

GAHC010317612019



Judgment reserved on : **07th February, 2022**
Judgment delivered on : **06.04.2022.**

IN THE GAUHATI HIGH COURT

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

W.P(C) No.390 of 2020

Smti. Protiva Devi

.....Petitioner

-Versus-

The State of Assam

Represented by the Commissioner and Secretary to the Govt. of Assam, Education (Secondary) Department, Dispur, Guwahati-781006

2 The State Selection Board,

Through the Chairman, i.e. the Commissioner and Secretary to the Govt. of Assam, Education (Secondary) Department, Dispur, Guwahati-781006

3 The Director of Secondary Education, Assam

Kahilipara, Guwahati-781019

4 The Inspector of Schools, Jorhat District Circle,

Jorhat, Assam, PIN-785001

5 Smti. Sevika Phukan,

Newly appointed Headmistress of Sarojini Devi Uchha Balika Bidyalaya, Chengeligaon, Jorhat, Vill & P.O. Chengeligaon, Dist.- Jorhat, Assam, PIN 785010

.....Respondents

- B E F O R E -

HON'BLE THE CHIEF JUSTICE MR. SUDHANSHU DHULIA

HON'BLE MR. JUSTICE SOUMITRA SAIKIA

Advocate for the petitioner : Mr. I.H. Saikia, Advocate

Advocate for the respondents : Ms. P. Chakraborty, Standing Counsel for R- 1 to 3

Mr. P. Sharma. Sr. Government Advocate for R-4

Mr. P. Bora, Advocate for R-5

JUDGMENT AND ORDER (CAV)

(Soumitra Saikia, J)

The vires of the Rule 14(2) of the Assam Secondary Education (Provincialisation) Service Rules, 2003 (hereinafter referred as "*the Rules of 2003*") has been questioned by the petitioner in the present writ petition. The petitioner was initially appointed as a Graduate Teacher in C.S. Rawanapur Higher Secondary School, Majuli by an order dated 12.10.1988 issued by the Inspector of Schools, Jorhat District Circle. By order dated 16.06.1994 issued by the Director of Secondary Education, Assam, she was transferred from C.S. Rawanapur Higher Secondary School, Majuli to Sarojini Devi Uccha Balika Bidyalaya, Chengeligaon, Jorhat. She was also appointed as In-charge, Headmistress of the Sarojini

Devi Uccha Balika Bidyalaya, Chengeligaon, Jorhat vide the order dated 26.04.2016 issued by the Director of Secondary Education, Assam upon the post falling vacant due to the retirement of the previous incumbent. During the relevant period of time in response to an advertisement issued by the concerned authorities in the year 2015, she applied for and was selected as the Assistant Headmistress of the School. In terms of the said selection by order dated 05.08.2017, the petitioner was promoted to the post of Assistant Headmistress of Sarojini Devi Uccha Balika Bidyalaya, Chengeligaon, Jorhat. Although she was appointed as the Assistant Headmistress and had joined in a substantive post, she continued to also discharge her services as the In-charge, Headmistress of the said school since 01.05.2016.

2. The Department of Secondary Education, Government of Assam advertised the post of Headmaster along with other posts lying vacant including those which are likely to fall vacant by 31.12.2017. In response to the said advertisement, the petitioner as well as respondent No. 5 applied for the post of Headmistress of Sarojini Devi Ucchal Balika Bidyalaya, Chengeligaon, Jorhat. In the selection pursuant to the said advertisement, respondent No. 5 was selected for the post of

Headmistress in Sarojini Devi Uccha Balika Bidyalaya, Chengeligaon, Jorhat. Being aggrieved, the present writ petition has been filed challenging the validity of Rule 14(2) of the Assam Secondary Education (Provincialisation) Service Rules, 2003 as well as praying for consequential order for setting aside the impugned selection of the respondent No. 5 and also for setting aside the order dated 09.12.2019 issued by the Department of Secondary Education, Assam promoting the respondent No. 5 as the Headmistress of Sarojini Devi Uccha Balika Bidyalaya, Chengeligaon, Jorhat in place of the writ petitioner.

3. The learned counsel for the petitioner submits that under the Rules of 2003, the post of Headmaster is included in the cadre of Class-II (Senior) and the post of Assistant Headmaster is included in the cadre Class-II (Junior) under the Rules. The post of Graduate Teacher is also included in the cadre of Class-II (Junior). The learned counsel for the petitioner submits that the provisions for recruitment to the post of Headmaster/ Assistant Headmaster *inter alia* is prescribed under Rule 14 of the Rules of 2003. He strenuously submits that although under Rule 14(2), it is prescribed that the post of Headmaster shall be filled upon by promotion from school wise seniority list on the recommendation of the

State Selection Board, Assam and the selection of the incumbent shall be based upon seniority and satisfactory ACR for the three (3) consecutive years, but it is also provided that the seniority shall be determined from the date of receiving the Graduate Scale as per Rule 24(2). The learned counsel for the petitioner submits that it is this provision for deciding the seniority on the basis of receiving Graduate Scale which is opposed to the scheme of the Rules and more particularly the class and cadre specified under the Rules. As such to the extent the Rule provides for deciding the seniority on the basis of receipt of Graduate Scale of Pay as per Rule 24(2), the instant Rule i.e. Rule 14(2) is violative of Article 14 of the Constitution of India as it has the effect of treating two different posts in the cadre to be equal for the purposes of being feeder posts for promotion to the post of Head Master of the School. According to the learned counsel for the petitioner, the respondent No. 5 was not eligible for the selection to the post of Head Master for the years 2014, 2015 and 2016 as she did not fulfill the eligibility criteria because she did not acquire the requisite qualification of B.Ed Degree. On the contrary, the petitioner had all the requisite qualifications. She was a Master Degree Holder as well as B.Ed Degree holder and consequently she was selected for promotion to the post of Assistant Headmistress in the year 2017. The

petitioner having been promoted to the post of Assistant Headmistress with effect from 05.08.2017, her seniority and the seniority of respondent No. 5 cannot be equated. The learned counsel for the petitioner urged that the seniority in terms of receipt of the Graduate Scale can only be used as a yardstick to decide the seniority, provided the incumbents are holding the similar posts. The post of Assistant Headmistress is a higher post drawing a higher salary and the incumbent is also required to perform the higher responsibilities. Therefore, the determination of seniority from the date of receipt of Graduate Scale as prescribed under Rule 14(2) has the effect of treating two unequal persons as equal and therefore it offends the scheme of Article 14 of the Constitution of India. The learned counsel also submits that as the petitioner was transferred from C.S. Rawanapur Higher Secondary School, Majuli to Sarojini Devi Ucha Balika Bidyalaya, Chengeligaon, Jorhat, her seniority in respect of the earlier school has not been counted as well. The learned counsel for the petitioner therefore submits that the Rule 14(2) in so far as it decides the seniority between the incumbent from the date of receipt of Graduate Scale should be suitably interfered with and set aside. The learned counsel for the petitioner submits that the provision of Rule 14(2) in so far as it provides for seniority to be decided on the basis of receipt of

Graduate Scale is arbitrary as it seeks to equate the seniority of two posts which are not equal in hierarchy. The learned counsel submits that the feeder post to the post of Assistant Head Master is a graduate teacher, therefore, the seniority to be counted from the date of receipt of Graduate Scale cannot be the yardstick for determining the seniority for a person who in the meantime had been promoted to the post of Assistant Head Master.

4. The learned Government Advocate appearing for the Department submits that the matter in respect of the vires of Rule 14(2) had already been dealt with by a Co-ordinate Bench of this Court in *Kripa Sindhu Das Vs. State of Assam & Ors* reported in *2020(1) GLT 545*. The learned counsel for the Department submits that since the Judgment in *Kripa Sindhu Das (Supra)* upheld the vires of Rule 14(2), no further deliberation on the matter is called for as the issue raised in the writ petition is similar to the issue raised in the writ petition in the case of *Kripa Sindhu Das (Supra)*.

5. The learned counsel appearing for the respondent No. 5 supports the contention of the learned Government counsel that the issue

pertaining to the vires of Rule 14 (2) of the Rules of 2003 had already been upheld in *Kripa Sindhu Das (Supra)*. He submits that this matter is squarely covered by the Judgment and Order dated 16.08.2019 passed in *Kripa Sindhu Das (Supra)* and should therefore be dismissed.

6. We have heard the learned counsels for the parties and have perused the pleadings on record. It would be necessary to refer to the relevant Rules before proceeding further in the matter. Rule 3 of the Rules 2003 lays down the classes on the cadre. Rule 14 provides for Recruitment to the Post of Vice Principal/Head Master/ Head Mistress/ Superintendent/ Asstt. Head Master/ Asstt. Head Mistress of High/ HS/HS & MP School and Rule 24(2) provides for seniority. The said Rules are extracted below:

3. Classes and Cadres - (1) *The service in provincialised School shall consist of the teaching and non-teaching staff. The teaching staff shall consist of following classes and cadres, each one of those constituting a distinct and separate cadre as on the commencement of these rules, namely: - (a) Class II (Senior): - It includes the cadres of - (i) Principal; (ii) Vice-Principal; (iii) Post-Graduate Teacher; (iv) Headmaster/Superintendent; (b) Class II (Junior): - It includes the cadres of - (i) Assistant Headmaster/Assistant Superintendent; (ii) (a) Graduate Teacher, (b) Hindi Teacher having Bachelor Degree from any recognized University, (c) Classical Teacher (Sanskrit/Arabic/Language teacher) having Bachelor Degree from any recognized University; (iii) Demonstrator; (iv) Senior Classical Teacher without Bachelor Degree; (v) Music Teacher; (vi) Junior Teacher/Junior Classical Teacher/Junior*

Hindi Teacher; (vii) Craft Teacher:

14. Recruitment to the post of Vice Principal/Head Master/Head Mistress/Superintendent/Asstt. Head Master/Asstt. Head Mistress of High/HS/HS & MP School- (1)

The post of Vice-Principal shall be filled up by promotion on the basis of combined seniority in the School among the Graduate and Post-Graduate Teachers with minimum 10 (ten) years of teaching experience in case of Post Graduate teachers and 12 years teaching experience, in case of Graduate teacher subject to Page No.# 7/27 satisfactory Annual Confidential Report for 3 (three) consecutive years. Selection shall be made on the basis of recommendation of the State Selection Board. The seniority of teachers in the Schools shall be determined as per provision under Rule 24 (1). (2) The post of Head Master/Head Mistress and Superintendent shall be filled up by promotion from the School-wise seniority list on the recommendation of the State Selection Board. The selection of Head Master/Head Mistress/Superintendent shall be based upon seniority and satisfactory Annual Confidential Report for 3 (three) consecutive years. The seniority shall be determined from the date of receiving graduate scale as per Rule 24 (2). (3) The post of Assistant Head Master/Asstt. Head Mistress/Assistant Superintendent shall be filled up by promotion from the school-wise seniority list of Assistant Teachers on recommendation of the State Selection Board. The selection shall also be based upon satisfactory Annual Confidential Report for last 3 (three) years and seniority of service in graduate scale of pay with a minimum 7 years of teaching experience. In case of amalgamated High School the Head Master/Head Mistress of the M.E. School is eligible for selection as Assistant Head Master/Asstt. Head Mistress subject to condition that - (i) the incumbent should have at least 5 years of teaching experience in M.E. School if he/she is the founder Head Master/Head Mistress of the M.E. School; (ii) the incumbent should have at least 10 years of teaching experience in M.E. School if he/she is not the founder Head Master/Head Mistress of the M.E. School. The seniority shall be determined as per provision of Rule 24(2). (4) Eligibility for the post of Head Master/Head Mistress/Superintendent/Assistant Head Master/Asstt. Head Mistress/Asstt. Page No.# 8/27 Superintendent of High/High Madrassa School as the case may be - (i) the minimum qualification

for the post of Head Master/Head Mistress/Superintendent/Assistant Head Master/Asstt. Head Mistress/Assistant Superintendent shall be graduate in Arts, Science or Commerce with B.T. or B.Ed. degree; (ii) He/She must possess at least 10 years of teaching experience as Graduate Teacher; (iii)He/She must possess at least seven years of teaching experience as Graduate teacher to be an Assistant Head Master/Head Mistress/Asstt. Superintendent.

24. Seniority.- 2) *If a member of the service in a cadre fails to join the appointment within the initial 15 days of receipt of the order of appointment or within the extended period as mentioned in rule 19, but joins later, his seniority shall be determined in accordance with the date of joining.*

7. The Rules extracted above defines the class and cadre under Rule 3 where it is seen that both posts of Assistant Head Master and the post of Graduate Teacher are included in Class-II (Junior) cadre. Rule 14(2) prescribes promotion to the posts of Headmaster/Headmistress and Superintendent from the school-wise seniority list on recommendation by the State Selection Board and that the seniority will be from the date of receipt of Graduate Scale as per Rule 24(2).

8. In the Judgment of *Kripa Sindhu Das (Supra)*, it is seen that in the said matter vires of Rule 3, Rule 14(2), Rule 24, and Rule 25 of the Rules of Assam Secondary Education (Provincialised) Service Rules, 2003 have been questioned by the petitioner therein. The vires of the said Rules have been put to challenge by the petitioner therein on the following

grounds:

(i) The post of Head Master and Assistant Head Master in a High School are to be filled up by way of promotion, but in both the cases the feeder cadre is that way of Graduate Teacher. But the cadre of Assistant Head Master although a higher post and drawing a higher salary is not a feeder cadre to fill up the post of Head Master.

(ii) The scale of pay of Assistant Head Master is higher than that of the Graduate Teacher, which difference in the pay structure have been maintained in the Assam Services (Revision of Pay) Rules, 2017. From the said classification, it is clear for all intents and purposes that the cadre of Assistant Head Master is a higher cadre than that of the cadre of Graduate Teacher. The effect of Rule 24(2) and Rule 25 of the Rule of 2003 are that for fixation of *inter se* seniority of all the members of the feeder cadre in the Service are place in a single Gradation List on the basis of date of appointment, date of joining of School, receipt of Graduate Scale Etc. There is no provision of placing of Assistant Head Master in a Higher position than Graduate Teacher in the Gradation List by virtue of the incumbent have been promoted to a higher post with

higher salary and greater responsibility.

As such the contention of the petitioner in *Kripa Sindhu Das (Supra)* was that the incumbent in the cadre of Assistant Head Master cannot be equally treated at par with incumbent in the feeder cadre of Graduate Teacher for the purposes of promotion to the cadre of Head Master in the High School.

9. The Co-ordinate Bench of this Court considered the relevant Rules and contentions made by the parties. The Co-ordinate Bench held that as the Rules permit, there is no infirmity in taking School-wise seniority in the cadre of Graduate Teacher as the basis for considering the inter se seniority and also for the purposes of considering the incumbents in the feeder cadre for promotion to the next higher post. The Co-ordinate Bench negated the challenge made by the petitioner therein that inclusion of only the cadre of Graduate Teacher as the feeder cadre for promotion to the cadre of Head Master in a School, without any reference to the intermediate higher cadre of Assistant Head Master, does not diminish the chance of promotion of the Assistant Head master to the next higher post of Head Master as compared to the Graduate Teachers. It was held that

the right to be considered for promotion is a fundamental right, while the right to promotion is (not) fundamental right. It was held that the right of the Assistant Head Master to be promoted to the post of Head Master is not denied or diminished as he still can be promoted to the post of Head Master by taking into account his seniority in the cadre of Graduate Teacher and therefore his chance of getting promoted to the post of Head Master is not lost. It was also held that in High Schools having five (5) Classes i.e. from Class-VI to Class-X, the cadres of Head Master, Assistant Head Master and Graduate Teacher exists. But in Schools having two (2) Classes i.e. Class IX and Class X, the cadres of Head Master and Graduate Teacher exists and but there is no cadre of Assistant Head Master. As per the strength of cadres provided in Schedule-III(A)-Teaching, the number of posts in the cadre of Assistant Head Master is lesser than the number of posts in the cadre of Head Master in the High Schools in the State. The cadre of Head Master in both the types of High Schools is a single post cadre. The cadre of Assistant Head Master in High Schools having five (5) Classes is also a single post cadre. However, the cadre of Graduate Teachers are available in both the types of High Schools. It was further noticed that the post of both Head Master and Assistant Head Master are to be filled up by promotion from the numbers of service on the basis of

School-wise seniority. This Court held that if the contention of the petitioner to the effect that the Assistant Head Master is to be made in the feeder cadre for the promotion to the cadre of Head Master, to the exclusion of a Graduate Teacher, then in Schools having the post of Assistant Head Master as the selection is made School-wise, there will be only one incumbent available for selection to vacant post of Head Master. If the said incumbent is not found suitable then the post of Head Master is likely to remain vacant.

11. As regards Schools where there are no Assistant Head Master, it was held that when a vacancy in the post of Head Master arises, in the absence of Graduate Teacher being made a feeder cadre, the post of Head Master can never be filled up.

12. On the basis of the reasoning given, this Court came to a finding that no fundamental right of any members of the service has been violated and the keeping the over-all effects and workability of the provisions impugned, it was held that the impugned provisions did not result of any kind of unfairness, arbitrariness and irrationality to the incumbent in the cadre of Assistant Head Master. The said writ petition

was accordingly found to be devoid of merit and dismissed.

13. We have carefully perused the Judgment of the Co-ordinate Bench as discussed above. The issue raised in the present proceedings have already been specifically dealt with by this Court in *Kripa Sindhu Das (Supra)*. We are in complete agreement with the views arrived at by the learned Co-ordinate Bench of this Court. There are no averments or submissions made that the Judgment rendered by the Coordinate Bench in *Kripa Sindhu Das (Supra)* requires any reconsideration. Accordingly, we find no reasons to take a different view in the present proceedings, from the view taken by the Co-ordinate Bench in *Kripa Sindhu Das (Supra)*.

13. Accordingly, we find no merit in the writ petition and the same is therefore, dismissed.

14. Interim order, if any, stands vacated.

15. No order as to costs.

JUDGE

CHIEF JUSTICE

Comparing Assistant