC were granted pay protection whereas such benefits have not been given to the petitioners. Vide a Communication dated 16.08.2022 though notional increments to the petitioners have been granted by taking the date from 30.12.2016, it is the case of the petitioners that the issue regarding pay protection has not been resolved and they had been denied of such benefits. The petitioners have accordingly prayed for a direction to give them the benefit of pay protection which they were getting in December, 2016 and also for a direction to hold them eligible to appear in Career Advancement Schemes from the date of their initial appointments.

7. With regard to the other establishment, namely, Bineswar Brahma Engineering College (hereinafter the BBEC) the issue is analogous and only certain factual aspects are different which is noted herein below briefly.

8. The BBEC was brought under Society mode on 15.07.2009. Posts were created vide communication dated 05.12.2009. Advertisement was made in

December, 2009 followed by the appointment orders on 04.08.2010 and 25.11.2010 both issued by the Addl. Chief Secretary to the Govt. of Assam. The Administrative control was taken away on 30.12.2016 and letters dated 20.03.2018 and 11.04.2018 were issued to Accountant General informing about regularization of services. Pay Protection was conferred to APSC appointed candidates vide communication dated 25.03.2022.

9. I have heard Shri S. S. Goswami, learned counsel for the petitioners in WP(C) No. 1162/2023 whereas Shri S. Borthakur, learned counsel appears for the petitioners in WP(C) Nos. 3770/2021 and 5610/2022. I have also heard Shri A. R. Tahbildar, learned Standing Counsel, Higher Education Department, Shri R. Boro, learned counsel appearing on instructions of Shri C. Baruah, learned Standing Counsel, Accountant General, Assam. Shri R. Sensua, learned counsel has appeared for respondent no. 4 in WP(C) No. 3770/2021.

10. It has been clarified that there are 6 petitioners in WP(C) No. 1162 of 2023, who are of from JIST. On the other hand, out of the 5 petitioners in WP(C) No. 3770/2021, 2 out of the JIST and 3 from the BBEC.

11. Shri Goswami, the learned counsel for the petitioners has formulated his arguments in the following manner:-

- (i) The existing Jorhat Science College was converted into a Society by a conscious decision of the Government of Assam.
- (ii) The MoA to constitute the Society under the ***Societies Registration Act, 1860*** would show that the entire control and management of the Society was under the Government.

- (iii) The Governing Body was constituted of Members, majority of which were high officials of the Government of Assam and the Chairman was the Chief Secretary of the State who was to preside over all the meetings of the Governing Body.
- (iv) All matters relating to the Society including appointments/duties to be assigned, salaries etc. were to be made only with prior approval of the Government.
- (v) The posts in question were duly created by the Higher Education Department vide Communication dated 20.08.2009.
- (vi) The Selection Committee was duly constituted which is equivalent for selection to Gazetted posts in the Government.
- (vii) The advertisement for recruitment dated 12.12.2009 was issued by the Director of Technical Education, Assam.
- (viii) The appointment orders in question were issued on 04.08.2010 by the Addl. Chief Secretary, Govt. of Assam In-charge of Education (Higher) Department.
- (ix) While the administrative control of the JIST was brought under the Government of Assam vide the notification dated 30.12.2016, by the said notification, the Higher Education (Technical) Department had also exercised the power of dissolving the Society.
- (x) The minutes of the meeting of the Governing Body had resolved that all decisions of the Society were to be incorporated by the Government and also

take care of the liability of the Society.

(xi) The personnel, who were recruited through the APSC vide advertisement dated 26.07.2012 was at a stage when the Society was yet to be taken over by the Government and therefore there cannot be any difference with the services rendered and the connected issues, only because of the change in the mode through which the recruitment was done.

(xii) While the personnel appointed through the APSC at a time when the Institute was still under the Society has been given pay protection, such pay protection and other benefits could not have been deprived to the petitioners.

12. The learned counsel for the petitioners has submitted that the aforesaid impugned action is clearly discriminatory and hit by Article 14 of the Constitution of India. Shri Goswami, the learned counsel has fairly submitted that the petitioners are not aggrieved by such pay protections given to the persons who were recruited through the APSC, the concerns and claims is for an equal treatment so far as the petitioners are concerned. It is submitted that there is no *intelligible differentia* between the persons recruited through the APSC and the petitioners who were recruited by a duly constituted Selection Committee which was competent to make selection for Gazetted posts in the State of Assam. It is submitted that the mode of recruitment which was admittedly through a due process cannot be a factor to have been taken into consideration for the aspect of grant of pay protection.

13. In support of his submission, Shri Goswami, the learned has placed reliance upon the case of ***Pranab Kumar Deka & Ors Vs State of Assam & Ors*** reported in ***(2016) 1 GLR 391***. In the said judgment, the Article 14 and

its facets have been elaborately explained, the relevant portion of which is extracted herein below:-

“32. Question for consideration is whether such a classification is a reasonable one or whether such a classification would be violative of Article 14 of the Constitution of India?

33. Article 14 provides that the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.

34. Right to equality is a basic feature of our Constitution. Any treatment of equals unequally will be a breach of the equality clause and thus violative of such basic feature. Article 14 forbids class legislation but it does not forbid reasonable classification of persons etc. for the purpose of achieving specific objective. For a classification to be reasonable, the following two tests must be fulfilled:-

1. The classification should not be arbitrary. It must be based on an intelligible differentia which clearly distinguishes the persons or things grouped together as one category from the others left out of it.

2. The differentia which is adopted as the basis of classification must have a rational or reasonable nexus with the object sought to be achieved. In other words, there must be a live link or nexus between the intelligible differentia based on which the classification is made and the object sought to be achieved.

35. Article 14 together with Articles 19 and 21 of the Constitution have received the maximum attention of the Apex Court as these articles form the core of our constitutional values. Article 14 has been explained and interpreted in several leading decisions of the Supreme Court. It is not necessary to revisit all those decisions at this stage. However, advertiring to the doctrine of classification, it needs to be pointed out that the Apex Court has sounded a note of caution by pointing out that the doctrine of classification is only a subsidiary rule evolved by the Courts to give practical content to the doctrine of equality. The Supreme Court has warned against over-emphasis on the doctrine of classification as it may erode or impeach upon Article 14 itself making it ineffective. In the recent Constitution Bench decision in Subramaniam Swamy (*Supra*), all the principles governing Article 14 have been succinctly culled out and restated. After surveying the case laws governing the subject, the Apex Court observed as follows :-

“70. Undoubtedly, every differentiation is not a discrimination but at the same time, differentiation must be founded on pertinent and real differences as distinguished from irrelevant and artificial ones. A simple physical grouping which separates one category from the other without any rational basis is not a sound or intelligible differentia. The separation or segregation must have a systematic relation and rational basis and the object of such segregation must not be discriminatory.....”

14. Shri Borthakur, the learned counsel appearing in the other two writ petitions has endorsed the contentions and submissions of Shri Goswami, learned counsel. He has however additionally drawn the attention of this Court to the Calculation Chart prepared and annexed in his petition. Attention of this Court has also been drawn to a Note dated 07.12.2018 issued by the Principal, BBEC wherein for one of the petitioners, it has been stated that while he was drawing a gross salary of Rs.63,318/- (Rupees Sixty Three Thousand Three Hundred Eighteen) in November, 2016 his gross amount was fixed @ Rs. 52,488/- (Rupees Fifty Two Thousand Four Hundred Eighty Eight) on taking over.

15. Shri Borthakur, learned counsel has also placed reliance upon the case of ***State of Gujarat & Anr. Vs Raman Lal Keshav Lal Soni & Ors.*** reported in **(1983) 2 SCC 33** on the aspect of discrimination.

16. Shri A. R. Tahbildar, learned Standing Counsel of the Department has however defended the impugned action. He has contended that the appointment of the petitioners were stated to be temporary and were to be as per the Rules of the Society. By drawing the attention of this Court through the affidavit-in-opposition filed in WP(C) No. 1162/2023, the learned Standing Counsel has submitted that selection of the petitioners by a Selection Committee cannot be held to be equivalent to the selection made by the APSC and therefore the present claim is not justified. It is also contended that the regularization of the services of the petitioners were done only in the year 2016 and therefore the claim for pay protection for the earlier period is not justified.

17. Shri Boro, the learned counsel representing the Accountant General, Assam and Shri R. Sensua, learned counsel for the respondent no. 4 (BBEC) in

WP(C) No. 3770/2021 submit that they will not have a major role in the present controversy.

18. In rejoinder, both Shri Goswami and Shri Borthakur, learned counsel have submitted that the respective Societies did not have their own Rules and they had adopted all the relevant Rules of the Govt. of Assam and the AICTE and UGC Norms and Guidelines. As such, the prayer made in the writ petitions are fully justified in which appropriate orders are liable to be issued.

19. The rival submissions have been duly considered and the materials placed before this Court have been carefully examined.

20. There is no manner of doubt that both the educational institutions were at the relevant point of time in Society mode. However, it would be relevant to examine the composition and functioning of such Society. The materials on record would show that the Governing Body of the Society was constituted by high officials of the Government of Assam and the Chairman was none other than the Chief Secretary of the State and all meetings of the Governing Body were to be presided by the Chief Secretary. The matters relating to appointment, duties and salaries were all to be done with prior approval of the Government. The posts for the respective Institutions run by the Society were created by the Higher Education Department vide Communications to the Accountant General, Assam. The recruitment in which the petitioners had participated and were selected were by duly constituted selection committee which were for Gazetted posts in the Government. The advertisements through which the petitioners could offer their candidatures and were subsequently appointed were issued by the Director of Technical Education and the appointments were also made by the said Department. Therefore, for all

practical purpose, the Societies in question were under the absolute control of the Government. However, the said aspect may not be of much relevance for the purpose of determining the issue in the present case.

21. The case of discrimination has been sought to be established between the petitioners in these cases *vis-à-vis* certain other recruits in the said establishment who were recruited through an advertisement by the APSC. It is however to be noted is that the process initiated through the APSC were of a period before taking over of the respective Societies by the Government. The crucial issue regarding the protection of pay cannot be connected or related to the agency through which the recruitments were done. After all, the Societies were admittedly not a private body but were wholly controlled by the Government and each and every functioning of the Society were to be done only with prior approval of the Government.

22. Therefore, while the benefit of pay protection has been given to the set of employees who were inducted through the APSC while the establishments were still under the Society, such benefits cannot be denied to the petitioners. It has been brought to the notice of this Court by a note prepared by the Principal regarding the gross difference of fixation of pay at the time when the establishments in question were taken over by the Government from the Society. The protection of pay is a basic right of an employee when he shifts from one Government Organization to another through proper channel. Further in the instant case, there was not even any change of the establishment and it was only a change of the management. As stated above, such change was only formal in nature as for all practical purposes, the erstwhile Societies were also wholly controlled and run by the Government.

23. Under the aforesaid facts and circumstances and the discussions made above, this Court is of the considered opinion that the differentiation of the petitioners *vis-à-vis* the candidates who were appointed through the APSC in the year 2014 which is much before the taking over of the establishment by the Government in the year 2016 is clearly discriminatory. In any case, the petitioners cannot be denied the benefits of protection of pay on such taking over by the Government even if the aspect of discrimination is overlooked. In the considered opinion of this Court, claim for a pay protection can be independently adjudicated and in the instant case such right clearly appears to have been violated.

24. Consequently, the writ petitions are allowed by directing grant of pay protections and the consequential holding of the petitioners to be eligible for Career Advancements Scheme from the date of initial appointment is made out. Which is to be done expeditiously and in any case, within a period of 4 (four) months from the date of receipt of a certified copy of the order.

25. Writ petitions accordingly stand allowed.

26. No order as to cost.

JUDGE

Comparing Assistant