(2011) 06 GAU CK 0058

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 9851 of 2003

Khagendranath Deka & Ors. APPELLANT

Vs

State of Assam & Ors. RESPONDENT

Date of Decision : 02-06-2011

Acts Referred:

Leave Rules, 1934 — Rule 12, 12, 3, 3, 3(iii)

Citation : (2011) 5 GLT 9

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Advocate : Advocates appeared for the Petitioners: Mr. U.K. Nair& Mr. B. Sarma., Advocates appeared for the Respondents: Mr. D. Saikia& Mr. B. Gogoi, Standing Counsel., Advocates appearing for Parties

Judgement

Hrishikesh Roy. J.

1. Heard Mr. Brijesh Sarma, learned counsel appearing for the petitioners. The respondents are represented by Mr. D. Saikia, learned Standing Counsel for the Finance Department.

2. The petitioners were Headmasters of different M. E. Schools and have retired from service between 30.09.2000 to 30.6.2003. They challenge the Office Memorandum (O.M.) dated 21.02.2000 (Annexure2A) and 11.12.2006 (Annexure4A) whereby it was decided by the Government that for those in the vacation department, leave encashment of unutilized earned leave shall be limited to a maximum of 80 days of the Earned Leave (E.L.) in the credit of the retiring employee. The second office memorandum dated 11.12.2006 also specified the maximum limit, to earned leave accruals of a vacation staff, to 80 days and no more. The petitioners contend that being the Headmasters and also the drawing and disbursing officers in the schools, they were required to attend duties even during the vacation period and could not remain away from duties, despite being a vacation department and accordingly, they are entitled to cash payment to the extent of credit of unutilized earned leave, at par with the

employee of anonvacation department.

3. The petitioners also contend that benefit of earned leave accrues to them on the strength of provisions made in The Leave Rules, 1934 (hereinafter referred to as ''Leave Rules'') and the maximum outer limit for leave encashment benefits confined to only 80 days (by the 2 impugned O.M.s) irrespective of earned leave credited in the account of retiring employees, is inconsistent with the provisions of the Leave Rules and is discriminatory visavis the employees of the nonvacation departments, who have been granted leave encashment benefit of earned leave upto a higher extent of 300 days.

4. Averments have been made in paragraph 17 of the writ petition to project that the petitioners had more than 300 days of earned leave credit on retirement and, are therefore, entitled to encashment benefit of the earned leave accumulated in their accounts to the maximum ceiling of 300 days, like an employee of a nonvacation department and the outer limit of 80 days stipulated through the 2 impugned memorandums, is discriminatory and is violative of their legal and constitutional rights.

5. The petitioner have also given instances of retired Headmasters serving in vacation department, who were granted encashment benefits of 240 days of earned leave and also instance of employee of another vacation establishment i.e. the Gauhati High Court of being granted encashment benefit of unutilized earned leave, for maximum of 300 days, at par with an employee in a nonvacation department.

6. Mr. B. Sarma, learned counsel refers to the provisions of S.R. 114 to point out that vacation department employees are permitted to be absent from duty during their vacation time. The counsel also refers to the Finance (Estt. A) department notification dated 15.6.1995 (Annexure3) to show that original Rule 12(a) of the Leave Rules was sub1 stituted and an employee in a vacation department was made entitled to 10 days earned leave in lieu of 20 days half pay leave, as was earlier admissible to such category of employees.

7.1. Referring to the definitions given in Rule 3 of the Leave Rules, the learned counsel points out from Rule 3(iii) that, ''half pay leave'' means leave earned in respect of completed years of service, and accordingly, he contends that even prior to the notification of 15.6.1995, accumulation of earned leave was possible to the credit of an employee in the vacation department. Elaborating the arguments, Mr. Sarma, points out that employees in the vacation department can take the benefit of earned leave under 4 different circumstances, firstly, earned leave can be availed under Rule 12(b) of the Leave Rules to the extent of those many days of vacation, not availed off by the employee. Secondly, on the eve of retirement, an employee can take the benefit of earned leave. In these 2 circumstances, even though the employee is not attending his duty by availing earned leave, he is paid his salaries by the Government. Thirdly, under Rule 12(d) of the Leave Rules, in case of death of a serving Government servant, the cash equivalent to the leave accrued to the account of the deceased is given, subject a upper to ceiling of 300 days, to the surviving family members. Mr. Sarma, submits that in all these 3 circumstances, the benefit of earned leave is granted without their being any upper cap of 80 days or 150 days and the extent of benefit for an employee of the vacation department is no different so far as the number of days are concerned from those in the nonvacation department.

7.2. It is argued by the petitioners that to restrict the cash equivalent claim at the time of retirement for a vacation department employee to maximum of 80 days or 150 days, would be arbitrary as the same vacation employee while availing the earned leave benefits in the first 3 circumstances (as mentioned in the preceding paragraph), are give the maximum extent of benefits permissible as in the case of nonvacation employees.

8. The counsel for the petitioners contended that the provisions of S.R. 114 was incorporated to regulate the E.L. benefit in the vacation department and it has nothing to do with encashment of the accumulated earned leave and if higher credit of earned leave is available on account of a retiring vacation employee, encashment benefit should be at par, with nonvacation employee, since neither categories of employees get any higher encashment benefits beyond what is credited in their earned leave account, subject to the ceiling limit of 300 days.

9. The provision of earned leave encashment benefits for the Central Government employees, similarly serving in the vacation department have been referred to by the learned counsel to point out that this category of the Central Government employees are given leave encashment benefits upto 300 days at par with nonvacation departments. The counsel submits that since such benefits for the State Govt. employees are usually parimateria with the Central Government employees and since the State Governments invariably adopts the amendments in F.R. and S.R. made by the Central Government, the leave encashment benefit cannot be restricted for a retired employee in a vacation department, to less than 300 days, through the impugned Notification(s).

10. The petitioners refer to the recent State Government Notifications of 19.2.2011 to show that the recommendation of the Anomaly Committee of the Assam Pay Commission, 2008 was accepted by the State to the extent that, encashment of earned leave for employees in the vacation department be enhanced to 300 days w.e.f. 1.1.2011. Accordingly, Mr. Sarma submits that if the State Government has accepted the pre 1.1.2011 position to be an anomaly, the encashment benefit must be considered to the same number of days, as made available for employees in the nonvacation department, in the pre 1.1.2011 period.

11. Per contra, Mr. D. Saikia challenges the locus standi of the petitioners to challenge the two O.M.s dated 21.2.2000 and 11.12.2006, as according to the learned counsel, the petitioners have not stated that I they have more than 80 days earned leave I credit in their leave account, at the time of I their

superannuation from service. He submits that prior to 15.6.95, the employees in the vacation department were not entitled to any earned leave and since 10 days earned leave has been granted only from 15.6.1995, the maximum encashment benefit of the earned leave was stipulated initially as 80 days through the Notification dated 21.2.2000 and was subsequently raised to 150 days (through the Notification dated 9.7.2010) and 300 days (through the Notification dated 19.2.2011). Mr. Saikia submits that upper limit of leave encashment for the vacation department employee were decided, bearing in mind the likely number of days that E.L. credit will be available for a vacation department employee at that point of time and all the petitioners having retired by the year 2003, cannot claim the enhanced earned leave encashment benefit of 150/300 days given subsequently, through the O.M. dated 9.7.2000 and 19.2.2011, which can have only prospective effect.

12. Pointing out that an employee in the vacation department cannot be treated to be in the same class as an employee in the nonvacation department, who have no benefit of vacation during their service career. Mr. Saikia contends that when nonvacation department employees are entitled to 30 days earned leave as compared to 10 days for the vacation department employees, the upper ceiling on encashment benefit of the earned leave credit for the two categories of employees, cannot be at par with each other.

13. The departmental counsel further submits that the cash equivalent of earned leave credit is being granted for the vacation department employees through policy decision of the Government having regard to the State Government''s resource position and no enforceable right is available with the petitioners to demand fiscal benefits, when their claim is not based on any statutory enactment.

14. The specific instances of the vacation employees being granted leave encashment benefit of 300 days cited by the petitioners are contended to be mistakenly given and, accordingly Mr. Saikia submits that the petitioners cannot claim similar benefits on the basis of erroneous decision of the concerned officials.

15. Before the arguments of the learned counsels are considered, it would be appropriate to understand what is the nature of the leave encashment benefit granted to a Government servant. In Union of India Vs. Justice S.S. Sandhawalia, reported in 1994(2) SCC 240, the Supreme Court had proceeded on the basis that provision of granting cash equivalent for credit in leave started because, earned leave had to be refused for pressure of work, despite leave credit in the account of the Government servant. By refusing leave in public interest, in order to avoid administrative disturbances, it was felt that leave be denied and the deprived employee be paid cash equivalent and on this basis, the leave encashment system was formalized into Rule, with a view to compensate for the refused earned leave and encouraging accumulation of earned leave, to claim monetary benefits upon retirement.

16.1. Construing the leave encashment benefit in the above light, it would now be appropriate to deal with the relevant provisions of Leave Rules under Rule9, employees in the nonvacation departments are given earned leave for 30 days in a calendar year, whereas under Rule12(a), a Government servant in a vacation department is granted 10 days earned leave, in lieu of 20 days half pay leave with effect from 15.6.1995, as the Rule in question was. substituted by the amending Notification dated 13.6.1995. Previously, under the unamended provision of Rule 12, the earned leave was not admissible to an officer in the vacation department. Rule 12(b) provides that if the officer in the vacation department is prevented from availing the full vacation, such proportion of the unavailed leave, would be admissible to him in respect of the concerned year, in accordance with the provisions of Rule9.

16.2. SubRule(c) of Rule 12 further provides that when earned leave is taken in combination with other leave, it shall not exceed the amount of earned leave due and admissible to the officer at a time under Rule 9. Under the unamended Rule13, half pay leave is admissible to an officer for 20 days in a calendar year. Through the amendment incorporated by the notification dated 15.6.1995, 20 days half pay leave as earlier admissible under Rule 13(a)(i), was withdrawn and a Government servant in the vacation department was given the benefit of 10 days earned leave. However, the existing provision made under SubRule(b) and (c) of proportionate benefit under Rule 9 given to the employees of nonvacation department continued to be made available, even for the employees serving in a vacation department.

16.3. A reading of the Rule 12(b) and 12(c) of the Leave Rules which have remained unchanged, suggests that earned leave was available to the proportionate extent of days, when vacation was not availed in a given year, by a vacation department employee.

17. This takes us to the question as to whether cash equivalent of earned leave at par with the nonvacation department employees is available to the retiring employees from a vacation department. When cash payment in lieu of unutilized earned leave was first granted through Notification dated 19.7.1978 (Annexure1), the Government did not make any distinction between vacation and nonvacation department as it was decided that State Government Servants will be paid cash equivalent of leave salary in credit of the retiring State Government Employees, subject to maximum of 240 days earned leave. Since no distinction in the said Notification was made between the vacation and nonvacation department employees, it would normally cover all Government employees, serving under both kinds of establishments. But since no specific provision was earlier available for granting earned leave to an employee in a vacation department, through the Notification dated 15.6.1995, this category of employees was granted 10 days earned leave, in lieu of the earlier 20 days half pay leave.

18. In the definition of ''earned leave'' given in Rule 3 of the Leave Rules, it is defined to mean leave earned under the provision of Rule 9 which obviously are

applicable for employees in nonvacation department. But under SubRule(iii) of Rule 3, ''half pay leave'' is defined to mean leave earned in respect of completed years of service.

19. Prior to the Notification of 19.7.1978, no category of Government servant was entitled to encashment of the earned leave credited in his account and no cash benefit accrued to him for unutilized earned leave. But from the Notification dated 19.7.1978, the State Government employees became entitled to cash equivalent of the accumulated E.L. subject to the maximum of 240 days of leave credit.

20. Rule 12 of the Leave Rules applicable to the vacation department has various subclauses which shows the entitlement of those employees in vacation department, to the benefits under Rule 9 (applicable to nonvacation department) and interpretation of provision of SubRule (b), (c) and (d) of Rule 12, suggest that the employees of the vacation department too, are entitled to the benefit of earned leave. Furthermore cash equivalent of leave salary was also admissible to the family of a deceased employee under SubRule (d) of Rule 12 to the maximum of 300 days, which is at par with the nonvacation department.

21. An analysis of the provisions of the Leave Rules projects that State Government employees of both departments are entitled to earned leave benefits in their respective accounts and cash equivalent of earned leave benefit under the Rules is same for the employees in the two departments. The basis for such a conclusion can be culled out from the fact that an employee in a vacation department can avail paid leave benefits even while he is on half days pay leave or 10 days earned leave. Likewise cash equivalent of leave salary is also admissible to the family members of a deceased Government servant.

22. The next question is whether any ceiling on the number of days of accumulated earned leave for the purpose of encashment benefits, can be placed for a retiring employee of a vacation department. It is seen that State Government after limiting the benefit to 80 days through the impugned notification of 21.2.2000, had subsequently increased the number of days to 150 days (through the Notification dated 9.7.2010) and to 300 days (through the Notification dated 19.2.2011), after accepting the recommendation of the Anomaly Committee. Thus w.e.f. 1.1.2011, the encashment of earned leaved for an employee of the vacation department is admissible for 300 days which is at par with the employees of nonvacation department. Whether an employee of a vacation department will have earned leave accumulated in his account, to the extent of 300 days is something, which will depend upon how much of his permissible 10 days of earned leave, remains unutilized each year and also the number of days on which, the employee in the vacation department can''t avail their vacation, because of exigency of work. But to say that since only 10 days of earned leave is available to a vacation department employee, it would not be correct in my view, to put fetters on the number of days of unutilized earned leave, which the vacation department employee can encash, at the time of

superannuation from service.

23. However, the above conclusion is found reasonable not because instances have been cited by the petitioners, of encashment of earned leave to the extent of 300 days, permitted for similarly situated retired Headmasters of M.E. schools and also the employees of vacation departments like the High Court. But the basis for the conclusion is found from the provision of the Leave Rules which, even before the 1995 Notification, had provided the employees of the vacation department, the benefits of earned leave in various manners, as prescribed under SubRule (b), (c) and (d) of Rule 12 of the Leave Rules.

24. Although it is within the discretion of the State Government to decide on the policy for granting leave encashment benefits to its employees in the vacation department, having regard to the notifications dated 21.2.2000, 9.7.2010 and 19.2.2011, it can be gathered that even the State Government has come round to the view that, full leave encashment benefit at par with nonvacation establishments, should be granted for employees in the vacation department.

25. As regard the submissions made by Mr. Saikia that employees in the vacation department are in a separate class visavis the employees in the nonvacation department, on examination of the provisions of the Leave Rules and the Notification dated 19.7.1978, I am of the considered opinion that for the purpose of leave encashment benefits, there is no distinguishing factors for the employees of the two departments. Significantly both categories can claim encashment benefits to the extent of leave credited in their accounts at the time of retirement and since it is theoretically possible for a vacation department employee to accumulate leave to a maximum permissible 300 days by for going his vacation and accumulating the permissible 10 days earned leave, the benefit of leave encashment for a vacation department employee cannot be restricted, in my view, to any lesser number of days, than what is granted to a nonvacation department employee.

26. On the plea of financial stringency raised by the State Counsel, it is contended on behalf of the petitioners by Mr. Sarma, that the Central Government has committed itself to meet the expenditures of leave encashment benefits, for the State Government employees and this decision is incorporated in the O.M. dated 23.10.1999. But in response, Mr. Saikia submitted that the entire expenditure for payment of leave encashment benefits to the State Government employees, are borne by the State Government and no claim for reimbursement for this amount has so far been made to the Central Government notwithstanding the O.M. dated 23.10.1999.A copy of the written instruction of 2.6.2011 containing the said instruction is also produced by the departmental counsel.

27. In the above context, while it is important to bear in mind the resources of the State, it cannot be overlooked that recommendation was made by an expert body like Anomaly Committee, for raising the limit of earned leave benefits to

300 days to make it at par with the nonvacation department employees and this recommendation has been accepted by the State Govt. as can be seen from the Notification dated 19.2.2011. Therefore, it is apparent that financial stringency has not be considered to be a relevant factor by the State Government for accepting the recommendation of the Pay Anomaly Committee. The only thing is that encashment of earned leave benefit for 300 days has been extended w.e.f. 1.1.2011.

28. In order to answer as to whether the maximum permissible days should be at par with nonvacation department employees, it would useful to examine once again the Government Notification of 19.7.1978. In the said Notification, no distinction is made of employees of the vacation and nonvacation department and the benefit of cash equivalent of unutilized leave credit, has given to all categories of State Government employees. Whether the examples cited by the petitioners, of benefits being granted to the retired M.E. School teachers and High Court employees (both vacation department employees) are on the basis of the said Government Notification dated 19.7.1978, is not clearly discernible. But in the absence of any other documents which permits leave encashment benefits to the State Government employees (barring the Notification dated 19.7.1978), it would be fair to assume that employees in the vacation department were also conferred similar benefits at par with their brothers in the nonvacation department and that is how the benefits was granted to them, in the cases of vacation establishment employees, cited by the petitioners.

29. That apart, since encashment benefits to retired employees of the vacation department is limited to 300 days, the cash outflow from the State coffer is not unlimited. When vacation is availed by employees of a vacation department, they shall not be entitled to any leave encashment benefit for the availed vacation. But that does not mean that when the earned leave at the permissible rate of 10 days are in the credit of the retiring vacation department employee, there is no reasonable basis for restricting the leave encashment benefits to any lesser days, than what is available to a nonvacation department employee.

30. It may also be recorded in passing that, amendments made by the Central Government covering similar conditions of services of leave for the Central Government employees, are usually adopted and incorporated in the relevant F.R. and S.R. for the State employees and from the history of changes incorporated by the State Government from time to time, it is apparent that all major leave and retirement benefits decided for the Central Government employees, have also been made available subsequently for the State Government employees. This is reflected in the amendments made in Rule 12 of the Leave Rules and also the Notification(s) issued by the State Government increasing the limit of leave encashment benefits. Therefore, the support for the conclusion reached in the preceding paragraphs, are also taken from the past practice of the State Government which made consequential amendments in the relevant State provisions.

31. On the question of locus raised by Mr. Saikia, I find that petitioners have given sufficient details to show that they are entitled to leave encashment benefits at par with others in the nonvacation department and accordingly this issue is answered in their favour.

32. Before parting with the case, it must be recorded that a benefit for the Government employees is being considered in this case. The actions of the State shows that they have given the leave encashment benefits to the vacation department employees and through periodic reviews, the benefit is extended currently to the same extent as in the case of a nonvacation establishment. Considering the objective that this practice was evolved to compensate those who had to forgo leave for reasons of public exigency, the provisions in my view deserves a liberal construction.

33. For the forgoing reasons and discussions, I find enough justification to allow the writ petition and the same is accordingly allowed. Therefore, the Office Memorandum dated 21.8.2000 and Office Memorandum dated 11.12.2006 are set aside and quashed. The respondents are accordingly directed to take into account the earned leave in the credit of the petitioners and to grant them the leave encashment benefits, to the extent of permissible days at the relevant time, for the employees in the nonvacation department. Since the petitioners have long retired from services, the respondents are ordered to carry out the necessary exercise to grant the leave encashment benefits of the petitioners expeditiously and preferably, within a period of 6(six) months from today.

34. The case stands allowed with the above directions.

