

GAHC010058092024



2024:GAU-AS:10332-DB

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

WA No. 101/2024

Naren Chandra Deka,
S/O-Parasuram Deka,
Resident of Village-Kuwarikuchi, Kundar Gaon,
P.O.-Dakshin Gaon, P.S. Ghagrapar,
District- Nalbari, Assam, Pin-781350.

...Appellant
-Versus-

1. Kalyan Das,
S/O-Sri Girish Das,
Resident of Village-Barkhala,
P.O.-K.P. Barkhala,
P.S. Ghagrapar,
District- Nalbari, Assam, Pin-788816.
2. The State of Assam,
Represented by the Secretary to the Government
of Assam, School Education Department, Dispur,
Guwahati-781006.
3. The Director of Secondary Education, Assam,
Kahilipara, Guwahati-19.
4. The Inspector of Schools,

Nalbari District Circle, Nalbari College Road,
Raj Baruah Complex, Nalbari, Pin-781335.

...Respondents

For Appellant : Mr. I.H. Saikia, Advocate.
For Respondent(s) : Mr. J. Roy, Senior Advocate.
Mr. D. Das, Advocate.
Ms. H. Teronpi, SC, School Education Department.

Date of Judgment & Order22.10.2024

BEFORE
HON'BLE MR. JUSTICE KALYAN RAI SURANA
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

JUDGMENT & ORDER (CAV)
(M.K. Kalita, J.)

1. Heard Mr. I.H. Saikia, learned counsel for the appellant. Also heard Mr. J. Roy, learned Senior Counsel, assisted by Mr. D. Das, learned counsel for the respondent No. 1. Also heard Ms. H. Teronpi, learned Standing Counsel for School Education Department for respondent Nos. 2 to 4.

2. This writ appeal has been preferred by the appellant, who was the respondent No. 1 in the writ petition impugning the judgment and order dated 27.02.2024, passed by the learned Single Judge in WP(C) No. 2066/2023, whereby, the learned Single Judge had set aside and quashed the order under Memo No. GB-EST/APTT/FP/24/2022/06 dated 30.03.2023, issued by the Director of Secondary Education, Assam, whereby the present

appellant was allowed to hold the charge of the Principal of Paschim Barigog Dhirdutta Higher Secondary School, Nalbari, Assam from 01.04.2023.

3. The facts relevant for consideration of instant Writ Appeal, in brief, are that the present appellant was allowed, by the order dated 30.03.2023 of the Director of Secondary Education Assam, to hold the charge of the Principal of Paschim Barigog Dhirdutta Higher Secondary School, Nalbari, Assam from 01.04.2023. However, the respondent No. 1 preferred a writ petition against the aforesaid order, which was registered as WP(C) No. 2066/2023.
4. In the writ petition the respondent No. 1/writ petitioner had contended that the present appellant is junior to him in service and the impugned appointment order was passed disregarding the seniority. The contention of the present appellant in the writ petition was that the respondent No. 1/writ petitioner had obtained the B.Ed and M.A. degree simultaneously from two different universities without obtaining required permission from the authority under the rules. The learned Single Judge relying on the judgment of a co-ordinate bench (single bench) of this Court in WP(C) No. 5419/2024 (judgment dated 18.12.2023), which relied on an earlier order of this Court in the case of "**Smti Mousumi Saharia v. Smti Rekha Kalita and 3 Ors.**" whereby, it was held that a degree obtained without prior permission of the

appointing authority would be a misconduct under Rule 13 of the Rules of 1965. However, same by itself cannot invalidate the otherwise valid degree obtained from a recognized university.

5. The learned Single Judge, thus, by the impugned judgment dated 27.02.2024, allowed the writ petition and set aside and quashed the order dated 30.03.2023 of the Director of Secondary Education Assam, whereby the present appellant was allowed to hold the charge of the Principal of the Paschim Barigog Dhirudatta Higher Secondary School, Nalbari, Assam.
6. The appellant herein, has preferred the instant appeal mainly on following grounds: -
 - i. That the learned Single Judge has failed to appreciate the fact that the appellant was appointed as a graduate teacher on 30.10.1998 following due process of law and his seniority should be counted from 30.10.1998. Whereas, the respondent No. 1/writ petitioner was appointed on *ad hoc* basis on 16.09.1998 for a specific period which was subsequently extended and his service was confirmed only on 12.08.2010 and therefore, his seniority should be counted w.e.f. 12.08.2010.
 - ii. That the learned Single Judge has failed to consider the fact that the respondent No. 1/writ petitioner

had obtained his M.A. degree without permission from the appropriate authority and therefore, he committed a misconduct under Rule 13 of the Assam Civil Services (Conduct) Rules, 1965 and on the basis of such a degree the respondent No. 1/writ petitioner cannot claim promotion/appointed to a higher post.

- iii. The learned Single Judge has failed to take into consideration that the appellant was appointed as In-charge Principal of the School on an *ad hoc* basis and therefore, he may not be replaced by another *ad hoc* appointee before filling up the post of the Principal of the School on regular basis.
- 7. We have considered the submissions made by the learned counsel for both the sides and have gone through the materials available on record, including the judgment passed by learned Single Judge which has been impugned in this Writ Appeal.
- 8. The learned counsel for the Appellant has raised few legal issues, which are discussed below. The points pressed into service are as follows: -

 - a. The appellate Court is required to hear the appellant on the question of facts and law.

- b. On counting the period of ad hoc service of the respondent no.1.
- c. Challenge to the seniority position of the respondent No.1

The appellate Court is required to hear the appellant on the question of facts and law:-

- 9. On the point that the First Appellate Court is required to re-hear the matter on facts and in law as invoked by the aggrieved person, the learned counsel for the appellant has cited the case of "***M/s. Ramnath Exports Pvt. Ltd. v. Vinita Mehta & Anr.,***" reported in 2022 Live Law (SC) 564.
- 10. There is no dispute with the said well settled legal proposition. In fact, the Court had not even prevented the learned counsel for the appellant to raise any point and therefore, why this issue has been raised is quite questionable and unwarranted.
- 11. In the said context, it may be mentioned that in the case cited by the learned counsel for the appellant, the Supreme Court of India was referring to the exercise of appellate power in light of section 96 of the Code of Civil Procedure, 1908. The learned counsel for the appellant has not made any effort to explain how the said principles would apply in connection with Intra-Court appeal filed under Article 226 of the Constitution of India.

12. In the case of "***Tractor and Farm Equipment Ltd., Chennai v. Secretary to the Govt. of Assam, Department of Agriculture, Guwahati & Ors.***" reported in (2004) 1 GLT 117, this Court has held in the context of Intra Court appeals under Article 226 of the Constitution of India that the judgment of the Single Judge should be set aside or quashed only when there is patent error on the face of the record or the judgment is against the established or well settled principle of law. Moreover, in the case of "***Rita Yorung v. State of Arunachal Pradesh***" reported in 2010 (2) GLT 276: (2010) 0 Supreme (Gau) 137, this Court has held that if two reasonable and logical views are possible, the view adopted by the Single Judge should normally be allowed to prevail. Paragraph 26 thereof is quoted below:-

"26. While dealing with the present appeal; one has to bear in mind that a writ appeal is really not a statutory appeal preferred against the judgment and order of an inferior Court to the superior Court. The appeal inter se in a High Court from one Court to another is really an appeal from one coordinate Bench to another coordinate Bench and it is for this reason that a writ cannot be issued by one Bench of the High Court to another Bench of the High Court nor can even the Supreme

Court issue writ to a High Court. Thus, unlike an appeal, in general, a writ appeal is an appeal on principle and that is why, unlike an appeal, in an ordinary sense, such as a criminal appeal, where the whole evidence on record is examined anew by the appellate Court, what is really examined, in a writ appeal, is the legality and validity of the judgment and/or order of the Single Judge and it can be set aside or should be set aside only when there is a patent error on the face of the record or the judgment is against the established or settled principle of law. It two views are possible and a view, which is reasonable and logical, has been adopted by a Single Judge, the other view, howsoever appealing such a view may be to the Division Bench, it is the view adopted by the single Judge, which should, normally, be allowed to prevail. Hence, the impugned judgment of the learned Single Judge cannot be completely ignored and this Court has to consider the judgment and order in its proper perspective and if this Bench, sitting as an appellate Bench, is of the view that the decision has been arrived at by the learned

Single Judge without any material error of fact or law, then, the judgment, in question, should be allowed to prevail. The reference made, in this regard, by Mr. Dutta to the case of State of Tripura v. Ramendra Nath Dey, (2001) 1 GLR 54 is not misplaced."

13. In the case of "**Assam State Electricity Board Vs. Sri Surya Kanta Roy**" reported in (1994) 1 GLR 383, this Court has held that in writ appeal, the appellate court will not interfere with the discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the court has ignored the settled principles of law. It would also be appropriate to refer to the decision of the Supreme Court of India in the case of "**N. Ramachandra Reddy v. State of Telengana**" reported in (2020) 16 SCC 478: AIR 2019 SC 4182, that while considering Intra-Court appeal, unless the appellate Bench concludes that the findings of Single Judge is perverse, it shall not disturb the same. Hence, we find that the scope of interference in Intra-Court appeal under Article 226 of the Constitution of India is not so wide as when the first appellate court is deciding an appeal under section 96 of the Code of Civil Procedure, 1908.
14. Therefore, in the light of the discussions above, the Court is of the opinion that in depending on the facts of the case, it would

not be obligatory for the Appellate Bench to re-hear the appellant on every point urged in every intra-court appeal. Hence, the point urged by the learned counsel for the appellant is without any merit.

On counting the period of ad hoc service of the respondent No. 1:

15. On the point that the period of *ad hoc* service rendered before regularisation of service cannot be added for the purpose of seniority, the learned counsel for the appellant has cited the case of (i) "***Central Council for Research in Homeopathy v. Bipin Chandra Lakhera***" reported in (2011) 15 SCC 563, (ii) ***Ch. Narayana Rao v. Union of India & Ors.*** Reported in (2010) 10 SCC 247, and (iii) "***M. Madalaimuthu & Anr. V. State of Tamil Nadu &Ors.***" reported in (2006) 6 SCC 558.

16. There is absolutely no quarrel with the said settled legal principles. Nonetheless, in the opinion of the Court, the said principles will have no application in the present case because from the contents of the appointment order dated 16.09.1998, issued by the Inspector of Schools, Nalbari, the name of the petitioner was recommended by the District Level Selection Board, but the appointment of respondent no. 1 was made on ad hoc basis and after extending his service from time to time, by

order dated 03.01.2000, the service of the respondent no.1 was extended till further order. It appears from the order dated 12.08.2018, issued by the Inspector of Schools, Nalbari that the service of the respondent no. 1 as well as of the appellant was confirmed with effect from their respective date of joining. Thus, from the contents of the initial appointment order dated 16.09.1998, it appears in no uncertain terms that the respondent no.1 was selected on recommendation made by District Level Selection Board and therefore, as his appointment was not irregular or illegal, his service was confirmed, which is different from regularisation of service. Therefore, in this case, the service of the respondent no. 1 has been regularised.

- 17.** In the case of "***Ch. Narayana Rao. v. Union of Indi & Ors.***" (2010) 10 SCC 247, and "***Union of India v. Dharam Pal & Ors.***" (2009) 4 SCC 170, the Supreme Court of India, by following the decision of the Constitution Bench in the case of "***Direct Recruit Class II Engg. Officers Assn. Vs. State of Maharashtra***" reported in (1990) 2 SCC 715, has held that where *ad hoc* appointment is made by following the procedure laid down by the rules and the appointees continues in the post till his regularisation, seniority must be counted from the date of initial joining.

- 18.** In this case in hand, the respondent no. 1 was appointed by order dated 16.09.1998. However, it appears from the contents of the gradation/seniority list annexed to the memo of appeal that

the respondent no. 1 had joined on 17.09.1998. Under such circumstances, when the initial appointment order dated 16.09.1998 *prima facie* discloses that the respondent no.1 was selected by a separate authority, the Court is of the considered opinion that the decision of the learned Single Judge is based on correct legal appreciation of the matter because as on date, there is no material on record to show that there is any challenge to the said initial appointment order of the respondent no.1 that was issued on 16.09.1998.

Challenge to the seniority position of the respondent No.1:

- 19.** Having pressed into service the legal issue no. 1 referred herein before, the learned counsel for the appellant has submitted that notwithstanding that the appellant has failed in W.P.(C) 3544/2024 to assail the seniority position of the respondent no.1 in the gradation/ seniority list, but as (i) the appointment order of the respondent no.1, (ii) the order of confirmation of his service, and (iii) the gradation/ seniority list of the respondent no.1 is on record of the case, it should be decided in this appeal the legality of the seniority position of the respondent no. 1 in the said gradation/ seniority list.
- 20.** It was submitted that the appellant's initial appointment order does not refer to *ad hoc* appointment and therefore, the appellant was appointed on regular basis and thus, it is contended that it

cannot be accepted that the service of the appellant was confirmed on 12.09.2010 along with the respondent no.1. In support of his contention that if the initial appointment not made in accordance with Rules, period of service rendered as ad hoc appointee cannot be taken into consideration, the learned counsel for the appellant has cited the case of "**M. Madalaimuthu & Anr. V. State of Tamil Nadu & Ors.**" reported in (2006) 6 SCC 558.

- 21.** In connection with the contention that even if there is no pleading in the writ petition, the issue being one of law, can be raised by the appellant in this appeal and in support of the said contention, the case of (1) "**M/s Starline Agency v. Nabajit Das & Ors.**," WA. No. 38/2010, decided by the Division Bench of this Court on 24.02.2011, (ii) "**Bongaigaon Refinery & P.C. Ltd. & Ors. V. Girish Chandra Sarmah**" reported in (2007) 7 SCC 206, and (iii) "**Commissioner of Income Tax, Central-I, Mumbai v. Prithvi Brokers and Shareholders Pvt. Ltd.**" reported in 2012 Legal Eagle (Bom) 2591 were cited.
- 22.** The said submissions of the learned counsel for the appellant has been countered by the learned senior counsel for the respondent no.1 by submitting that the foundational pleadings by the appellant is absent in the writ proceeding as well as in the memorandum of appeal filed by the appellant.
- 23.** At the outset, it would be appropriate to state that the Court is

conscious of the fact that if this issue, as raised by the learned counsel for the appellant is touched in this order, the decision, if any, on the issue would prejudice either side. Therefore, cornered by the submissions by the learned counsel for the appellant, as the learned counsel for the appellant has persistently pressed the point, the Court has reluctantly examined this point.

24. In the case of ***Commissioner of Income Tax*** (supra), by referring to the earlier decision the Supreme Court of India in the case of ***CIT v. Kanpur Coal Syndicate*** reported in AIR 1965 SC 325, it was held by the Supreme Court of India in relation to the provision of section 251(1)(a) of the Income Tax Act, 1961 that the power of the Appellate Assistant Commissioner was co- terminous with that of the Original Authority and he can do what the Income Tax Officer can do, i.e., in relation to assessment order, confirm, reduce, enhance or annul the assessment. It is in the said context of the provision of section 251 of the Income Tax Act, it was held that the appellate authorities, therefore, have jurisdiction to deal not merely with additional grounds, which became available on account of change of circumstances or law, but with additional grounds which were available when the return was filed. Therefore, the cited case does not help the appellant in any manner whatsoever.
25. In the decision of this Court in the case of ***M/s. Starline Agency***, (supra) reliance was placed on the decision of the Supreme Court

of India in the case of **Bongaigaon Refinery and P.C. Ltd.** (supra). In the case of **Bongaigaon Refinery and P.C. Ltd.** (supra), the learned counsel for the respondent, in the writ proceeding as writ petitioner, had abandoned the plea of perversity and in the said context, it was held that as the writ appeal was a continuation of the original order passed in the writ jurisdiction by the learned Single Judge, it cannot operate as an estoppel against learned counsel for the respondent to press the same. The said observation of the Supreme Court of India is indicative of the fact that the plea of perversity was taken in the writ petition. But, in the present case in hand, despite statement by the learned senior counsel for the respondent no.1 that there is no pleading by the appellant in the affidavit-in-opposition filed by the appellant in the writ proceeding, the learned counsel for the appellant could not show any pleading on the point by the appellant before the writ proceeding. Hence, the hereinbefore referred two cases cited by the learned counsel for the appellant does not help the appellant in any manner whatsoever.

- 26.** In this case, notwithstanding that the challenge to the seniority position of the respondent no. 1 is not raised by the appellant either in the writ proceeding or in this appeal. Yet, the learned counsel for the appellant and the respondent no. 1 have both contested on the said point by citing cases. Based on the persistent statement made by the learned counsel for the

appellant at the Bar that issue raised on behalf of the appellant has to be addressed by this Court, brings to the fore an issue as to whether the issue should be decided herein or that the parties be relegated to have the issue decided in W.P.(C) 3544/2024.

- 27.** In the aforesaid context, the Court is conscious of the fact that in the event this point is answered, out of the appellant and the respondent no.1, either side would suffer irreparable prejudice in the proceeding of W.P. (C) 3544/2024.
- 28.** In no uncertain terms, the learned counsel for the appellant and the learned senior counsel for the respondent no.1, have considered the said position and have elected to continue to address the Court on the said point. In such a situation, the Court is of the opinion that it is well settled principle of law that even if the issues are not framed on a particular point, but if the contesting parties have participated in a long debate before this Court on the seniority position of the respondent no.1, despite full knowledge of the fact that the School Education Department has not filed their affidavit-in-opposition in W.P.(C) 3544/2024, it would not be appropriate to leave the issue raised by the learned counsel for the appellant undecided qua this appeal.
- 29.** In this appeal, the materials available on record show that in the appointment order of the respondent no.1 dated 16.09.1998, issued by the Inspector of Schools, Nalbari, clearly reflects that on

the recommendation made by the Selection Board, the respondent no.1 was appointed as Assistant Teacher on ad hoc basis. The subsequent order dated 12.08.2010, issued by the Inspector of Schools, not only the respondent no.1, but the services of 3 (three) others, including the appellant was confirmed. Thus, there are no materials available to suggest that the appointment of the respondent no.1 was illegal in any manner whatsoever. Hence, for the limited purpose of this appeal, the Court is inclined to hold that the appellant was confirmed. Thus, there are no materials available to suggest that the appointment of the respondent no.1 was illegal in any manner whatsoever. Hence, for the limited purpose of this appeal, the Court is inclined to hold that the period from date of joining i.e. 17.09.1998 till the date of issuance of order dated 12.08.2010, issued by the Inspector of Schools has to be considered for calculating seniority.

- 30.** Thus, in light of the discussions above, the challenge to the seniority position of the respondent no.1, qua this appeal, fails. The finding on this point is without prejudice to the parties in the proceeding of W.P. (C) 3544/2024. The point no. (c) is answered accordingly.

Finding and decision:

- 31.** On the question as to whether the impugned order requires any

interference, in light of the discussions above, the Court is of the unhesitant opinion that the appellant has failed to show that the impugned decision of the learned Single Judge is perverse in any manner whatsoever, passed without considering the materials on record, or there is any patent error apparent on the face of the record or the judgment is against the established or well settled principle of law.

- 32.** Hence, following the dictum of the Division Bench of this Court in the case of "**Assam State Electricity Board v. Surya Kanta Roy**" reported in (1994) 1 GLR 383, the Court is of the considered opinion that in light of the facts and law involved in this case in hand, the writ appellate Court will not interfere with the discretion of the Court of first instance and substitute its own discretion because the appellant has failed to demonstrate that the learned Single Judge has exercised its discretion arbitrarily or capriciously or perversely or where any settled principles of law was ignored.
- 33.** Thus, this appeal fails and is accordingly, dismissed.

JUDGE

JUDGE

Comparing Assistant