

(2023) 05 GAU CK 0012

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 8311 Of 2022

Baharul Islam And 35 Ors

APPELLANT

Vs

State Of Assam And 4 Ors

RESPONDENT

Date of Decision : 04-05-2023

Acts Referred:

Assam Services (Pension) Rules, 1969 — Section 31

Citation : (2023) 05 GAU CK 0012

Hon'ble Judges : Devashis Baruah, J

Bench : Single Bench

Advocate : A R Bhuyan

Final Decision : Disposed Of

Judgement

1. Heard Mr. A. R. Bhuyan, the learned counsel appearing on behalf of the petitioners and Mr. P. N. Sharma, the learned Standing counsel appearing on behalf of the respondent Nos. 1, 3, 4 and 5. I have also heard Mr. R. Borpujari, the learned Standing counsel appearing on behalf of the respondent No.2.

2. The case of the petitioners herein is that the petitioners are entitled to the Old Pension Scheme in terms with the Assam Services (Pension) Rules, 1969 (for short "the Rules of 1969") and not the New Defined Contributory Pension Scheme, 2009 which was brought into effect vide the notification dated 06.10.2009. It appears from a perusal of the petition and more particularly to the order of regularization of the petitioners dated 17.08.2005 that the petitioners herein were initially appointed in excess of the posts during the period from 01.03.1991 to 30.11.1996 and upon being enquired into by the one man enquiry Committee headed by Shri S. Monoharan, I.A.S. and subsequently by the Task Force/District Level Screening Committee, the services of the petitioners along with the others were regularized w.e.f. their joining against the vacant posts. In fact, the issue involved herein had already been dealt with by this Court by a detail judgment in the case of Purnima Hore and Another Vs. State of Assam and Others reported in (2023) SCC Online Gau 1165. Paragraph No.105

to Paragraph No.111 of the said judgment categorically dealt with the case of excess teachers and their entitlements and thereby declaring that the excess teachers like the petitioners would be entitled to the New Defined Contributory Pension Scheme, 2009 and not to the Old Pension Scheme in terms with the Rules of 1969. It was categorically held by this Court that the petitioners therein who were appointed in the category of excess teachers would not be entitled to the Old Pension Scheme inasmuch as their period of service rendered earlier prior to being regularized cannot be taken into consideration for the purpose of pension.

3. At this stage, this Court also finds it relevant to take note of the submission of Mr. A. R. Bhuyan, the learned counsel appearing on behalf of the petitioners that a Coordinate Bench of this Court in WP(C) No.8694/2018 with another writ petition vide an order dated 12.08.2021 had held that the petitioners therein would be governed by the Assam Services (Pension) Rules, 1969 and not by the NPS. A deeper analysis of the order dated 12.08.2021 would reveal that the Coordinate Bench of this Court was not informed prior to applying the order passed in WP(C) No.3662/2009 as well as also the order passed in Review Petition No.16/2019 which were matters pertaining to dropped teachers whose claims for pension under the Old Pension Scheme was completely different. It is relevant herein to take note of that in a similar circumstances, the Coordinate Bench of this Court had also passed an order dated 04.08.2015 in WP(C) No.5705/2011 on the basis of the order passed on 12.05.2015 in WP(C) No.4169/2009, which was a case of dropped teachers. This Court in its judgment and order dated 31.03.2023 in the case of Purnima Hore and Another (supra) has also dealt with the said aspect of the matter at Paragraph Nos. 109 and 110.

4. Paragraph Nos. 106 to 111 of the judgment in the case of Purnima Hore and Another (supra) having dealt with the issue of excess teachers, this Court finds it relevant to extract the same hereinunder:

"106. These writ petitioners were appointed by the Deputy Inspector of Schools and they received their salary and allowances from the date of initial appointment up to the year 1996 and thereafter they were not paid. At that relevant point of time, certain irregularities in the appointments were detected in the Education Department and the Education Department was unable to determine as to which of the appointments were illegal, irregular or regular. In view of the above, an Enquiry Committee was constituted headed by Sri S. Manoharan, IAS which in common parlance called the Manoharan Committee. The cases of various teachers were subjected to scrutiny by the Manoharan Committee. It is an admitted position that the Manoharan Committee had categorized the appointments of teachers who were subjected to scrutiny into three categories. The first category being such teachers whose entry into the service was found to be illegal; the second category being such teachers whose entry to the services were found to be irregular and the third category being such teachers whose entry in the service were considered to be legitimate. While

making the scrutiny, it was found that there were various appointments which were made in excess of the vacant posts and such teachers who were appointed in excess of the vacant posts are commonly termed as Excess Teachers. It is an admitted position that in respect to the second category of cases, whose entry into the service was considered to be irregular, two Cabinet decisions were taken being dated 20.01.2000 and 24.02.2005. In the first Cabinet decision dated 20.01.2000, a decision was taken to regularly induct into services 3511 number of teachers. In the second Cabinet decision which was taken on 24.02.2005, a decision was taken to induct further 2776 number of teachers. It is an admitted fact that in respect to the petitioners before this Court, their services were regularized after 01.02.2005 on the dates so mentioned in the chart hereinabove. They had given an undertaking at the time of submitting the joining report that they would come within the ambit of New Pension Scheme. One very important aspect of the matter is that these petitioners, pursuant to their regularization in the year 2005 itself, have accepted their appointment order without any demurrer and now have approached this Court in the year 2020, 2021, 2022, i.e. almost after around 15 years.

107. This Court while dealing with the category of teachers belonging to the OBB Scheme has dealt with the concept of regularization as observed by the Supreme Court in the case District Bar Association, Bandipora (supra). In doing so, this Court has also opined that as regularization is not a source of recruitment but is aimed at validating certain irregular appointments which may have come to be made in genuine and legitimate administrative exigencies, the State would be within its power to formulate a Scheme within the exception carved out in paragraph No. 53 of the judgment of the Supreme Court in the case of Umadevi (3) (supra). The Manoharan Committee and the Cabinet decisions have categorically observed that appointments of those teachers which were irregular were to be regularized by virtue of the Cabinet decision. In a recent judgment passed by the Coordinate Bench of this Court in the case of Abani Baruah v. State of Assam, reported in 2022 SCC OnLine Gau 2004, the Coordinate Bench dealt with the question as to whether those teachers who were appointed in excess of the sanctioned posts as in the instant case, would be governed by the Rules of 1969. The Coordinate Bench of this Court after taking into account Rule 31 of the Rules of 1969 held that the petitioners therein, having been appointed in excess of the available sanctioned vacant posts, their entry into the Government services prior to 01.02.2005 were not legitimate under law and the petitioners therein have to be accepted that they have not entered the Government service in a manner so as to be given the entitlement to the aforesaid period to be included as a part of the Government service that they have rendered. The Coordinate Bench of this Court further held that there was no infirmity in the order of regularization dated 22.08.2005 which categorically provided that the petitioners therein would be governed by the NDCPS. Paragraph No. 17 to 21 of the said judgment, being relevant, is quoted herein under:—

"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.”

108. In the instant cases, as the facts are similar to the facts in the case of Abani Baruah (supra), this Court has no reasons to differ with the observation so made in the above quoted paragraphs.

109. This Court further may add, in view of the submissions made by the learned counsels appearing on behalf of the petitioners, that the petitioners are entitled to the similar treatment in view of the order dated 12.05.2015 in WP(C) No. 4169/2009 as well as the order dated 04.08.2015 in WP(C) No. 5705/2011. It is also the categorical submission that pursuant to the order dated 04.08.2015 passed in WP(C) No. 5705/2011, the petitioners therein have already been granted the relief by the Director of Education thereby counting the past services for the purpose of computation of pensionary benefits as per the provisions of the Rules of 1969.

110. This Court while dealing with the category of Dropped Teachers by following the law laid down by the Supreme Court in the case of Col. (Retd.) B. J. Akkara (supra) as well as Dr. O.P. Nijhawan (supra) held that the principle of res judicata or estoppel shall not bar the State from resisting the instant writ petitions in respect to the similarly situated persons though the order passed by this Court had already been implemented upon. At this stage, it is relevant to mention that the order dated 12.05.2015 in WP(C) No. 4169/2009, this Court had already held that the said order shall not be a precedent in view of the fact that the said order was passed ignoring the insertion of Rule 2A by the Amending Rules with effect from 01.02.2005 as well as Rule 31 of the Rules of 1969. Apart from the above, the said order dated 12.05.2015 in WP(C) No. 4169/2009 was passed in the case of Dropped Teachers and this Court is baffled with the submissions made by the learned counsel for the petitioners that the said order should be applied to the facts of the instant case which is in the category of Excess Teachers. As regards the order dated 04.08.2015 passed in WP(C) No. 5705/2011, this Court with due respect is constrained to observe that it seems the attention of the Coordinate Bench of this Court was not drawn that there is a major difference between teachers who fall in the category of Dropped Teachers and those teachers who

have been found to be irregular on account of being appointed against non-sanctioned vacancies and thereby termed as Excess Teachers. If the said aspect would have brought to the notice of the Coordinate Bench of this Court, the Coordinate Bench would not have applied the judgment of the Coordinate Bench of this Court dated 12.05.2015 passed in WP(C) No. 4169/2009 to the case of Excess Teachers.

111. Under such circumstances, this Court is further of the opinion that the claim of the writ petitioners to be granted the benefit under the Old Pension Scheme thereby treating the period of service rendered earlier prior to being regularized for the purpose of pension is totally misconceived. Besides, the petitioners having accepted the order of regularization passed in the year 2005 and thereupon having waited for a period of almost 15 years, this Court is of the opinion that the petitioners are not entitled to relief as claimed for. Taking into account the orders of Regularization, the petitioners in the instant category of cases cannot claim rights under the Rules of 1969. They shall be regulated under the NDCPS, 2009.”

5. Taking into account the above law laid down, this Court therefore is of the opinion that the petitioners are not entitled to the pension in terms with the Rules of 1969 as well as also would not be entitled to subscribe to the fund in terms with General Provident Fund (Assam Service) Rules, 1937. The petitioners herein shall be governed by the New Pension Scheme applicable to the State Government employees of corresponding rank. This Court further taking into account the judgment in the case of Purnima Hore and Another (supra) as well as the Office Memorandum dated 01.02.2021 further declares that the petitioners herein shall be eligible for the benefit of Retirement Gratuity and Death Gratuity on the same terms and conditions as are applicable to the employees covered by the Rules of 1969 in view of the Office Memorandum dated 01.02.2021.

6. With above observations and directions, the instant writ petition stands disposed of.