



GAHC010121642012

Page No.# 1/24



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

Case No. : WP(C)/3543/2012

ABANI BARUAH and 44 ORS
S/O- JHAGI BARUAH, VILL.- BALIJAN, P.O.- CHENGAMARI, DIST.-
SONITPUR, ASSAM.

2: MAHENDRA MOHAN BORAH
C/O- LT. TANKESWAR BORAH
VILL.- BARPAM TINIALI
P.O.- SOOTEA
DIST.- SONITPUR
ASSAM.

3: LOHIT CHANDRA BORKATAKY
C/O- HAREN CH. BORKATAKY
VILL.- RANGAMARI
P.O.- PAVOI
P.S.- CHARIALI
DIST.- SONITPUR
ASSAM.

4: UTTAM MANDAL
S/O- LT. NAGENDRA MANDAL
VILL.- RABAR B. BAZAR.

5: SHIBA PRASAD BARMAN
S/O- TILL BD. BARMAN
VILL.- JALAKUBARI
P.O.- JAMUGURIHAT
DIST.- SONITPUR
ASSAM.

6: LAKHINANDAN KONCH
S/O- KHARGESWAR KONCH
VILL.- BARPATGAON
P.O.- GHORAMARA



DIST.- SONITPUR
ASSAM.

7: LATIKA MUHARI BISWAS
D/O- SRI CHANDRANATH MUHARI
VILL.- KUMARGAON
WARD NO. 2
TEZPUR
DIST.- SONITPUR
ASSAM.

8: KULKUL DAS
S/O- MOHINI MOHAN DAS
VILL.- SHAMACHANU ROAD
DIST.- SONITPUR
ASSAM.

9: PRANATI HAZARIKA
D/O- SRI KAMAL HAZARIKA
VILL.- UDALPUR
P.O.- SOOTEA
DIST.- SONITPUR
ASSAM.

10: MINU HAZARIKA
D/O- LT. JOGESWAR HAZARIKA
VILL.- MONENEKURI
P.O.- NANDIKOSWAR
DIST.- SONITPUR
ASSAM.

11: MAINUL ISLAM
S/O- MD. TAHIRUSSING
P.O. and VILL.- DOLABARI
DIST.- SONITPUR
ASSAM.

12: DIPEN DAS
S/O- BHOLARAM DAS
VILL.- CHEGDIMARI
P.O.- PANPUR
P.S.- JAMUGURIHAT
DIST.- SONITPUR
ASSAM.

13: AJIT BORAH
S/O- THOGIRAM BORAH
VILL.- MONONAKURI



P.O.- NANDIKESWAR
DIST.- SONITPUR
ASSAM.

14: ILA MISHRA
D/O- LAMESWAR MISHRA
VILL.- KARATAIGAON
P.O.- NIZCHUTIA
DIST.- SONITPUR
ASSAM.

15: PADMA BAHADUR NEWAR
S/O- PURANARAM NEWAR
VILL.- NO. 2
CHRISTIAN BASTI
P.O.- RANGA CHAKHUWA
DIST.- SONITPUR
ASSAM.

16: KALPANA HAZARIKA
D/O- LT. MADHAB CHANDRA HAZARIKA
VILL.- MONANAKURI
P.O.- NANDIKESWAR
DIST.- SONITPUR
ASSAM.

17: ANJALI DAS
D/O- LT. MILAN CHANDRA DAS
VILL. and P.O.- KEKARGAON
KAMARCHUBURI
DIST.- SONITPUR
ASSAM.

18: PUNIRAM BHUYAN
S/O- GANESH BHUYAN
VILL.- BARBHUYANGAON
P.O.- SOOTEA
DIST.- SONITPUR
ASSAM.

19: PANKAJ BORAH
S/O- ANANDA CH. BORAH
VILL.- DEKASUNDAR
P.O.- JAMUGURIHAT
DIST.- SANITPUR
ASSAM.

20: MANJULA MAHANTA



D/O- LT. SARBESWAR MAHANTA
VILL.- WARD NO. 6
P.O.- DHEKIAJULI
DIST.- SONITPUR
ASSAM.

21: NISHA PROVA LAHKAR
D/O- JADAB CHANDRA LAHKAR
VILL. and P.O.- LAHKARPARA
DIST.- NALBARI
ASSAM.

22: ANI SAIKIA
C/O- KAMALA SAIKIA
VILL.- MOINAJULI WARD NO. 2
P.O.- DHEKIAJULI
DIST.- SONITPUR
ASSAM.

23: TRINAYAN SAIKIA
S/O- TARANI KANTA SAIKIA
VILL. and P.O.- DA- BESSERIA
DIST.- SONITPUR
ASSAM.

24: RAJINDRA BORAH
S/O- LHIROD CH. BORAH
VILL. and P.O.- DEPOTA
DIST.- SONITPUR
ASSAM.

25: HIMANGSHU BORAH
S/O- TILAK BORAH
VILL.- DA-BESSERIA
P.O.- BESSERIA
DIST.- SONITPUR
ASSAM.

26: NIRMALA DEVI
D/O- LT. MAHENDRA NATH
VILL.- SONTU HAYARAPARA
P.O.- TEZPUR
DIST.- SONITPUR
ASSAM.

27: RITA BORA
D/O- KAMAKHYA CHARAN BORA
VILL.- MILANPUR



P.O.- DEPOTA
DIST.- SONITPUR
ASSAM.

28: PABAN KUMAR BORAH
S/O- LT. KIRAN CHANDRA BORAH
VILL. and P.O.- KETEKIBARI
DIST.- SONITPUR
ASSAM.

29: NARAYAN UPADHAYA
S/O- SRI BISHNU PRASAD UPADHAYA
VILL.- TINIGHARIA
P.O.- MANSIN
DIST.- SONITPUR
ASSAM.

30: IMI SAIKIA
S/O- BASANTA SAIKIA
VILL.- MISHATETELIA SAIKIA CHUBURI
P.O.- TEZPUR
DIST.- SONITPUR
ASSAM.

31: ASWINI KUMAR SARMA
S/O- TILAK CH. SARMA
VILL.- GAJENGAGURI
P.O.- ORANG
P.S.- DHEKIAJULI
DIST.- SONITPUR
ASSAM.

32: SAIFUL ISLAM
S/O- MD. LAKUB ALI
VILL.- KARAIANI
P.O.- NAPAM
DIST.- SONITPUR
ASSAM.

33: OMAR ALI
S/O- MD. ABDUL HAQUE
VILL.- BIHIAGAON
P.O.- PANCH MAIL
DIST.- SONITPUR
ASSAM.

34: RANU KALITA TAMULI
D/O- KHARGESWAR KALITA



C/O- J.C. TAMULI HOUSING COMPLEX
TEZPUR
DIST.- SONITPUR
ASSAM.

35: DIPAK DAS
S/O- LT. PURNA KANTA DAS
P.O. and VILL.- KEHERU KHANDA
DIST.- SONITPUR
ASSAM.

36: NIRMAL DAS
S/O- LT. RIKHESWAR DAS
VILL. and P.O.- KEHERU KHANA
DIST.- SONITPUR
ASSAM.

37: KARUNA DAUKA
D/O- CHANDRA DHAR HALOI
VILL.- NIZIBARI
P.O.- SIRAJULI
DIST.- SONITPUR
ASSAM.

38: MONI DEVI
D/O- NOMAL CH. NATH
VILL. and P.O.- NARANGKATI
DIST.- SONITPUR
ASSAM.

39: RAJANI MAHANTA
S/O- LT. KRISHNA MAHANTA
VILL.- BALISIHA
DIST.- SONITPUR
ASSAM.

40: ANJANA NANDI
D/O- SRI BINOD NANDI
VILL.- WARD NO. 9
DHEKIAJULI
DIST.- SONITPUR
ASSAM.

41: DIPCHAND SATNAMI
S/O- LT. HARIRAM SATNAMI
VILL. and P.O.- BAHBERA
DIST.- SONITPUR
ASSAM.



42: SHIBU KUMAR BRAHMA
VILL.- KAKOPATHAR
P.O.- GORUBANDHA
MISSAMARI
KDIST.- SONITPUR
ASSAM.

43: SATYAJIT AICH
S/O- SRI MANORANJAN AICH
WARD NO. 3
DHEKIAJULI
DIST.- SONITPUR
ASSAM.

44: MRIDUL BORAH
S/O- SRI GANA BORAH
VILL. and P.O.- MAZ - RAWMARI
DIST.- SONITPUR
ASSAM.

45: KHAGEN SARMA
S/O- K. SARMA
VILL.- GAGAL GAON
P.O.- KALABARI
DIST.- SONITPUR
ASSAM

VERSUS

THE STATE OF ASSAM AND ORS
REP. BY THE COMMISSIONER and SECY. TO EDUCATION ELEMENTARY
DEPTT., ASSAM, DISPUR, GHY- 6.

2:THE DIRECTOR OF ELEMENTARY EDUCATION
ASSAM
KAHILIPARA
GHY- 19.

3:THE DIST. ELEMENTARY EDUCATION OFFICER
TEZPUR
DIST.- SONITPUR
ASSAM.

4:THE SECY. TO THE GOVT. OF ASSAM
FINANCE DEPTT.
DISPUR
GHY- 6

Advocate for the Petitioner : MR.H K DAS

Advocate for the Respondent : SC, EDU

**B E F O R E
HON'BLE MR. JUSTICE
ACHINTYA MALLA BUJOR BARUA**

Date of Order: 10.05.2022

JUDGMENT & ORDER (ORAL)

Heard Mr. S Borthakur learned counsel for the petitioners. Also heard Mr. A Phukan, learned counsel for the respondents No.1, 2 and 3 being the authorities under the Elementary Education Department, Government of Assam and Mr. A Chaliha, learned counsel for the respondent No.5 being the authorities under the Finance Department, Government of Assam.

2. The petitioners claim that they had participated in a selection process for the posts of Assistant Teacher in ME/MV Schools in the State of Assam pursuant to an advertisement dated 03.09.1991 which was published in a local daily 'The Sentinel'. The petitioners were subjected to an interview process by the Sub-Divisional Level Advisory Board (for short, the Board) and under the Rules prevailing at the relevant point of time, the Board was the appropriate authority for undertaking the interview. It is stated that pursuant thereof a select list was published and the petitioners were appointed in the manner as indicated in the tabular form in paragraph 4 of the writ petition, which is extracted as below:

SL.No.	Name of the petitioner	Order number and date of appointment	Date of joining	Name of school where appointed
1	Abani Baruah	16.09.93	17.09.93	Diplonga M.E. School
2	Mahendra Mohan Borah	16.12.93		Pub Jamuguri M.E. School
3	Lohit Ch. Borkataky	14.12.93	19.01.94	Batiamari M.V. School
4	Uttam Mandal	19.10.93	01.11.93	Bhijkhowa M.E. School
5	Shiba Prasad Barman	20.12.93	27.01.94	Gaminipal M.E. School
6	Lakhinandan Konch	23.11.94	25.11.94	Balipara M.V. School
7	Latika Muhari Biswas	20.12.93	25.11.94	Parbatia Girls M.V. School, Tezpur
8	Kulkul Das	20.12.93	18.01.94	Parbatia Girls M.V. School, Tezpur
9	Pranati Hazarika	22.11.94	26.11.94	Anandaram Dekial Phukan M.E. School, Bedati
10	Minu Hazarika	23.11.94	23.11.94	Chilabandha Girls M.V. School
11	Mainul Islam	19.10.93		Bhojkhowa Sirajia M.E. Medressa
12	Dipen Das	22.09.93	23.09.93	Balijuri M.E. School

13	Ajit Baruah	19.11.94	21.11.94	Bir Lachit M.E. School
14	Ila Mishra	23.11.94	25.11.94	Chatia Girls M.V. School
15	Padma Bahadur Newar	23.11.94	25.11.94	Balijuri M.E. School
16	Kalpana Hazarika	19.11.94	21.11.94	Baghmari Balika Vidyalaya
17	Anjali Das	20.12.93	01.01.94	Dekargaon M.V. School
18	Puniram Bhuyan	14.12.93	03.01.94	Uttam Chetia M.E. School
19	Pankaj Baruah	20.12.93	27.01.94	Paschim Jamuguri M.E. School
20	Manjula Mahanta	15.03.94	18.04.94	Barsala M.E. School
21	Nisha Prova Lahkar	01.04.94	01.04.94	Ma Sahar M.E. School
22	Miss Ani Saikia	15.03.94	02.05.94	Brajhar M.E. School
23	Trinayan Saikia	20.12.93		Besseria Girls M.V. School
24	Rajindra Borah	20.12.93	18.01.94	Depota M.E. School,
25	Himangshu Borah	19.10.93	03.11.93	Besseria M.V. School
26	Nirmala Devi	20.12.93	18.01.94	Parbatia M.E. School, Tezpur

27	Smt. Rita Bora	20.12.93	18.01.94	Bishnujyoti M.E. School
28	Paban Kumar Borah	19.10.93	01.11.93	Bishnujyoti M.E. School
29	Narayan Upadhaya	18.09.93	21.09.93	Mansiri M.E. School
30	Jimmy Saikia	19.11.94	22.11.94	Parbatia Girls M.V. School
31	Aswini Kumar Sarma	23.11.94	25.11.94	Rangpara M.E. School
32	Saiful Islam	26.10.93	26.10.93	Mansiri M.E. School
33	Omar Ali	11.10.93		Panch Mile M.E.M
34	Ranu Kalita Tamuli	19.11.94	21.11.94	Bihaguri Girls M.V. School
35	Dipak Das	20.10.94	01.02.94	Keheru Khanda M.V. School
36	Nirmal Das	20.12.93	03.01.94	Keheru Khanda M.V. School
37	Karuna Dawka	20.12.93	01.02.94	Swahid Dwijen Bhuyan M.E. School
38	Momi Devi	20.12.93	01.02.94	B.D. Kanoi M.E. School
39	Rajani Mahanta	20.12.93	01.02.94	Kathaludub M.E. School
40	Anjana Nandi	15.03.94	18.04.94	Vivekananda Vidyapith

41	Dipchand Satnami	20.12.93	14.02.94	Basbera M.E. School
42	Shibu Kr. Brahma	15.03.94		Missamari M.E. School
43	Satyajyit Aich	15.03.94	18.04.94	Vivekananda Vidyapith M.E. School
44	Mridul Borah	20.12.93	20.12.94	Rowmari M.E. School
45	Khagen Sarma	23.11.94		Santipur M.V. School

3. The petitioners had received their salary and allowances from the date of initial appointment up to the year 1995 and, thereafter, they were not paid. During the same period, certain irregularities in the appointments were detected in the Education Department and it was a situation where the Department was unable to determine as to which of the appointments were illegal, irregular or regular. In view of the above and also under certain other circumstances, an enquiry committee was constituted headed by Sri S Manoharan, IAS, which in common parlance is called the 'Manoharan Committee'. The cases of the writ petitioners were also subjected to a scrutiny by the Manoharan Committee. It is stated that the Manoharan Committee had categorized the appointments of the teachers who were subjected to the scrutiny into three categories. The first category being such teachers whose entry into services were accepted to be illegal, the second category being such teachers whose entry into services were considered to be irregular and the third category being such teachers whose entry into services were considered to be legitimate. It is also stated that in respect of the second category of teachers whose entry into services were

considered to be irregular, two cabinet decisions were taken being dated 21.02.2000 and 24.02.2005. In the first cabinet decision of 21.02.2000, a decision was taken to regularly induct into services 3511 number of teachers. Accordingly such teachers were regularly inducted into service and are getting their service benefits as entitled. But as the number of teachers who were categorized to be irregularly appointed were more than 3511, the second cabinet decision was taken on 24.02.2005 to induct a further 2776 numbers of teachers. The present writ petitioners are included in the second cabinet decision wherein a decision was taken to induct on regular basis 2776 numbers of teachers. Accordingly, by the order dated 22.08.2005 of the Director of Elementary Education Assam, the petitioners were regularized w.e.f. the date of their joining against the vacant posts as per the list enclosed thereto in the scale of pay of Rs.3130/- to 6600/- per month plus other allowances as admissible under the Rules.

4. A list of teachers wherein the names of the writ petitioners were included also accompanied the order dated 22.08.2005 and the said list which was in a tabular form also contained a column as to against which post the teachers concerned were adjusted.

5. Accordingly, the writ petitioners after their regular induction into services are governed by the '*New Defined Contribution Pension Scheme*' (for short, the NDCPS). The applicability of the NDCPS in respect of the petitioners and the inclusion of the clause thereof in the appointment letters that the petitioners would be governed by the NDCPS is assailed in this writ petition.

6. Mr. S Borthakur, learned counsel for the petitioners raises a contention that for all purpose, in the facts and circumstances of the present case it would have to be construed that the petitioners are in a continuous service since the respective dates of appointments in the year 1993 and it being so, it cannot be a case that they have entered the Government service only as per the order dated 22.08.2005. Accordingly, it is the submission that the petitioners should be governed by the Assam Services (Pension) Rules 1969 (for short, the Pension Rules of 1969) as it stood prior to the introduction of the NDCPS.

7. Mr. A Phukan, learned counsel for the respondents in the Elementary Education Department on the other hand raises a counter contention that the services of the petitioners from the year 1993 were not pursuant to an entry into service by legitimate means and, therefore, under the law, the said period cannot be construed to be a period when the petitioners have entered the Government services. It is the further contention that considering the manner in which the petitioners were earlier appointed, they did not have any legal right to remain in service. But the respondent authorities took a cabinet decision not to dispense with the services of such category of teachers and to provide them with an opportunity to enter into the Government services in a legitimate manner prospectively from the date of such decision and the implementation thereof. Accordingly, it is the contention of Mr. A Phukan, learned counsel for the Elementary Education Department that the aforesaid condition in the order dated 22.08.2005 was introduced that as the petitioners were legitimately allowed to enter the Government services by virtue of the said order and the said order being subsequent to the cutoff date of 01.02.2005, therefore, they would be covered by NDCPS and not by the Pension Rules of 1969 as it stood



prior to the introduction of the aforesaid scheme.

8. In the conspectus of the aforesaid contentions of the parties, a decision to be arrived at in the facts and circumstances of the present case would be as to since when the petitioners have legitimately entered into Government services, that is whether as per their original appointments in the year 1993 or as per the order dated 22.08.2005.

9. If we accept the contentions raised by the parties that the report of the Manoharan Committee had categorized the teachers into three different categories i.e. firstly, the teachers whose entry into Government services were illegal i.e. by entering services through some other manipulative means, secondly, the teachers whose entry into Government services were irregular and thirdly, such categories of teachers whose entry into Government services were by legitimate means, we have to understand that the writ petitioners having been placed in the second category, their entry into services were irregular and that the entry into services of the present writ petitioners in the year 1993 were not a legitimate entry. The categorization of the writ petitioners in the second category that their entry into Government services were irregular has not been assailed and in fact accepted by the petitioners by accepting the order dated 22.08.2005 for entering into Government services, other than the condition contained therein that their services would be governed by the NDCPS.

10. The relevant provisions of the NDCPS as regards its applicability are as extracted.

“3. *The scheme shall be applicable to all new entrants joining State Government Service on regular basis against sanctioned vacant post filled up with the approval of either SLEC or Finance (SIU) Department on or after 1st February, 2005. It would also be applicable to all Government servants whose services were/will be regularized against regular posts on or after 01.02.2005 with the benefit of prospective date.*

4. *The teaching and non-teaching employees of provincialised Educational Institutions as well as that of Panchayat who join State Government service on or after 01.02.2005 on regular basis shall come under the purview of the above scheme.”*

11. A reading of the applicability of the NDCPS is that the scheme would be applicable to all the new entrants joining the State Government on a regular basis against vacant sanctioned posts on or after 01.02.2005. In other words, four conditions precedent are to be satisfied for the applicability of the NDCPS i.e. the Government employee concerned must be a new entrant joining the State Government service, secondly, such joining ought to be on a regular basis, thirdly, it should be against a vacant sanctioned post and, fourthly, it should be on or after 01.02.2005.

12. In the instant case, firstly, the petitioners by the order dated 22.08.2005 have entered Government service, secondly, such entry is on a regular basis, thirdly, it is against a sanctioned vacant post and fourthly, the entry is after 01.02.2005. Consequently, all the four conditions precedent of the NDCPS are satisfied and therefore, from such point of view, the petitioners would be governed by the provisions of the NDCPS.

13. But to understand whether because of their earlier services from the year 1993 the petitioners would also be governed by the provisions of the Pension Rules of 1969 as it stood prior to the introduction of the NDCPS, as a corollary, we can also view that if the petitioners satisfy the conditions that prior to 01.02.2005 they were the entrants to the Government services and such entry was on a regular basis and further it was against a vacant sanctioned post, perhaps it could have been looked into whether they would be governed by the Pension Rules of 1969 as it stood prior to the introduction of the NDCPS. But Rule 31 of the Pension Rules of 1969 itself provides for the eligibility of an employee to be qualified for pension under the said Rules.

14. If all the aforesaid four conditions precedent are satisfied, it has to be understood that the employee concerned would be governed by the NDCPS and not by the Pension Rules of 1969 as it stood prior to the introduction of the NDCPS. From the said point of view also, when we look into the factual matrix as regards the writ petitioners in the present writ petition, we find that although there may be a claim that the petitioners have entered into Government services in the year 1993 itself, but such entry in view of the conclusion of the Manoharan Committee cannot be said to have been on a regular basis and we take note that it has been projected by the authorities that although it is the claim of the writ petitioners that they were appointed pursuant to a selection process as per the advertisement dated 03.09.1991, but no material is available that they were appointed against sanctioned vacant posts. On the other hand, a claim is made by the respondents that the appointments of the petitioners were in excess of the available sanctioned vacant posts. Rule 31 of the Pension Rules of 1969 is extracted as below:



“31. The service of an officer does not qualify for pension unless it conforms to the following three conditions:

Firstly, the service must be under Government;

Secondly, the employment must be substantive and permanent;

Thirdly, the service must be paid by Government:

Provided that the Governor, may, even though either or both of conditions(1) and (2) above are not fulfilled:-

(i) declare that any specified kind of service rendered in a non-gazetted capacity shall qualify for pension, and

(ii) in individual cases and subject to such conditions as he may think fit to impose in each case allow service rendered by an officer to count for pension."

15. Rule 31 of the Pension Rules of 1969 as it stood prior to the introduction of the NDCPS provides that an employee would be qualified for pension if it conforms to three conditions i.e., firstly, the service must be under Government, secondly, the employment must be substantive and permanent and thirdly, the service must be paid by the Government.

16. The concept of substantive employment was examined by the Supreme Court in *Baleshwar Dass Vs. State of UP and Others* reported in (1980)4 SCC 226 and in *Ramesh K Sharma and Anothers Vs. Rajasthan Civil Services and Others* reported in (2001) 1 SCC 637 as well as in *OP Singla and Another Vs. Union of India and Others* reported in (1984) 4 SCC 450.

In paragraph 31 of its judgment in *Baleshwar Dass* (supra), it is provided as extracted:

“31.What, in the context, is a substantive capacity vis-a-vis an appointment to a post? In our view, the emphasis imparted by the adjective "substantive" is that a thing

is substantive if it is "an essential part or constituent or relating to what is essential". We may describe a capacity as substantive if it has "independent existence" or is of "considerable amount or quantity". What is independent in a substantial measure may reasonably be described as substantive. Therefore, when a post is vacant, however designated in officialese, the capacity in which the person holds the post has to be ascertained by the State. Substantive capacity refers to the capacity in which a person holds the post and not necessarily to the nature or character of the post. To approximate to the official diction used in this connection, we may well say that a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially of long duration in contradistinction to a person who holds it for a definite or temporary period or holds it on probation subject to confirmation."

In paragraph 4 of its pronouncement in Ramesh K Sharma (supra), it has been provided as extracted:

"4. In Baleshwar Dass v. State of U.P., this Court held that when a person holds a post for an indefinite period especially for long duration in contradistinction to a person who holds it for a definite or temporary period or holds that on probation then it must be held that he held a post in a substantive capacity. Further if an appointment to the post is made by the proper authority after the person concerned passes the prescribed test and if a probation period has been prescribed therein, on completion of the probation period his appointment is further approved then also it can be said that he held a post in substantive capacity. This decision in Baleshwar Dass case was followed by this Court in O.P. Singla case."

In paragraph 78 of OP Singla and Another Vs. Union of India and Others reported in (1984) 4 SCC 450, it has been held as extracted:

"78. In the aforesaid decision this Court noted that a person is said to hold a post in a substantive capacity when he holds it for an indefinite period, especially of long duration in contradistinction to a person who holds it for a definite or a temporary period or holds it on probation subject to confirmation. If the appointment was to a

post and the capacity in which the appointment was to be made was of indefinite duration, if the proper authority had been consulted and had approved, if the tests prescribed have been taken and passed, if probation has been prescribed and has been approved, one may well say that the post was held by the incumbent in a substantive capacity. Applying these tests to the facts and circumstances of this case dealing with the officers holding the post for a long time, there is no doubt that the petitioners officers have held the positions in substantive capacities.”

17. On a conjoint reading of the aforesaid pronouncements laid down by the Supreme Court, it would be discernible that in order to be in a substantive employment the conditions to be fulfilled, amongst others, would be that the person holds the post for indefinite period, i.e., for a long duration in contradistinction to a person who holds it for a definite or a temporary period, the appointment to the post is made by the proper authority after the person concerned passes the prescribed test and the post to which the appointment is made is vacant, although it may be immaterial as to in what manner the post is designated in officialese. If all the three conditions are simultaneously satisfied it could be understood that the person concerned was in a substantive employment.

18. Having taken note of the requirements to accept an employment to be a substantive employment, we have to understand that the second condition in Rule 31 of the Pension Rules of 1969 requires that the appointment to the post is made by the proper authority after the person concerned passes the prescribed test and the post to which the appointment is made is vacant i.e. a sanctioned vacant post.

19. In the aforesaid context, in the instant case, it is an admitted position that the writ petitioners were appointed in the year 1993, may be, by following some process, but it was in excess of the available sanctioned vacant posts. If it is accepted that the petitioners were in employment from the year 1993 and the same may have been for a long duration, but as regards the other conditions that the appointment to the post is to be made by a proper authority after the person concerned passes the prescribed test and that the post to which the appointment was made is a sanctioned vacant post, would not be satisfied in the facts and circumstances of the present case, more so, in view of the conclusion that had already been arrived that the petitioners were appointed in excess of the available sanctioned vacant posts. Having been appointed in excess of the available sanctioned vacant posts, not only the condition that the post is required to be a vacant sanctioned post would not be satisfied, even the requirement that the person concerned would have to pass the prescribed test may also be not satisfied as the selection or the prescribed test was done only in respect of the available sanctioned vacant posts for which the selection process was undertaken and, therefore, even if the petitioners may have participated in some selection process, it cannot be said that they have passed the prescribed test which is a requirement to be in a substantive employment.

20. In the absence of the satisfaction of two of the conditions precedent that the petitioners ought to have been appointed on regular basis and against sanctioned vacant posts, prior to 01.02.2005, which is the cutoff date for the applicability of the NDCPS, it has to be understood that the present writ petitioners have not joined the Government services on a substantive and permanent employment prior to 01.02.2005, although they may have been

appointed or continued in service in some other manner. Further, as the petitioners were not in an employment which was substantive and permanent, they have not satisfied the requirement of the condition of qualifying service provided in Rule 31 of the Pension Rules of 1969 that the employment must be substantive and permanent. If the entry into Government service of the present writ petitioners in the year 1993 were not legitimate under the law, it has to be accepted that they have not entered the Government service in a legitimate manner, so as to be given an entitlement to the aforesaid period of service to be also included as a part of the Government services they had rendered.

21. When we look into the order dated 22.08.2005 by which the petitioners were regularized in service w.e.f. the date of joining against the vacant posts, it is discernible that the petitioners had joined the Government services on a regular basis against sanctioned vacant posts subsequent to 01.02.2005. From such point of view, we do not find any infirmity in the order dated 22.08.2005 which provides that the petitioners would be governed by the NDCPS.

22. But, however, Mr. S Borthakur, learned counsel for the petitioners refers to the list of teachers enclosed to the order dated 22.08.2005 and points out to the 5th column in the said list which provides for the posts against which adjustments were proposed and by referring to the word 'adjusted' appearing in the 5th column of the list, it is contended that the petitioners were not appointed to Government services by the order dated 22.08.2005 but were on the other hand adjusted.

23. Accordingly, it is contended by Mr. S Borthakur learned counsel for the petitioners that as the petitioners were adjusted by the said order, it was neither a case that they were appointed nor it was a case that they were regularised in service by the said order. According to Mr. S Borthakur, learned counsel the very word adjusted is itself an indication that there were some prior services by the petitioners and therefore, it being a case of there being some prior service, the order dated 22.08.2005 is not an indication either of an appointment or that of a regularization. Accordingly a submission is made that if the word 'adjusted' appearing in the 5th column of the list enclosed to the order dated 22.08.2005 is given its appropriate meaning, the petitioners would have to be construed to have joined Government services even prior to the order dated 22.08.2005.

24. We are not expressing any view on the said submission raised by Mr. S Borthakur, learned counsel for the petitioners nor we are trying to read the meaning of the word 'adjusted' appearing in the 5th column of the list enclosed to the order dated 22.08.2005, vis-à-vis, the other provisions in the said order which provides that the concerned teachers were regularised by the order dated 22.08.2005 with effect from their respective dates of joining against the vacant posts as per the enclosed list. If the petitioners intend to give a different meaning to the word 'adjusted' appearing in the 5th column of the list enclosed to the order dated 22.08.2005 and thereby claim that they have entered Government services even prior to the said order dated 22.08.2005, liberty is granted to the petitioners to make a representation before the Secretary to the Government of Assam in the Elementary Education Department Government of Assam. In the event of any such representation is filed, the Secretary may give



a meaning to the word 'adjusted' appearing in the 5th column of the list enclosed with the order dated 22.08.2005, and the implications thereof, but shall make no attempt to re-visit the conclusions arrived at in this judgment in any other manner.

25. Accordingly, while rejecting the writ petition for the relief sought therein, the writ petitioners are also given the liberty to file a representation as indicated hereinabove.

26. If any representation is submitted, the Secretary to pass the reasoned order by providing for the meaning and purport of the word 'adjusted' appearing in the 5th column of the list enclosed to the order dated 22.08.2005 within a period of three months from the date of receipt of the representation as indicated hereinabove.

27. Writ petition stands disposed of in the above terms.

JUDGE

Comparing Assistant