

(2022) 04 GAU CK 0008

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 1777 Of 2015

Habib Ali Barbhuiya

APPELLANT

Vs

State Of Assam And 8 Ors

RESPONDENT

Date of Decision : 05-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 309
Assam Service (Pension) Rules, 1969 — Section 31, 36, 108, 108(b), 152
U.P. Retirement Benefit Rules, 1961 — Rule 3(8)
Gujarat Civil Services (Pension) Rules, 2002 — Rule 25
Punjab Civil Services Rules-Volume- II, — Rule 3.12

Citation : (2022) 04 GAU CK 0008

Hon'ble Judges : Michael Zothankhuma, J

Bench : Single Bench

Advocate : Dr. B. Ahmed, A.M.S. Mazumder, A.A.R. Karim, T.C. Chutia, J. Handique, R. Mazumdar

Final Decision : Disposed Of

Judgement

1. Heard Dr. B. Ahmed, learned counsel for the petitioner. Also heard Mr. T.C. Chutia, learned counsel for the respondent nos.1, 3, 6, 7, 8 & 9 and Mr. R. Mazumdar, learned counsel for the respondent no.5. Mr. J. Handique, learned counsel appears for the respondent nos.2 and 4.

2. The petitioner s case is that he was temporarily appointed as a Patowari in the office of the respondent no.9 on 10.03.1966. The petitioner was thereafter sent for training for the Recorders Class Certificate Course in 1982 and after completion of the course, he was given a Certificate dated 09.06.1983. However, the petitioner s service as an untrained temporary Patowari was terminated by discharging him from service w.e.f 01.07.1982, vide order dated 23.06.1982. The petitioner thereafter did not work for 5 (five) years. The petitioner was subsequently temporarily re-appointed into service, vide order dated 11.08.1987 w.e.f. the date of joining.

3. The petitioner thereafter retired from service on attaining the age of superannuation on 29.06.2002. As no pension and other pensionary benefits was being given to the petitioner, the petitioner has filed the present writ petition 13 years later, praying for grant of pension and other pensionary benefits.

4. During the course of the proceedings of this case, the respondents came to a finding that the petitioner should have actually retired from service on 31.08.2001 and in view of the petitioner overstaying his service period, the respondents sought to recover an amount of Rs.48,069/- from the petitioner, due to excess pay given for overstay in service.

5. The petitioner's counsel submits that the post of Patowari is a Grade-III post. He submits that as the petitioner had no hand in the overdrawal of his pay and overstay in service, the respondents cannot be allowed to make recovery of the amount of Rs.48,069/-, in terms of the judgment of the Apex Court in State of Punjab and others Vs. Rafiq Masih (White Washer), reported in (2015) 4 SCC 334. He also submits that the State respondents have to count the period from 13.08.1987 to 31.08.2001, i.e. 14 years 18 days alongwith the petitioner's earlier service period from 10.03.1966 till 01.07.1982, for the purpose of grant of pension. However, the period of five years from 01.07.1982 to 10.08.1987 was not required to be counted for the purpose of pension, as the petitioner was not in service during the said period.

6. The petitioner's counsel submits that the petitioner having worked continuously from 10.03.1966 to 01.07.1982 and from 13.08.1997 to 31.08.2001 in a regular sanctioned post, the petitioner's service has to be deemed to have been regularized. Further, the petitioner having been allowed to go on superannuation retirement, the petitioner cannot be denied payment of pension in terms of Rule 108 (b) of the Assam Service (Pension) Rules, 1969, herein after referred to as the 1969 Pension Rules. In support of his submissions, the learned counsel for the petitioner has relied upon the judgments of the Apex Court and this Court, which are as follows:-

(1) Prem Singh Vs. State of Uttar Pradesh & Others reported in 2019 (10) SCC 516.

(2) The State of Gujarat & Others Vs. Talsibhai Dhanjibhai Patel, 2022 LiveLaw (SC) 187.

(3) Dolly Borpujari Vs. State of Assam & Others reported in 2010 (2) GLT 147.

(4) Kabiram Rajbangshi Vs. State of Assam & Others reported in 1997 (1) GLT 589.

(5) Judgment & Order dated 08.03.2018 passed in Sh. Abdul Hannan Vs. State of Assam & Others in WP(C) No. 2821/2009.

7. Mr. T.C. Chutia, learned counsel for the respondent nos. 1, 3, 6 to 9 submits that the petitioner's service was terminated vide order dated 23.06.1982 w.e.f.

01.07.1982. He also submits that the petitioner had been suspended prior to his discharge/termination from service vide order dated 23.06.1982. Thereafter the petitioner was without a job for 5 years and he was again re-appointed as a Patowari on temporary basis vide order dated 11.08.1987. The petitioner's service was never regularized and as such, he is not entitled to the grant of pension. He submits that the petitioner can be given gratuity only for the period from 13.08.1987 i.e. the date of joining till 31.08.2001, i.e. the date the petitioner should have actually retired from service, as per Rule 152 of the "1969 Pension Rules". He submits that the period prior to 13.08.1987 cannot be counted as service for the purpose of payment of pension as the same was also temporary in nature.

8. He submits that in terms of Rule 152 of 1969 Pension Rules, the petitioner, who is a temporary Government servant is eligible to be given gratuity, as the petitioner had completed 5 (five) years of continuous service at the time of his retirement. He further submits that there being no challenge to Rule 152 of the 1969 Pension Rules, the petitioner cannot be given any benefit beyond payment of gratuity in terms of Rule 152.

9. Mr. R. Mazumdar, learned counsel for the respondent no.5 submits that in terms of paragraph 4 of the affidavit-in-opposition filed by the respondent no.5, the pension case of the petitioner has been settled and accordingly terminal gratuity of Rs.33,600/- has been issued to the Treasury Officer, Hailakandi for payment to the petitioner. He submits that proportional pension can be paid to the petitioner only if the petitioner's service was regularized. However, as the petitioner's service was never regularized, he could not be said to be entitled to payment of pension in violation of Rule 152 of the 1969 Pension Rules. He also submits that the recovery of Rs.48,069/- is to be made from the petitioner due to overstay in service for 9 months. However, as Rs.33,600/- has already been recovered from the terminal gratuity payable to the petitioner, the amount of RS.14,469/- still needs to be recovered. The counsel for the respondent no.5 also submits that in terms of the letter dated 10.11.2017 issued by the Senior Assistant Settlement Officer, Hailakandi, wherein it has been shown that the petitioner was appointed afresh w.e.f. 13.08.1987, the petitioner is entitled to gratuity for his period of service from 13.08.1987 to 31.08.2001.

10. Mr. J. Handique, learned counsel for the respondent Nos. 2 & 4 submits that as the petitioner's service was neither confirmed nor regularized, there is no question of the petitioner being paid pension in violation of the 1969 Pension Rules.

11. I have heard the learned counsels for the parties.

12. The petitioner was appointed as a Patowari on temporary basis vide order dated 10.03.1966 without any advertisement being issued. The petitioner's service was thereafter terminated vide order dated 23.06.1982 w.e.f. 01.07.1982, stating that the temporary untrained Patowari was discharged from

service w.e.f. 01.07.1982. The petitioner has not challenged the order dated 23.06.1982 by which his service was terminated by way of discharge. Though the petitioner has annexed a certificate dated 09.06.1983, which states that the petitioner had completed his training course for the Records Class Certificate allegedly held from 10.02.1982 to 10.08.1982, the original certificate has not been produced in this Court. In any event, at the time the petitioner was discharged from service vide order dated 23.06.1982 w.e.f. 01.07.1982, the petitioner had not completed his Records Class Certificate training course.

13. The petitioner was thereafter re-appointed as Patowari on temporary basis without any advertisement being issued, vide order dated 11.08.1987. The order dated 11.08.1987 is re-produced below :

"Perused representation submitted by Md. Habib Ali Barbhuiya, dt. 17.6.87, to Govt and seen Govt letter No.RIR.85/83/166 dt.18.6.87 for taking necessary action.

ORDER

In the interest of public service Md. Habib Ali Barbhuiya, a retrenched Patowary is hereby appointed temporarily as Patowari with effect from the date Md. Habib Ali Barbhuiya joins to R.K. Nagar circle on usual scale of pay. The service of Habib Ali Barbhuiya, Patowari is purely temporary and liable to be terminated at any time without assigning any reason and notice thereof."

The Order dated 11.08.1987 clearly shows that the appointment of the petitioner was a fresh appointment. Though the order dated 11.08.1987 shows that the petitioner had submitted a representation dated 17.06.1987, the said representation dated 17.06.1987 is not a part of the writ petition.

14. The petitioner thereafter submitted representations dated 20.08.1987 and 02.09.1987 to the Secretary to the Government of Assam, Revenue (L.R) Department stating that his service had been terminated vide order dated 23.06.1982. The petitioner prayed that the respondents should set aside the termination order dated 23.06.1982 and to treat all his period of service from 1966 till 01.07.1982 as period spent on duty for all purposes. He also prayed for regularization of his service by creating a supernumerary post of Patowari w.e.f. 01.07.1982 under the regular establishment of Deputy Commissioner, Cachar and for appointing him against the said post. However, the petitioner's service was never confirmed nor regularized.

15. The prayer of the petitioner is that a direction should be issued to the respondents to count his service period from 10/03/1966 till the date of his superannuation, excluding the 5 year period from 01.07.1982 – 11.07.1987 and release the regular pension and other pensionary benefits of the petitioner, without recovering the salaries received by the petitioner till May/2002.

16. Though the petitioner has prayed that his service period from 10.03.1966 till the date of his retirement should be counted as continuous service, the discharge

order dated 23.06.1982 and the subsequent re-appointment order dated 11.08.1987 has not been put to challenge. In the case of State of Kerala vs M. K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (Dead) and Others, reported in (1996) 1 SCC 435, the Apex Court has held that all official decisions are presumed to be valid until set aside or otherwise held to be invalid by a court of competent jurisdiction.

In view of the law laid down by the Apex Court, the discharge order dated 23.06.1982 and the petitioner's re-appointment order dated 11.08.1987 will have to be considered to be valid orders as on date. The above order dated 11.08.1987 clearly shows that the petitioner was appointed on temporary basis. There is no prayer made by the writ petitioner to either confirm or regularize his service as Patowari in the writ petition. Thus, the petitioner cannot be said to be a regular Government servant as his service was never regularised.

17. Rule 31, 36, 108 and 152 of the 1969 Pension Rules states as follows:

"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 servant 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.

36. Service does not qualify unless the officer holds a substantive office on a permanent establishment:

Provided that continuous temporary or officiating service under the Government of Assam, followed without interruption by confirmation in the same or any other post, shall count in full as qualifying service except in respect of-

(a) periods of temporary or officiating service in non-pensionable establishment, and

(b) periods of service paid from contingencies.

Note 1. In case of Central Government servant who is permanently transferred to the State Government without any interruption in service, the term temporary or officiating service used in the above proviso shall include such service rendered under the Central Government who have agreed to bear the proportionate

pensionary liability on a reciprocal basis.

Note 2. The Governor of Assam is pleased to declare as pensionable the temporary services (without lien in any pensionable posts) rendered under the State Government by the re-employed released personnel of Sylhet, who held pensionable appointment before partition, irrespective of whether they retire during the continuance of temporary services or as a result of the abolition of the temporary posts so held or on subsequent absorption in other permanent vacancies.

The Governor is also pleased to condone the period of interruptions in service of such personnel before their re-employment irrespective of the period of break.

Cases of personal who, though being absorbed in permanent posts, actually serve in temporary appointments and retire therefrom do not come within the purview of this rule.

108. The amount of pension shall be regulated as follows-

(a) After a service of less than ten years, gratuity not exceeding (except in special cases and under the orders of the Governor up to a maximum of 12 months emoluments) one-half months emoluments for each completed six monthly period of service. If the emoluments of the officer has been reduced during last three years of service, otherwise than as a penalty, average emoluments may, at the discretion of the authority which has power to sanction the gratuity, be substituted for emoluments.

(b) After a service of not less than ten years a pension not exceeding the following amounts:-"

152. (i) A temporary employee who retires on superannuation or is discharged on account of retirement or is declared invalid for further service will be eligible for a gratuity at the rate of half months pay for each completed year of service; provided that he had completed not less than 5 (five) years, continuous service at the time of retirement/discharge/ invalidation.

Note. Pay for the purpose of determining the amount of gratuity will mean only basic pay and also dearness pay, if any, at the time of relinquishing service. It will not include special pay, personal pay, and other emoluments classed as Pay . In case the person concerned was on leave with or without allowance immediately before retirement/discharge /invalidation, pay for this purpose will be that which he would have drawn had he not proceeded on such leave.

(ii) The grant of gratuity under Cl. (i) above will be subject to the service rendered by the employee concerned being held by the authority competent to appoint him to be approved and satisfactory.

(iii) No gratuity will be admissible-

(a) in a case where the employee concerned resigns his post or is removed or

dismissed from public service,

(b) to a probationer or other Government servant discharged for failure to pass the prescribed test or examination,

(c) to a re-employed pensioner,

(d) to one paid from contingency or one belonging to a work-charged establishment or any other service governed by separate rules or order,

(e) to one in contract service unless there is any specific stipulation in the contract-deed,

(f) to one entitled to benefit of Contributory Provident Fund or similar other benefits.”

18. In the case of Prem Singh (supra), the appellant/employee was appointed as a Welder in the year 1965 in a work-charged establishment. He was thereafter transferred from one place to another and his services were regularized in the year 2002, prior to his superannuation in the year 2007. The appellant/employee's prayer was to count his period of service spent in the work-charged establishment as qualifying service under Rule 3(8) of the U.P. Retirement Benefit Rules, 1961. The Apex Court held that reading down the provisions of Rule 3(8), service rendered even prior to regularization in the capacity of work-charged employees, contingency paid fund employees or non-pensionable establishment shall also to be counted towards qualifying service for pension even if such service is not preceded by temporary or regular employment in a pensionable establishment.

In the above case of Prem Singh (supra), the Apex Court had held that the period of service of the employee, prior to his regularization, was also to be counted as qualifying service for the purpose of pension. In the present case, the petitioner not having his service regularized or confirmed at any stage, the decision of Prem Singh (supra) does not apply to the facts of this case. Further, it is settled law that a decision is an authority for what it decides and not what logically follows from it. A little difference in facts changes the precedential value of a decision.

19. In the above case of Abdul Hannan (supra), this Court held that the determination of pension payable to the retired Extra-Writer should not only be with reference to his 14 (fourteen) years regularization of his service, but also by taking into account the past temporary service. This Court in Kabiram Rajbangshi (supra) also held in the same line. This Court is of the view that the judgment in Abdul Hannan (supra) and Kabiram Rajbangshi (supra) will not be applicable to the facts of this case, inasmuch as, the services of the petitioners in the above cases had been regularized. However, in the present case, the petitioner's service was not regularized.

20. In the case of Talsibhai Dhanjibhai Patel (supra), the Apex Court has upheld

the decision of the High Court of Gujarat, wherein the High Court directed the State to pay pensionary benefits to an employee who had retired after rendering more than 30 years of service on ad hoc basis. The Apex Court held that to take the services of an employee on ad hoc basis for 30 years of continuous service and thereby deny him pension on the ground that he is not entitled to pension/pensionary benefit is unreasonable on the part of a welfare State.

The High Court of Gujarat had granted pension in terms of Rule 25 of the Gujarat Civil Services (Pension) Rules, 2002, which provided that qualifying service for the purpose of pension would include all services in any capacity, whether temporary or permanent. However, the service was to be rendered in a pensionable establishment.

21. In the present case, the petitioner's temporary service was never regularized or confirmed. Further, the "1969 Pension Rules" does not provide for grant of pension to a temporary employee, who retires on superannuation. It only provides for payment of gratuity to a temporary employee who retires on superannuation, in terms of Rule 152 of the 1969 Pension Rules, provided the employee completes not less than 5 years of continuous service at the time of retirement.

22. Rule 108 (b) of the 1969 Pension Rules, on the other hand provides for the payment of proportionate amount of pension to a regular Government servant, who has been in service for not less than 10 years.

23. In the case of Dolly Borpujari (supra), the Division Bench of this Court has held that the contract employee, who was promoted, without incorporation of the words "on contract service" in the promotion order and made to retire on reaching the age of superannuation, prescribed for all other employees of the State of Assam, whose services were regulated under the Rules framed under Article 309, was eligible to receive superannuation pension, as the employee was serving under the Government in a substantive and permanent capacity for 14 ½ years and as such, disqualification under Rule 31 would not apply to the service of the said employee. The Division Bench held that as the employee's service was purely contractual, the only known mode of putting an end to his service would be by the stipulation recorded in the contract or by termination of the contract by an appropriate procedure. However, as he had been made to retire on reaching the age of superannuation, as prescribed for all other employees of the State of Assam, whose services were regulated by Rules framed under Article 309 of the Constitution, the said contract employee's service would have to be treated to be substantive and permanent. The Division Bench further held that the contract employee having received pay from the Government as per the scale prescribed by the ROP Rules, 1998 and having received the benefits of increments, and having crossed the efficiency bar (EB), leave etc., besides being made to go on superannuation after reaching retirement date, confers a substantive status on the service rendered by the contract employee. The Division Bench of this Court thus held that the contract employee was holding a

post on substantive and permanent basis and could not have been disqualified to receive pension under Rule 31 of the "1969 Pension Rules". Paragraph Nos. 13 & 14 of the Division Bench judgment in Dolly Borpujari (supra) is reproduced below:-

"13. Next it has to be determined as to whether the appellant served in such Government posts on substantive and permanent basis. On this aspect, it is contended by the respondent that since the appellant was initially appointed on contract basis, she cannot be said to be serving in a substantive or permanent post. But should the initial appointment be the decisive factor in determining the character of the appellant's service or whether we can consider the said service to be on substantive basis as the appellant was made to superannuate from the post, not because of any specific obligation arising out of the so called contractual appointment, but because the appellant was compulsorily superannuated after reaching the age of superannuation applicable for Government servant. Having regard to the decision laid down by the Supreme Court in P.L. Dhingra (supra) and Roshan Lal Tandon (supra) the appellant though drafted into the service of the State by a contract such service later transformed into status. At least some of the conditions of service including the cessation of service by Superannuation are determined by the statutory Rules applicable for those who are posted on substantive and permanent service of the Government.

14. While in service the appellant received pay from the Government as per the Scale prescribed by the R.O.P. Rules, 1998, she also received the benefits of increments, cross the EBs, leaves etc. and was made to go on superannuation after reaching the retirement age and this significant characteristics of the service of the appellant, in our view, confers a substantive status on the service rendered by the appellant."

24. Rule 31 of the "1969 Pension Rules" provides that the service of an officer does not qualify for pension unless it conforms to three conditions i.e. (i) the service must be under the Government, (ii) the employment must be substantive and permanent (iii) the service must be paid by the Government. In the present case, the first and third conditions are applicable to the petitioner. The question that needs to be decided is as to whether the employment of the petitioner was substantive and permanent. In the present case, the petitioner's service was never regularized and neither was it confirmed.

25. Though the learned counsel for the respondent no.5 has taken a stand that the petitioner was entitled to pension for the period 13.08.1987 to 31.08.2001 in terms of the letter dated 10.11.2017 issued by the Senior Assistant Settlement Officer, Hailakandi, it is seen that the letter dated 10.11.2017 does not state that the petitioner is entitled to pension, but only entitled to pensionary benefits.

26. In the case of Secretary, State of Karnataka & Ors. Vs. Uma Devi 3, 2006 4 SCC 1, the Apex Court has held at para 53 that there may be cases where

irregular appointments (not illegal appointments) of duly qualified persons, in duly sanctioned posts, might have been made and the employees have continued to work for 10 years or more, but without intervention of the orders of the courts or tribunals. The Apex Court held that the Union Government and the State Government and their instrumentalities should take steps to regularize as a onetime measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals. The judgment in the above case was passed on 10.04.2006, while the petitioner herein retired on 29.06.2002, though he should have retired on 31.08.2001. As such, the petitioner's case was never considered by the authorities for regularization. However, there is no averment made in the pleadings to show that the petitioner's appointment was illegal.

27. In the case of Uttar Haryana Bijli Vitran Nigam Ltd. & Others vs. Surji Devi (supra), the Apex Court has held that the wife of the workcharged employee was not entitled to the grant of any family pension, as per the provisions contained in the Punjab Civil Services Rules. The Apex Court held that as the service of the work charged employee was never regularized, though he had worked for 11 years and had expired before he could get the benefit of regularization. However, sentiments and sympathy alone cannot be a ground for taking a view different from what is not permissible. Rule 3.12 of the Punjab Civil Services Rules provides for payment of pension and enumerates 3 conditions for grant of pension. Rule 3.12 of the Punjab Civil Services Rules is reproduced below:

"3.12 The service of a Government employee does not qualify for pension unless it conforms to the following three conditions:

First.- The service must be under Government.

Second.- The employment must be substantive and permanent.

Third.- The service must be paid by Government."

In the present case, the petitioner has prayed for grant of pension. However, it is noticed that for granting of pension, the qualification provided in Rule 31 of the Assam Services Pension Rules, 1969, herein referred to as "1969 Pension Rules", is similarly worded as Rule 3.12 of the Punjab Civil Services Rules. Rule 31 of the "1969 Rules" states as follows:

"Conditions to qualifying service.- The service of an officer employee 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 servant 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.”

Para 16 and 17 of the judgment of the Apex Court in *Uttar Haryana Bilji Vitran Nigam Ltd. & Others vs. Surji Devi* (supra) states as follows:-

“16. The scheme relating to grant of Family Pension was made under a statute. A person would be entitled to the benefit thereof subject to the statutory interdicts. From a bare perusal of the provisions contained in the Punjab Civil Services Rules, Volume 2 vis-à-vis the Family Pension Scheme, it would be evident that the respondent was not entitled to the grant of any family pension. The husband of the respondent was a work-charged employee. His services had never been regularized. It may be unfortunate that he had worked for 11 years. He expired before he could get the benefit of the regularization scheme but sentiments and sympathy alone cannot be a ground for taking a view different from what is permissible in law. [See *Maruti Udyod Ltd. v. Ram Lal*, *State of Bihar v. Amrendra Kumar Mishra*, *SBI v. Mahatma Mishra*, *State of Karnataka v. Ameerbi* and *State of M.P. v. Sanjay Kumar Pathak*].

17. The statutory provisions, as noticed hereinbefore, debar grant of family pension in favour of the family members as the deceased employee was a work-charged employee and not a permanent employee or temporary employee. The period during which an employee worked as a work-charged employee could be taken into consideration only when his services are regularized and he becomes permanent and not otherwise.”

28. In terms of the judgment of the Apex Court in *Uttar Haryana Bilji Vitran Nigam Ltd. & Others* (supra), a work charged employee, whose services has never been regularized cannot be granted pension, in view of Rule 3.12 of the Punjab Civil Services Rules, which is akin to Rule 31 of the 1969 Pension Rules. Thus, though there is a bar for grant of pension in respect of work charged employee, whose services has never been regularized, the same does not appear to be the case for a permanent or temporary employee. Though Rule 31 of the 1969 Pension Rules requires that the employment must be substantive and permanent, the petitioner having been made to serve continuously against a sanctioned post on temporary basis from the year 1987 till her retirement on superannuation pension on 29.06.2002, the same confers a substantive status on the service rendered by the appellant, despite the petitioner being a temporary Patowari, in terms of the Division Bench judgment in *Dolly Borpujari* (supra).

It should also be noted that there is a difference between rule 3.12 of the Punjab Civil Services Rules and Rule 31 of the 1969 Pension Rules, inasmuch as, the proviso to Rule 31 of the 1969 Pension Rules provides that the Governor may declare any specified kind of service rendered in a non-gazetted capacity or in

any individual case, subject to such conditions as he may think fit to impose, to be qualified for pension, even though either or both of condition Nos. 1 & 2 of Rule 31 of the 1969 Pension Rules are not fulfilled. Due to the difference in facts in this case vis-a-vis the case of Uttar Haryana Bijli Vitran Nigam Ltd. & Others (supra), this Court finds that the decision made in the above case is not applicable to the facts in this case.

29. In the present case, the petitioner had been working in a regular sanctioned post from 1966-1982 on temporary basis. Thereafter, his service was terminated and he was re-appointed afresh on temporary basis, after 5 years. The petitioner was made to retire on reaching the age of superannuation 14 years later. Rule 152 of the "1969 Pension Rules" provides that a temporary employee who retires on superannuation, would be eligible for gratuity. This Rule 152 has not been put to challenge and as per the said provision, the petitioner, who is a temporary employee can only be given gratuity. However, by following the judgment of the Division Bench of this Court in Dolly Borpajari (supra), the petitioner's service can also be treated to have been in a substantive capacity, inasmuch as, the petitioner's service has been under the Government in a regular post and he has also been paid by the Government till his retirement, as per the pay scale prescribed for a Patowari. As such, proportionate pension can be payable to the petitioner in terms of Rule 108 (b) of the 1969 Pension Rules, if the Governor declares that the service of the petitioner shall qualify for pension in terms of the proviso to Rule 31 of the 1969 Pension Rules. However, there being a 5 year break prior to the petitioner's fresh appointment as a Patowari on temporary basis, vide order dated 11.08.1997, the petitioner's service for grant of proportionate pension will have to be counted only from 11.08.1997, till the date of his retirement, i.e., 31.08.2001. Accordingly, this Court is of the view that the disqualification under Rule 31 of the 1969 Pension Rules would not be applicable to the case of the petitioner herein.

30. In view of the above reasons, this Court directs the State respondents to issue a declaration, in terms of the proviso to Rule 31 of the 1969 Pension Rules to render the service of the petitioner from 11.08.1987 to 31.08.2001 to qualify for payment of proportionate pension. Thereafter, the pension will have to be paid in terms of Rule 108 (b) of the 1969 Pension Rules.

31. With regard to the question of recovery of Rs.48,069/- due to overstay in service, it would be profitable to refer to the judgment of the Apex Court in the case of Rafiq Masih (White Washer) (supra), wherein the Apex Court has held that recovery of excess pay was impermissible from Class-III and Class-IV employees. Further, there is nothing in the pleadings of the respondents to show that the petitioner overstayed in service, due to any misrepresentation or fraud on the part of the petitioner. As the post of Patowari is a Class-III post, no recovery can be affected due to the petitioner's overstay in service, especially when the overstay in service and excess pay made cannot be attributed due to any fraud or misrepresentation on the part of the petitioner. Accordingly, in view

of the above reasons, the petitioner would have to be given his full gratuity amount of Rs. 48,069/-, which should be done within a period of 1 (one) month from the date of receipt of a certified copy of this order. The respondent no.5 is accordingly directed to pay the said amount of Rs. 48,069/- to the petitioner.

32. The entire exercise for payment of pension to the petitioner should be completed within a period of 4 months from the date of receipt of a certified copy of this Order.

The writ petition is accordingly disposed of.