
(2023) 03 GAU CK 0042
In the Gauhati High Court
Case No : Writ Appeal No. 343 Of 2021

Khanindra Kalita

APPELLANT

Vs

State Of Assam And 8 Ors

RESPONDENT

Date of Decision : 24-03-2023

Acts Referred:

Citation : (2023) 03 GAU CK 0042

Hon'ble Judges : Sandeep Mehta, CJ;Kardak Ete, J

Bench : Division Bench

Advocate : R C Saikia

Final Decision : Allowed

Judgement

Kardak Ete, J

1. We have heard Mr. R.C. Saikia, learned counsel for the writ appellant. We have also heard Mr. N.J. Khataniar, learned Standing Counsel representing the Education (Secondary) Department as well as Ms. R.B. Bora, learned Standing Counsel representing the BTC.

2. This writ appeal is preferred against the judgment and order dated 06-03-2019, passed by the learned Single Judge, in WP(C) No. 4462 of 2015, whereby the writ petition filed by the appellant has been dismissed.

3. The issue involved in this writ appeal is as to whether the service of the appellant would be governed by the Old Pension Rules or the New Pension Scheme.

4. The case of the appellant is that he was initially appointed as Assistant Teacher on honorary basis by the Principal of the Paschim Banbhag L.P. School, Khatikuchi, on 28-01-1991 and he was working as such till 03-01-2003. In the year 1992, an advertisement was issued for the post of Additional Science Graduate Teacher. The appellant applied for the post and appeared in the interview conducted by the District Level Selection Committee and was selected.

His name appeared at Sl. No. 125 of the Select List. Although his name appeared at Sl. No. 125, some of the selected candidates, whose names were below the appellant, have been appointed by the respondent authorities. When the representation for appointment submitted by the appellant has fetched no response, the appellant approached this Hon'ble Court by way of WP(C) No. 5394/1999 and vide order dated 25-03-2002 the writ petition was disposed of with a direction to consider the appointment of the appellant against the 10% quota reserved for appointment of sons, daughters or near relative of retired school teachers, as per the policy of the State Government. Several correspondences were made to the authorities of the State Government for consideration of the appellant's case in terms of the Hon'ble High Court's direction in WP(C) No. 5394/1999 and associated writ petitions, but to no avail. Thereafter, vide order dated 25-02-2003, the appellant was allowed to draw monthly salary against the retired vacancy, with effect from 01-02-2003. The appellant has drawn monthly salary till 01-01-2006 regularly and has been attending duties without any break.

5. Vide the order dated 07-06-2004, service of the appellant was adjusted against a post fallen vacant due to retirement of one Anil Kumar Sarma. Pursuant to the letter dated 29-07-2006 issued by the Joint Director of Secondary Education, Assam, the Assistant Accounts Officer (EDP), by his order No. GPF/EDP/Cell/Allot/2365, dated 12-10-2006, allotted the appellant the GPF Account No. FPD/29/4314 and entry to this effect was made in the Service Book of the appellant. It is noted that the appellant has been pursuing the matter for regularisation of his service or for appointment in terms of the selection process held in 1992, but all in vain.

6. While the appellant was serving after being adjusted against the post as indicated supra, suddenly the payment of monthly salary of the appellant was stopped since 01-01-2006. Aggrieved, the appellant filed another writ petition, i.e., WP(C) No. 1573/2007 which was disposed of on 03-08-2007 with a direction that the case of the appellant shall be taken up as per the common judgment delivered in WP(C) No. 2147/1999.

7. An Expert Committee was constituted by the State Government. Accordingly, vide Report dated 18-09-2008, the claim of the appellant was rejected. The appellant approached this Hon'ble Court by filing the WP(C) No. 5532/2010. This Court, vide order dated 24-02-2012 disposed of the said writ petition by setting aside the Expert Committee Report and directed the State to pay salary to the petitioner from March, 2006 onwards. Thereafter, vide letter dated 14-03-2012, the Director of School Education, Assam, has directed for adjustment of the appellant's service against the vacant post of Assistant Teacher, Science Graduate in Paschim Banbhag Higher Secondary School. Pursuant to that, the respondent No. 3, vide order dated 04-04-2012, had issued an order adjusting the appellant on the post of Science Graduate Teacher with effect from 01-01-2006 in the scale of pay of Rs. 3580/- to 8750/- per month (Pre-Revised)

plus other allowances as admissible under rules against the vacant post of Science Graduate Teacher. The order dated 04-04-2012 (Annexure-23 to this appeal) is reproduced hereinbelow:

"GOVERNMENT OF ASSAM

OFFICE OF THE DIRECTOR OF SECONDARY EDUCATION, ASSAM

KAHILIPARA, GUWAHATI-781019

NO. GB-EST/DSE/CC/60/2012/151 Dated Kahilipara the 4th April/2012

ORDER

In compliance of the Hon'ble High Court's order dtd. 24-02-2012 passed in WP(C) No. 5532/2010 and in pursuance of the Govt. Letter No. ELC/WP(C) 5532/2010/722/131, dtd. 30-03-2012 Sri Khanindra Kalita, B. Sc., the petitioner of the above mentioned High Court Case who originally adjusted in Nehru Milan High School, Kharuajan and attached in Paschim Banbhag Higher Secondary School, Khatikuchi by the Inspector of Schools, NDC, Nalbari vide his order issued under Memo No. EST-4/Misc/03/1322-26, dtd. 07-06-2004 is hereby adjusted in Paschim Bahbhar Higher Secondary School, Khatikuchi with effect from 01-01-2006 in the Scale of Pay of Rs. 3580/- to Rs. 8750/- per Month (Pre-Revised) plus other allowances as admissible under rules against the vacant post of Science graduate vice Late Lakshidhar Talukdar, B. Sc., Assistant Teacher expired and his original appointment is hereby regularised.

The post was originally created vide Govt. Letter No. EPG.567/91/113, dtd. 16-11-1991 and retained the same permanently vide Govt. Letter No. PMA.93/2002/Pt-II/200, dtd. 29-04-2003.

This has the approval of Finance (SIU) Department vide this approval No.

EST.207/12, dtd. 29-03-2012 as indicated vide Govt. Letter referred to above.

Sd/- B.L. Sarma, ACS,

Director of Secondary Education, Assam,

Kahilipara, Guwahati-781019."

8. On perusal of the order dated 04-04-2012, it can be concluded that the original appointment of the appellant was regularized.

9. The respondent authorities, by its letter No. GB-EST/DSE/CC/60/2012/151-A dated 10-05-2012 by the Deputy Director of Secondary Education, Assam, addressed to the Inspector of Schools, NDC, Nalbari, Guwahati, in response to the appellant's application dated 10-04-2012 informed that the service of the appellant was adjusted with effect from 01-01-2006, hence, he will be covered by the New Pension Rules.

10. Being aggrieved by the impugned letter dated 10-05-2012, the appellant

filed the writ petition being WP(C) No. 4462/2015 on the ground that the appellant's service has been from 01-02-2003 as a regular Science Graduate Teacher till date and he has been allowed to draw first and second financial upgradation of Assured Career Progression Scheme (ACP) with effect from 01-01-2011 and the date of joining and regular service of the appellant is 01-02-2003. The order dated 15-07-2013 is reproduced hereinbelow:

"GOVT OF ASSAM

OFFICE OF THE INSPECTOR OF SCHOOLS, NALBARI DISTRICT CIRCLE,

NALBARI

ORDER

In pursuance of the Finance (PRU) Department's Notification No. FPC.10/2010/4, dated 25.05.2011 and Finance (Estt-A) Department's Notification No. FEG.28/2011/12 dated 19.06.2012. The following teaching and non-teaching staff of Paschim Bonbhag H.S. School/High School/High Madrasa is allowed to draw 1st and 2nd Financial Up-gradation under Assured Career Progression Scheme (A.C.P.S) with effect from 01.02.2013

Incumbent wise Basic Pay Fixed as shown below:

Sl.

No.

Name of Incumbents with designation

Date of joining

Date of regular service

Date of regular existing basic pay as on 01.01.2011

Pay after 1st Financial up- gradation as on gradation as on 01.01.2011

Pay after

Financial up-

gradation as on 01.01.2011.

Pay Band

Grade Pay

Pay Band

Grade Pay

Pay Band

Grade Pay

1.

Khanindra Kalita A/T

01.01.03

01.01.03

8770

3300

w.e.f. 9910

31.02.13

3300

2.

Narnarayan Sarma UDA

01.02.89

01.02.89

10090

2900

10090

2900

w.e.f 10090

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1.2.300

Sd/- N.C. Bora,

Inspector of Schools, N.D.C.,

Nalbari

Memo No. EST.3/NDC/Pt-I/Es.712/1988-92 Dated, Nalbari the 15/7/13."

11. The learned Single Judge considered the matter and vide order dated 06-03-2019, came to the conclusion that merely because in the service book there is an entry of date of joining as 01-02-2003, the said entry can only be related to the purely temporary appointment which was held by the appellant, who is found to be actually regularized w.e.f. 01.01.2006 by virtue of order dated 04.04.2012. The entries of date of joining as 01.02.2003 in the GPF account allotted to the petitioner is also not a conclusive proof of the regular appointment of the petitioner from that date. Such entries came to be recorded on

12.10.2006, when the new pension had come into force w.e.f. 01.02.2005 and same cannot be allowed to defeat the requirement of New Defined Contribution Pension Scheme as per the O.M. dated 06.10.2009, which mandates as follows: "this scheme would be applicable to all new entrance joining State Government services regular basis against vacant sanctioned posts on or after 01.02.2005. Accordingly, the learned Single Judge concluded as under:

"14. In view of the discussion above, this Court is of the view that as the impugned Memo No. GB- EST/DSE/CC/60/2012/159 dated 10.05.2012 (Annexure-31) is an order consequential to the Memo No. GB-EST/DSE/CC/60/2012/151 dated 04.04.2012 (Annexure-23) by which the appointment of the petitioner was regularized w.e.f. 01.01.2006. Without any challenge to the said order dated 04.04.2012, which had attained finality, the challenge against the consequential order dated 10.05.2012 is not sustainable because as mentioned hereinbefore, the O.M. dated 06.10.2009 (Annexure-13) contains clear mandate that the New Defined Contribution Pension Scheme would be applicable to all new entrants joining State Government services on regular basis against vacant sanctioned post on/or after 01.02.2005 and the petitioner after being appointed on regular basis w.e.f. 01.01.2006, would stand covered by the new pension scheme and not by the previous pension scheme and GPF scheme in force in the State prior to 01.02.2005."

12. Assailing the judgment and order dated 06-03-2009, passed by the learned Single Judge, the learned counsel for the appellant submits that since the appellant was allowed to continue in his service without break since 1991 and subsequently regularized the service of the appellant with monthly salary and other entitlements, the New Pension Scheme, i.e., O.M. dated 06-01-2009 would not govern the service of the appellant, but by the Old Pension Rules.

13. The learned counsel for the appellant submits that the order dated 04-04-2012 wherein it is stated that the post was originally created vide the Government letter No. EPG.567/91/113 dated 16-11-1991 and retained the same permanently vide Government Letter No. PMA.93/2002/Pt-II/200 dated 29-04-2003 by which it is shown that the service of the petitioner/appellant is regularized against the said post of Assistant Teacher. It is further submitted that the order dated 15-07-2013, clearly establishes the date of joining and regular service of the appellant as 01-02-2003 and also that the appellant has been granted financial upgradation, i.e, ACP from time to time, and hence, the service of the appellant cannot be regulated by the New Pension Scheme. He contended that the impugned letter dated 10-05-2012 is not sustainable in facts and in law and is liable to be set aside. Consequently, the impugned judgment and order dated 06-03-2019, passed by the learned Single Judge is not sustainable.

14. Countering the submission of the learned counsel for the appellant, Mr. Khataniar, learned standing counsel for the Secondary Education Department submits that since the appellant was adjusted in the service only from 01-01-2006 and his original appointment was regularised with effect from

04-04-2012, he can only be deemed to be an entrant who had joined State Government service on regular basis against a sanctioned vacant post after 01-02-2005 and, therefore, he would be governed by the provisions of the New Defined Contributory Pension Scheme. It is, therefore, submitted that the present appeal is devoid of merit and prayed for dismissal of the same.

15. We have considered the rival submissions of the parties and also perused the relevant documents placed on record. We have also carefully perused the judgment and order dated 06-03-2019, passed by the learned Single Judge.

16. The case of the appellant has its own chequered history. On consideration, we find that the appellant has been allowed to serve initially on honorary basis since 1991 and he continued in service, albeit by way of sheer adjustment, with regular salary and other entitlements. The appellant filed series of writ petitions seeking a direction for appointment as per the Select List of 1992 and also for payment of salary but no fruitful consideration has been made by the respondent authorities except for payment of salary and other emoluments. The service of the appellant has been regularized by the order dated 04.04.2012 which clearly indicates that Shri. Khanindra Kalita, the appellant was originally adjusted in Nehru Milan High School, Kharuajan and has been attached in Paschim Bahbhar Higher Secondary School, Khatikuchi with effect from 01.01.2006 against the vacant post and his original appointment is regularized. On careful reading of the order dated 04.04.2012, it is found that the service of the appellant has been adjusted in another school with effect from 01.01.2006 by regularizing his original appointment.

17. There is another order dated 15.07.2013, wherein the date of regular service of the appellant is clearly reflected as 01.01.2003. During his continuous service, the appellant has been allowed to draw regular salary, GPF account being FDP/29/4314 has also been allotted and the appellant has been granted financial upgradation (ACPS) from time to time with other similarly situated persons.

18. On careful consideration of the order dated 04.04.2012 and order dated 15.07.2013, coupled with the appellant's drawing of regular salary and granting of financial upgradation to him, we have no hesitation in holding that the service of the appellant would be governed by the old pension rules. The conclusion of the Learned Single Judge that without challenge being laid to the order dated 04.04.2012, the challenge against the consequential order dated 10.05.2012, was not sustainable and that the service of the appellant is covered by the new pension scheme, is not based on an apropos consideration of admitted factual matrix. As a consequence, the order dated 10.05.2012, not being sustainable is set aside.

19. In the result, the judgment and order dated 06.03.2019 passed by the learned Single Judge in writ petition No. 4462 of 2015, is reversed. We hold that the service of the petitioner was regularized well before coming into force of the New Pension Scheme and that he is entitled to the benefits of the old pension

rules.

20. The writ appeal is allowed accordingly.