(2016) 04 GAU CK 0050

In the Gauhati High Court

Case No : W.P. (C) 61 of 2011

All Assam Retired Officers, Teachers APPELLANT

Vs

State of Assam RESPONDENT

Date of Decision : 28-04-2016

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2016) 4 GauLJ 403 : (2017) 1 GauLR 357 : (2016) 4 GauLT 85 : (2016) 5 NEJ 139

Hon'ble Judges : Mr. A.K. Goswami, J.

Bench : Single Bench

Advocate : Mr. M.K. Choudhury, Senior Advocate. Mr. N. Barua, Advocate, for the Appellant; Mr. R. Newar, Government Advocate, Mr. S. Barua, Standing Counsel, Finance Department, Mr. A. Chetri and Mr. M.P. Sarma, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Mr. A.K. Goswami, J.—Heard Mr. M.K. Choudhury, learned senior counsel, appearing for the petitioners. Also heard Mr. S. Barua, learned standing counsel, Finance Department, appearing for the respondent No. 2; Mr. R. Newar, learned State counsel, appearing for the respondent Nos. 1 and 4 and Mr. A. Chetri, and Mr. M.P. Sarma, learned counsel, appearing for the respondent No. 3.

2. The writ petitioner No. 1 is a Committee formed by the officers, employees and teachers of the State Government who retired from service from 2006 onwards at the age of 59 years and from November 2007 at the age of 60 years. The Committee has a strength of about 2,500 members. Initially, the Committee was known as Retired Employees Committee and after registration under the Societies Registration Act, 1860, the Committee is now known as All Assam Retired Officers, Teachers and Employees Committee. The petitioner Nos. 2 and 3 are the President and General Secretary of the Committee, respectively.

3. The grievance, primarily expressed by the writ petitioners, is in relation to the

decision of the Government to give only notional benefit of enhanced revised pay structure with effect from 01.01.2006 and not the arrears of pension enhanced, death-cum-retirement gratuity, etc., due to revision of pay structure.

4. The Government of Assam had constituted the Assam Pay Commission, 2008 to examine and recommend changes in the pay structure, emoluments and conditions of service of different classes of State Government employees, to examine the existing amenities and facilities relating to death-cum-retirement benefits (DCRG), etc., to suggest re-organisation of existing service with a view to rationalising the work load and efficiency, etc., to examine and suggest the principles to be followed in granting relief due to increase in the consumer price index to the State Government pensioners and also to examine any other important matters that may be referred to the Commission by the Government. The Commission submitted its Report to the Government on 15.10.2009. To examine the Report of the Assam Pay Commission, 2008 and to concretize the action plan and to submit them to the Government, the Government of Assam had constituted a Committee by a Notification dated 26.10.2009 and the said Committee submitted its Report on 30.11.2009. Thereafter, the Government accepted the major recommendations of the Assam Pay Commission with modifications as suggested by the Committee and other modifications as were considered necessary and accordingly, a notification dated 04.02.2010 was issued. The Government decided to implement the recommendation of the Pay Commission with the modifications as aforesaid with effect from 01.01.2006. The Government at Clause 42 A(i) of the Report under the heading "General Decisions" indicated that no arrear shall be paid to employees who retired during the period from 01.01.2006 to 31.03.2009 and arrear shall be credited to their bank accounts in a single instalment after adjustment of interim relief in terms of Clause 42.4 under the heading "General Decision" in respect of employees who retired from 01.04.2009 to 31.01.2010. Subsequently, an Office memorandum dated 01.06.2010 was issued indicating sanction accorded by the Governor of Assam to the regulation/revision of pension/family pension with effect from 01.01.2006 in respect of pensioners/family pensioners in the manner indicated therein.

5. The writ petition was accordingly filed challenging the decision of the Government not to pay arrear pension, DCRG etc. to those who retired between the periods from 01.01.2006 to 31.03.2009. Basically the classification of employees in two groups of retired personnel has given rise to the present dispute.

6. An affidavit was filed by the respondent No. 2 stating that Assam Pay Commission, 2008 had recommended for the revised pay structure to take effect from 01.04.2009 but the revised pay of the employees shall be notionally fixed as on 01.01.2006. Though the pay of the employees would be fixed with effect from 01.01.2006, no arrear would be paid up to 31.03.2009. It is stated that in view of the assessment of the economic and financial condition of the State, the

Commission did not recommend payment of arrears for the period from 01.01.2006 to 31.03.2009 which is in consonance with the observation of the 6th Central Pay Commission that States which did not reflect a comfortable position as far as increased expenditure is concerned, can consider the option of deciding on a date of implementation different from that of the Central Government i.e. 01.01.2006. It is pleaded that additional fitment benefit of periodic pay revision shall not be given actual effect for the period between from 01.01.2006 to 31.03.2009 just like the serving employees who are not given any arrears of pay for the period between 01.01.2006 to 31.03.2009. While stating that DCRG and gratuity shall be paid on the basis of the pre-revised salaries for those who retired up to 31.03.2009 and the additional fitment benefit shall not be taken into account while calculating DCRG and gratuity for the period between 01.01.2006 to 31.03.2009, it is stated that arrear benefit of pay revision had been provided with effect from 01.04.2009 only. It is categorically stated that no employees, whether retired or serving, shall get any benefit on account of pay revision for the period between 01.01.2006 to 31.3.2009. It is also stated that arrears on account of pay revision for the period between 01.01.2006 to 31.03.2009 were not given to those employees who retired after 31.03.2009 even though they may get actual benefit on account of enhanced pension, DCRG, leave encashment benefit etc.

7. An affidavit was filed on behalf of respondent No. 3 stating that Pension and Public Grievance Department had published an Office memorandum dated 01.06.2010 in pursuance to the Report of the Assam Pay Commission, 2008.

8. In the affidavit-in-reply filed by the petitioners to the affidavit-in-opposition of the respondent No. 2, it is stated that the number of retirees for the period from 01.01.2006 to 31.3.2009 is 10,373 and the figure during the period from 01.01.2006 to 30.09.2008 would be 8,778 and therefore, additional financial burden in respect of DCRG and leave encashment will not be a considerable amount. It is asserted in the affidavit-in-reply that the claim is for arrears of pension, DCRG and leave encashment at revised rates. It is pleaded that a distinct division amongst employees is created in that whereas those who retired before 01.04.2009 but after 01.01.2006 will not get DCRG, leave encashment etc. at revised rates, those who retired/would be retiring after 01.04.2009 would get DCRG and leave encashment at revised rates besides arrear of pay and pension.

9. Mr. M.K. Choudhury, learned senior counsel for the petitioners has submitted that the decision of the Government to divide the pensioners in two groups for applying the recommendations of the Assam Pay Commission, 2008 is not based on any rational principle and even if there is any principle, the same has no nexus to the objects sought to the achieved through the recommendation of the Pay Commission. It is submitted that pensioners form a class and it is impermissible to make a class within a class for the purpose of payment of enhanced DCRG, leave encashment benefits besides arrears of pension. He has

also submitted that financial crunch cannot be a ground to deny the members of the petitioners Association what is lawfully due to them. The learned senior counsel has relied on the judgment of the Apex Court in the cases of D.S. Nakara and ors. v. Union of India, reported in (1983) 1 SCC 305 and All India Judges Association and ors. v. Union of India and ors., reported in (2006) 12 SCC 187 as well as a decision of this Court dated 20.12.1989 in Civil Rule No. 1874/1988 (Nikunja Mohan Chowdhury v. Deputy Commissioner, Karimganj and ors.).

10. Mr. S. Barua, learned standing counsel appearing for the Finance Department has submitted that the serving employees were also not given arrears on account of pay revision for the period from 01.01.2006 to 31.03.2009 and therefore, the prayer of the writ petitioners on that count is wholly unjustified. It is submitted by him that the Commission had clearly recommended no arrear should be paid for the period up to 31.03.2009. It is submitted that the 13th Finance Commission did not give any financial support to the States for the pay revision resulting in additional financial burden and therefore, the State Government has to take its decision within the means that it has. As all employees, whether serving or retired, had to forgo actual benefit on account of pay revision for the period from 01.01.2006 to 31.03.2009, no division or groups have been created as contended by the petitioners, he submits.

11. I have considered the submission of the learned counsel for the parties.

12. It will be also be relevant to take into account Clause 9.1 of Chapter 9 under the broad heading "Financial Implications" of the Report of the Commission.

"Date of effect: 9.1. The Commission recommends the revised pay structure to take effect from 1.4.2009. The revised pay for employees shall be initially fixed as on 1.1.2006. The pay of the employees would be fixed along with increment at 1% dearness allowance, etc. with effect from 1.1.2006 but no arrear would be paid for the period up to 31.3.2009. In view of the assessment of economic and financial conditions of the State as per information available to the Commission, the Commission does not recommend payment of arrears for the period between 1.1.2006 to 31.3.2009. All recommendations regarding allowances and other benefits will take effect only prospectively."

13. Clause 42.2 of the Report of the Assam Pay Commission reads as follows:

"42.2. Revised pay structure which will have notional effect from 1st January 2006 will apply to the Government employees who are in service on 31.12.2005 as well as to those who entered into service on or after 1st January 2006."

14. Clause 42.A reads as follows:

"A. Arrear in respect of retired/to be retired employees;

(i) In respect of employees who retired in the period from 1.1.2006 to 31.3.2009 no arrear shall be paid. In respect of employees who retired in the period from 1.4.2009 to 31.1.2010, arrear shall be credited to their bank account in a single instalment after adjustment of interim relief as per the O.M. mentioned in paragraph 4 above.

(ii) Clause 33(VI) may be referred for employees who have retired prior to 01.01.2006."

15. As there is a reference to Clause 33 (VI) in Clause 42.A(ii), it will be appropriate to also extract Clause 33 (VI) of the Report of the Assam Pay Commission. The same reads as follows:

"VI. Fitment Benefit to the past Pensioners:

All past pensioners are allowed fitment benefit equal to 40% of the basic pension. The increase will be allowed by taking into account the effect of conversion of 50% of Dearness Relief as Dearness Pension. Consequently, Dearness Relief at the rate of 86% on pension has been taken for the purposes of computing revised pension as on 1/1/2006. The fixation of revised pension, in no case, shall be lower than fifty percent of the sum of the minimum of the pay in the pay band and the Grade Pay thereon corresponding to the pre-revised pay scale from which the pensioner had retired. Actual drawal will however be subject to necessary adjustment of Commuted portion of pension, if any."

16. Clause 11.(ii) of O.M. dated 01.06.2010 reads as follows:

"Enhanced limit of DCRG, service gratuity, leave encashment and other retirement benefits based on revised pay shall be effective from 1.4.2009 and shall be applicable only for those employees who superannuated/died on or after 1.4.2009. No arrear shall be paid in respect of DCRG, service gratuity, leave encashment and other retirement benefits owing to the pay revision for the period from 1.1.2006 to 31.3.2009."

17. Though there is no pleading, a notification dated 19.02.2011 on resolution on the report of the Anomaly Committee is annexed as Annexure-2 to the affidavit-in-reply filed by the petitioners against the affidavit-in-opposition filed on behalf of respondent No. 2, i.e., Principal Secretary to the Government of Assam, Finance Department. Clause 6 of the said notification has relevance and, as such, the same is quoted herein below:

"6. Grant of arrear of pay and pension revision:

Payment of arrear on account of Pay and Pension revision shall be made to the employees and pensioners additionally for 6 months period prior to 01.04.2009 i.e. for the period between 01.10.2008 to 31.03.2009. The Interim Relief drawn for the period between 01.10.2008 to 31.03.2009 will be adjusted (deducted) from the arrears arising out of the revision of pay, pension for the period between 01.10.2008 to 31.03.2009. This additional arrear of pay and pension will be released in a single instalment.

However, the existing provision regarding DCRG, Leave Encashment and other retirement benefits shall remain unchanged i.e. the enhanced limit of DCRG, Service Gratuity, Leave Encashment and other retirement benefits based on revised pay are effective only from 01.04.2009 and are applicable only for those who superannuated or died on or after 01.04.2009."

18. Materials on record demonstrate that the Commission had recommended that the revised pay structure shall be effective from 01.04.2009 but the revised pay for employees shall be notionally fixed as on 01.01.2006. The Commission also did not recommend payment of arrears for the period 01.01.2006 to 31.03.2009 by providing that all recommendations regarding allowances and other benefits will take effect only prospectively. From the notification dated 19.02.2011, which is a resolution on the report of the Anomaly Committee, it is seen that payment of arrears on account of pay and pension revision shall be made to the employees and pensioners additionally for six months'' period prior to 01.04.2009 i.e. for the period from 01.10.2008 to 31.03.2009. Interim relief drawn for the period between 01.10.2008 to 31.03.2009 would be adjusted from the arrears arising out of revision of pay for the period between 01.10.2008 to 31.03.2009 and that the additional arrear of pay and pension would be released in a single instalment. It was also indicated that existing provisions regarding DCRG, leave encashment and other retirement benefits shall remain unchanged which, in other words, means that enhanced limit of DCRG, service gratuity, leave encashment and other retirement benefits based on revised pay are effective only from 01.04.2009. It is noticed that said affidavit of the Finance Department was sworn on 16.05.2011 and filed on 30.05.2011, that is to say, after the notification dated 19.02.2011 had been issued. It is not understood why the aforesaid notification was not referred to in the affidavit of respondent No. 2. The notification, in essence, makes it clear that the averments made in the affidavit of the respondent No. 2 that a serving officer shall not get any benefit on account of pay revision for the period between 01.01.2006 to 31.03.2009 is not correct. The Notification dated 19.02.2011, thus, goes to show that the State had not followed the recommendations of the Commission regarding payment of arrears for the period between 01.01.2006 to 31.03.2009 in to.

19. The core factual matrix in D.S. Nakara (supra) was that the liberalized pension formula brought about by Office Memo dated 25.05.1979 was made applicable prospectively to those who retired on or after 31.03.1979 in case of Government servants covered by Central Civil Service (Pension) Rules, 1972 (for short, ''the Rules'') and in respect of those defence personnel who become/ become non-effective on or after 01.04.1979 and, as a logical corollary, those who retired prior to the specified date, would not be entitled to the benefits of the liberalized pension formula. The challenge therein was only to that part of the scheme by which its benefits are admissible to those who retired from service after a certain date or, in other words, the petitioners wanted the scheme to be uniformly enforced with regard to all pensioners for the purpose of computation of pension irrespective of the date when the Government servant retired subject to the only condition that he was governed by the 1972 Rules. The issue that the benefit of the scheme would be available from the specified date irrespective of

the fact when the concerned Government servant actually retired from service was not in question. The Apex Court ruled that (i) pension is neither a bounty nor a matter of grace; (ii) pension is not a gratuity payment, but it is a payment for the past service rendered and (iii) it is a social welfare measure rendering socio-economic justice to those who, in their hey-days of their life toiled for the employer on an assurance that they would not be left in the lurch in their old age. The Apex Court held that the pensioners, for the purpose of pension benefits, form a class. As the State considered it necessary to liberalise the pension scheme, in absence of any rational principle having nexus to the object to be achieved, the Apex Court held that a homogeneous class cannot be arbitrarily divided by fixing an eligibility criteria unrelated to the purpose of pension, namely, granting benefits only to those who retired subsequent to that date, simultaneously denying the same to those who retired prior to that date and, accordingly, it was held to be discriminatory and it was observed that in absence of any acceptable or a persuasive reason for the division, the arbitrary action violated the guarantee enshrined in Article 14 of the Constitution . The Court had rejected the contention of the petitioners that pension should be made available not from 1982 but from the date of retirement holding that right to get pension, in the facts and circumstances of the case, accrued only after the recommendation had been accepted by the Government on 10.08.1983. The date of effect of the liberalized pension rules was fixed not from the date of retirement but from the date fixed by the Office Memorandum.

20. In Nikunja Mohan Chowdhury (supra) this Court had, in essence, rejected the classification made that pension would be available to temporary Government servants who had put in not less than 20 years of service to those only who had retired or would be retiring from 1.9.1982 and directed that pensionary benefits shall be made available to all the temporary Government employees who had put in not less than 20 years of service from 01.09.1982.

21. Paragraph 19 of All India Judges Association (supra), upon which Mr. Choudhury has placed reliance, reads as follows:

"19. Learned Amicus Curiae has invited the attention of the Court to the affidavit dated 18.04.2005 filed on behalf of the State. In paragraph 4 thereof, the only plea taken by the State of Kerala is that there is financial crunch in the State and the possibility of similar demand being raised by the employees of other departments. Both of these pleas have no substance and such pleas have been rejected earlier."

In paragraph 20 of All India Judges Association (supra), it was stated as follows:

"Let the State of Kerala make full compliance, issue notification in that regard and file affidavit of compliance on or before 30.06.2005."

22. The materials on record would go to show that special provision has been made for those employees who had retired prior to 01.01.2006. There are two classes of retired employees - (i) those who had retired prior to 01.01.2006,

prior to coming into force of the revised pay structure with effect from 01.01.2006, and (ii) those who had retired after 01.01.2006 onwards. At the cost of repetition, it will be worthwhile to note that the Pay Commission recommendations were accepted vide Notification dated 04.02.2010. In other words, from 01.01.2006 to 04.02.2010, in respect of same categories of pensioners, who had retired after 01.01.2006, two classifications had been made: one class consists of the pensioners who retired during the period from 01.01.2006 to 31.03.2009 and the other, who retired from 01.04.2009 onwards. Subsequently, for the purpose of grant of arrear of pay and pension revision another classification was made from 01.10.2008 to 31.03.2009. No materials have been placed by the State Government to justify the classifications. Merely because there was a recommendation by the Pay Commission to that effect will not suffice. Because, such recommendation has to be considered and acted upon and therefore, the action taken by the State has to conform to the mandate of Article 14 of the Constitution of India. There is also no material placed by the State Government demonstrating that it will not be in a position to bear the financial burden. Even if such a plea was taken, how far that plea would have been tenable, in view of All India Judges Association (supra), is another question.

23. Article 14 is attracted when equals are treated differently without any reasonable basis. Article 14 permits reasonable classification, but the classification must satisfy the twin tests of classification being founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and that differentia must have rational nexus to the object sought to be achieved. The action of the State Government in granting benefit to a particular group by sub-dividing a homogeneous class of pensioners into two or more groups is, in the considered opinion of the Court, in absence of any reasonable, rational or persuasive reason for the division, discriminatory. One must bear in mind that pension is neither a bounty nor a matter of grace and it is a social welfare measure to render socio-economic justice.

24. In view of the above discussions, the writ petition is allowed in terms of the prayers made. Consequential action shall be taken accordingly by the State respondents without any delay.

25. No cost.

