

JUDGEMENT AND ORDER(ORAL)

1. This writ petition is directed against the order passed by the Director of Higher Education, Assam approving the particular resolution of the Governing Body of the College in question purportedly resolving to appoint the respondent No. 5 as the Head of the Department of Economics.
2. Shortly stated, the facts leading to filing of the instant writ petition are that the petitioner was appointed as Lecturer in the department of Economics in Goalpara College by Annexure-I order dated 10.02.95. The petitioner joined the post by submitting the joining report on 22.02.95.
3. By Annexure D letter dated 20.03.06 issued by the Principal and Secretary of the college, the petitioner was appointed as Head of the Department of Economics w.e.f. 01.02.06. Such appointment was made pursuant to the resolution adopted by the Governing Body of the college in its meeting held on 25.02.06. Occasion for such appointment arose when the earlier incumbent holding the post of HOD retired from service on 31.01.06 on attaining the age of superannuation.
4. As against the aforesaid position of the petitioner in the college and the department, the respondent No. 5 was first appointed against a non-sanctioned post by order dated 08.10.94. He was so appointed in the department of Economics. Such appointment of the respondent No. 5 against the non-sanctioned post was proceeded by selection for which candidatures were invited by the college authority vide its employment notice published in the issue of the Assam Tribune dated 09.09.93.
5. The respondent No. 5 continued against non-sanctioned post pursuant to joining on 04.11.94 and thereafter by order dated 28.10.96 he was appointed against a regular post which fell vacant on retirement of the incumbent namely Shri B.N. Patgiri. He was so appointed by the Director of the Higher Education by the aforesaid Annexure-M/8 order dated 28.10.96 in continuation of his earlier appointment.
6. By Annexure-M/10 order dated 21.06.03 indicating the respective dates of approval of appointment of the petitioner and the respondent No. 5 as 20.02.95 and 12.11.96 respectively, they were granted the benefit of senior scale of pay w.e.f. 14.02.02 and 12.11.02 respectively.
7. The respondent No. 5 by his Annexure-M/11 letter dated 25.01.06 requested the Principal of the college to confer him Headship of the department on the basis of his continuous appointment w.e.f. 04.11.94. However, by Annexure-M/12 letter dated 20.03.06, it is the petitioner who was appointed as Head of the Department.
8. The respondent No. 5 made Annexure M/13 representation dated 27.02.06 making a grievance against the Governing Body's resolution dated 25.02.06 resolving to appoint the petitioner as the Head of the Department.
9. By Annexure-M/14 letter dated 01.07.06 addressed to the Principal of the college, the Deputy Director of Higher Education, Assam while asking for furnishing the seniority list and ACR in appropriate format in respect of the incumbents named therein, also made further request to clarify the seniority position between the petitioner and the respondent No. 5. such clarification was sought for in view of the representation made by the respondent No. 5.

10. When the matter rested thus, the Director of Higher Education, Assam by his impugned order dated 04.07.07 (Annexure M/15) approved the purported resolution of the Governing Body of the college adopted on 20.02.07 towards appointment of the respondent No. 5 as Head of the Department of Economics. Pursuant to the order, the petitioner was asked to handover the charge to the respondent No. 5. That was done by Annexure- M/16 order dated 18.07.07 issued by the Principal of the college to the petitioner.

11. Being aggrieved by the aforesaid action of the Governing Body and the Director of Higher Education, Assam the petitioner has approached this Court by filing the instant writ petition. The writ petition was entertained by order dated 25.07.07 and operation of the impugned orders was stayed. The respondent No. 5 has filed Misc. case No. 3138/07 praying for vacation of the interim order. The Misc. case was taken up for hearing on 07.09.07 and it was felt that instead of hearing the Misc. case, the entire writ petition should be heard. Accordingly, the matter was fixed for final hearing. This is how the writ petition has been taken up for hearing.

12. While it is the case of the respondent No. 5 that on the basis of his date of joining the non-sanctioned post on 04.11.94 pursuant to his appointment by letter dated 08.10.94, he is senior to the petitioner who joined the department and the college on 22.02.95 pursuant to his appointment order dated 10.02.95, it is the case of the petitioner that he having been appointed against the sanctioned post in the time scale of pay, the appointment of the respondent No. 5 in a non-sanctioned post in consolidated pay cannot confer him seniority over the petitioner. According to the petitioner, the appointment of the respondent No. 5 having been approved in 1996 by order dated 28.10.96, his seniority will have to be counted from the said date and not from his earlier appointment, i.e. from 08.10.94 which was against a non-sanctioned post.

13. While the petitioner has referred to the provisions of the Assam College Employees (Provincialisation) Act, 2005, more particularly Section 2(b) and 2(c) so as to contend that the respondent No. 5 cannot get his seniority from 1994, the respondent No. 5 upon reference to UGC notification on revision of pay scale, minimum qualification for appointment of Teachers in University, College and other measures for maintenance of standards from 1998, has contended that his past service against non-sanctioned post is countable towards fixing the seniority. According to the respondent No. 5, the Director of Higher Education, Assam, has rightly fixed his seniority over the petitioner taking into account his service against the non-sanctioned post to which he was appointed in 1994.

14. Mr. A.S. Choudhury, learned Sr. counsel assisted by Mr. M. Sheikh, learned counsel for the petitioner upon reference to the aforesaid materials, submits that the Director without first determining the seniority between the petitioner and the respondent No. 5 has passed the impugned order. Referring to the resolution on the basis of which the Director of Higher Education has passed the impugned order, he submits that said resolution does not show anything regarding higher seniority of the respondent No. 5 over the petitioner.

15. Mr. B.D. Konwar, learned counsel for respondent No. 5, submits that as per UGC guidelines the respondent No. 5 being entitled to count his seniority for the period of service he had rendered against the non-sanctioned post, the Director of Higher Education has rightly passed the impugned order. Mr. U.K. Goswami, learned S.C., Education Department submits that the Director of Higher Education, Assam has passed the impugned order on the basis of the Governing Body's resolution. Mr. S.U. Ahmed, learned counsel representing the respondent No. 3, i.e. the Governing Body of the College, upon reference to the affidavit in opposition filed, submits that the Director of Higher Education, Assam has passed the impugned order on the basis of the materials available on record.

16. I have considered the submissions made by the learned counsel for the parties. I have also perused the materials on record. As noted above, it is the petitioner who was first appointed as HOD of the department by Annexure -3 order dated 20.03.06. It is an admitted position that Annexure-8 order dated 04.07.07 has been passed by the Director of Higher Education, Assam without affording any opportunity of being heard to the petitioner.

17. The Governing Body's resolution has been annexed to the affidavit in opposition filed by the respondent No. 3. The said resolution reads as follows:

Resolution No. 3 (a): The G.B. read and discussed DHE's Letter No. G(B) RC. 28/98/245 dated 01.07.06 and it is found that lecturer Mr. D. Nath of the Economics Dept. joined in non-sanctioned post on 04.11.94, Mr. Abdul Hussain, Lecturer of Economics dept. joined in sanctioned post on 22.02.95. However, Mr. D. Nath was approved in sanctioned post on 12.11.96. Mr. D. Nath was given annual increment while he was working in non-sanctioned post w.e.f. his date of joining in non-sanctioned post. Now, the G.B. feels that the DHE is to fix the seniority between the two lecturers as per rule. It is, therefore, resolved that the Principal be directed to submit a reply to the DHE's letter stating the date of joining of the two lecturers.

18. On perusal of the aforesaid resolution, it cannot be said that the Governing Body of the college decided the seniority of the respondent No. 5 over the petitioner. The matter was entrusted to the Principal of the college to submit an appropriate reply to the Director of Higher Education.

19. The Principal of the college by his letter dated 15.05.07 addressed to the Director of Higher Education only placed the facts as narrated in the aforesaid resolution of the Governing Body of the college. For a ready reference the letter dated 15.05.07 (Annexure R/2 to the affidavit in opposition filed by the respondent No. 3) is quoted below:

With reference to the subject cited above, I have the honour to state that due to retirement of Mr. A.S.R. Ahmed, Vice Principal and Head of Economics department of this college, Mr. Abdul Hussain, senior most lecturer in the sanctioned posts of Economics department, is appointed as Head of the department w.e.f. 01.02.06 in accordance with the resolution No. 10(f) of the G.B. meeting held on 25.02.06 and Mr. Hussain has been performing his duties as HOD since the date of his appointment.

Regarding the seniority in between Shri Abdul Hussain and Shri Dharmendra Nath, lecturers in Economics department, the matter is placed before the G.B. meeting held on 22.02.07 for its clarification. The G.B. feels that the seniority between the two lecturers be fixed by the DHE as per rule and directed the undersigned vide resolution No. 3 (a) to submit a reply to the DHE's letter stating the dates of joining of the two lecturers. The dates of joining of the two lecturers are mentioned in the seniority list submitted herewith.

Therefore, I would like to request you to accord necessary approval for the Headship of Economics department to the senior most lecturer fixed by your honour as per rule.

20. On perusal of the G.B.'s resolution No. 3 (a) dated 22.02.07 as well as the letter dated 15.05.07 addressed to the Director of Higher Education, Assam by the Principal of the college, it is not discernible as to who is senior. Both in the resolution as well as in the letter only facts regarding appointment of the respondent No. 5 and the petitioner on the respective dates were indicated without stating anything as to who is senior in the department.

21. The Director of Higher Education, Assam by his impugned order dated 04.0

7.07 approved the resolution No. 3 (a) dated 22.02.07 appointing the respondent No. 5 as the Head of the department of Economics in the college. As noted above, the resolution No. 3 (a) does not determine the seniority between the petitioner and the respondent No. 5. The impugned order dated 04.07.07 also does not depict anything regarding determination of seniority and yet the Director of Higher Education appointed the respondent No. 5 as the Head of the Department.

22. The Assam College Employees (Provincialisation) Act, 2005 on which Mr. Choudhury, learned Sr. counsel for the petitioner has placed reliance is an Act governing the employees of the provincialised college. As per section 2 (a) of the said Act, 'college' means any non-Government college in Assam in receipt of deficit grants-in-aid from the government and imparting general education in Arts, Commerce or Science stream in Graduate level. As per section 2 (b) 'employee' means an employee of a college both teaching or non-teaching appointed substantively against a sanctioned post. Section 2(c) defines 'existing employee' as an employee of a college both teaching and non-teaching appointed substantively against a sanctioned post and who is or has been in service on or after the 1st day of January, 2005.

23. Referring to the aforesaid definitions, Mr. Choudhury, learned Sr. counsel for the petitioner submits that since the appointment of the respondent No. 5 was against a sanctioned post in 2006 which is admittedly after the petitioner, the respondent No. 5 cannot score a march over the petitioner in respect of seniority.

24. The aforesaid definitions of employee and existing employee are applicable to both teaching and non-teaching employees working in the college. The said definitions are not indicative and decisive of seniority of the existing employees. By the definitions only recognition has been made in respect of employee and existing employees. The provisions of the Act do not indicate any principle regarding determination of seniority. Thus, I am of the considered opinion that said definitions in the Act are of no help to the case of the petitioner so far as the question relating to seniority is concerned.

25. The UGC notification on which Mr. B.D.Konwar, learned counsel for the respondent No. 5 has placed reliance is application to every University established or incorporated by order of a Central Act, Provincialised Act or a State Act, every institution including a constituent or an affiliated college recognized by the Commission, in consultations with the concerned University under Clause (f) of the Section 2 of the University Grants Commission, Act, 1956, and every institution Deemed to be a University under Section 3 of the said Act. The notification was issued on 24.12.98 indicating that same will come into force with immediate effect. Clause 3 prescribes the qualifications and other service conditions. Clause 8 deals with counting of past service. Clause 8.6.0 is quoted below:

8.6.0. The appointment was not ad-hoc in a leave vacancy of less than one year duration. Ad hoc service of more than one year duration can be counted provided:

- a) the ad hoc service was of more than one year duration
- b) the incumbent was appointed on the recommendation of duly constituted Selection Committee, and
- c) the incumbent was selected to the permanent post in continuation to the ad hoc service, without any break.

26. Upon reference to the aforesaid clause it is the case of the respondent No. 5 that although he was appointed against a non-sanctioned post, he being integral part of the college from 1994, he is entitled to get seniority from 1994. Be it stated here that the respondent No. 5 although was appointed in non-sanctioned post, his such appointment was done as per the UGC guidelines. As per the Govt. policy decision, the Lecturer appointed against non-sanctioned post pursuant

to selection as per norms are entitled to get regularization of service without any further selection.

27. All these aspects of the matter are required to be considered by the Director of Higher Education, Assam, more particularly when the impugned order has been passed without giving any opportunity to the petitioner. The Director of Higher Education has passed the impugned order on the basis of the representation made by the respondent No. 5, the Governing Body's resolution as well as the letter of the Principal referred to above, which never indicated anything regarding determination of seniority between the petitioner and the respondent No. 5. However, the Director of Higher Education has passed the impugned order upon reference to the resolution of the Governing Body of the college.

28. In view of the above, the matter shall go back to the Director of Higher Education, Assam for determination of seniority between the petitioner and the respondent No. 5 on the basis of the materials on record as well the principles relating to determination of seniority. The observation made above may also be considered by the Director of Higher Education. For a fresh decision the said Director may also give personal hearing to both the incumbents and the college authority fixing a particular date as expeditiously as possible not later than 30.11.07. Both the incumbents, as well as the college authorities may produce the relevant records to the Director including the copy of this judgment.

29. It is submitted by Mr. B.D. Konwar, learned counsel for the respondent No. 5 that presently neither the petitioner nor the respondent No. 5 is holding the post of HOD, but Mr. Choudhury, learned counsel for the petitioner has denied the same and submits that pursuant to the interim order passed by this Court, it is the petitioner who is presently holding the post of HOD. The Director of Higher Education shall also decide this issue towards maintaining the status quo as on today.

30. Writ petition is disposed of in above manner. Status quo as on today shall be maintained till a decision is arrived at by the Director of Higher Education consistently with the observation made above.