

**(2015) 06 GAU CK 0022**  
**In the Gauhati High Court**  
**Case No : Writ Petition (C) No. 2991 of 2013**

Mahendra Nath Sarma

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

**Date of Decision :** 05-06-2015

**Acts Referred:**

Assam Classical Institutions (Sanskrit and Pali-prakrit) (Provincialisation) Act, 1996 —  
Section 4 (3)

**Citation :** (2015) 06 GAU CK 0022

**Hon'ble Judges :** Michael Zothankhuma, J

**Bench :** Single Bench

**Advocate :** C. Bhattacharyya, for the Appellant; M.K. Mishra, Advocates for the Respondent

**Final Decision :** Dismissed

## Judgement

Michael Zothankhuma, J.—Heard Mr. C. Bhattacharyya, learned counsel for the petitioner. Also heard Mr. A. Chetri, learned counsel appearing for respondent No. 4 and Mr. MK Mishra, learned counsel appearing for the Higher Education Department.

2. Mr. C. Bhattacharyya, learned counsel for the petitioner submits that the petitioner's date of birth is 01.03.1939. The petitioner was appointed as Second Adhyapak in Jogeswari Darshan Vidyalaya in 16.03.1970. Thereafter, he was promoted as Pradhan Adhyapakin in the year 1982 and he served as Pradhan Adhyapak till his date of retirement on 31.03.2001.

3. The petitioner's counsel submits that his pension should be fixed by considering the average monthly emoluments in the last 10 months of service prior to 31.03.2001, wherein he was getting the pay of Rs. 8750 per month.

4. The petitioner's counsel further submits that the petitioner's pension has been fixed by considering the average monthly emoluments of the last 10 months prior to 01.03.1997, which is illegal.

5. The petitioner's counsel submits that the age of superannuation being 58 years, he was allowed to continue in service for an additional 4 years due to no fault of his and as such, his pension should be fixed by taking into account his date of actual retirement i.e., 31.03.2001.

6. The learned counsel for the petitioner has relied upon this Court's judgment in *Manohari Das Vs. State of Assam and Others*, (2008) 3 GLT 97 , in which it has been stated at paragraph six as follows:-

"6. In support of his submission, Mr. Kataki has placed reliance to the decision of this Court in *Smti. Charubala Devi Vrs. State of Assam and Ors.* reported in 1997(3) GLT 299 wherein in almost similar circumstances this Court at Para-19 held as follows:

This being the position... .. the petitioner herein was allowed to continue till 01.11.1992, this was because of mistake or fault on the part of the authority. The authority earlier did not take proper steps to correct the date of birth of the petitioner and the petitioner continued in service till 1992. The question is whether the petitioner should be given benefit of pension, for that particular period, the petitioner has received salary for this period. The service was also utilized by the authority. For the ends of justice and in order to not cause any prejudice to the petitioner, I direct that the authority shall determine pension of the petitioner as on 01.11.1992 the date on which she was released from service. The pension shall be given by the authority within a period of three months from the date of receipt of this order."

7. He has also relied upon the judgment of the Apex Court in *U.P. Raghavendra Acharya and Others Vs. State of Karnataka and Others*, AIR 2006 SC 2145 : (2006) 6 JT 416 : (2006) 6 SCALE 23 : (2006) 9 SCC 630 : (2006) SCC(L&S) 1948 : (2006) AIRSCW 2676 : (2006) 5 Supreme 380 to state that the respondents having allowed him to draw his pay and allowances till 31.03.2001, the pension should be calculated only on the basis of the emoluments drawn in the last 10 months prior to his retirement date.

8. Mr. MK Mishra, learned counsel appearing on behalf of Higher Education Department has submitted that though the petitioner's date of birth was recorded as 01.03.1939 in the Service Book, the petitioner was allowed to continue in service beyond his date of superannuation as the records were in the custody of the petitioner who had not submitted the same to the state respondents, to enable the respondents to verify the date on which the petitioner was to retire.

9. Mr. MK Mishra, learned counsel appearing for the respondents submitted that due to the respondents not being aware of the date of birth of the petitioner, they had inadvertently not forwarded the information to the petitioner of the correct date of retirement of the petitioner, which was to be on 01.03.1997.

10. Mr. MK Mishra, learned counsel appearing for the respondents has also

submitted that though the petitioner had worked an additional 4 years, no recovery for salary for the excess period of work has been made by the State respondents. He, however, submits that the pension of the petitioner has to be calculated, regard being had to the date of the petitioner would have attained the age of 58 years.

11. Mr. A. Chetri, learned counsel for the Pension and Public Grievance Department submitted that the petitioner having been born on 01.03.1939, he was to retire on 01.03.1997 and accordingly, the pension has to be calculated by considering the average monthly emoluments in the last 10 months of the petitioner's service w.e.f. 01.03.1997, in which case the petitioner's pension would have to be fixed at Rs. 2937 per month.

12. Heard learned counsel for the parties.

13. Rule 4 of the Assam Classical Institution (Sanskrit and Pali Prakrit) Provincialization Act, 1996 states that all employees other than Grade-IV employees of Classical institutions of Assam Sanskrit Board coming within the purview of this Act shall, on attaining the age of 58 years, go on superannuation.

14. Rule 4(3) of the above Act also states that any existing employee other than the Grade-IV employee, who does not intend to go on superannuation on attaining the age of 58 years shall have the option to continue upto the completion of the age of 60 years under the same terms and conditions, which were applicable to him immediately before the date of provincialisation.

15. On a query made by this Court as to whether the petitioner had exercised his option as per Section 4 (3) of the Act, the petitioner's counsel has submitted that no option was given to the petitioner or by the petitioner to continue serving beyond 58 years.

16. Rule 95 of the Assam Pension Rules, 1969 is with regard to the preparation of a list of officers, gazetted or non gazetted, who are to retire in the next calendar year and that the said officer due to retire is to be intimated one year in advance from the date of his anticipated retirement, so as to enable him to make a formal application for pension. It is also reflected in Rule 95 that

"if no intimation is however issued to the officer this shall not in any way change his date of retirement and shall not confer on the Government servant any right to remain in service beyond the date on which he is required to retire."

17. The pension amount payable to a pensioner is fixed by the Office Memorandum dated 02.04.1991 issued by the Commissioner and Secretary to the Govt. of Assam, Pension and Public Grievances Department, which at NOTE 1 states as follows:-

"Note(I)-The expression "emoluments" for the purpose of calculating various retirement death benefit contained under this office memo shall mean basic pay as defined in F.R. 9(21)(a)(i) of the State FRs. and SRs. which the Govt. servant

was receiving immediately before his retirement or on the date of death. Similarly, average "emoluments" shall be determined with reference to basic pay as defined under FR.-9(21)(a)(i) drawn by a Government servant during the last 10(ten) months of his service."

18. The question is basically as to whether the petitioner's pension is to be fixed by considering the emoluments on the last 10 months service w.e.f. 31.03.2001 or 01.03.1997.

19. The judgment in Manohari Das (supra), is not applicable to the present case inasmuch as in the said Manohari Das (supra), the petitioner had been allowed to go on superannuation pension based on the date of birth as recorded in his service book, though the date of birth in the service book was incorrect.

20. The case of U.P. Raghavendra Acharya and others (supra) is also not applicable to the present case, inasmuch as, the question in the above case was as to whether the appellant having been given the benefit of the revised pay scale w.e.f. 01.01.1996 could have been deprived of the retiral benefits calculated with effect therefrom. It was held in that case that if the appellant becomes entitled to the benefits of the revised scale of pay and consequently to the pension calculated on the said basis in terms of the impugned Rule, the State could not have amended the statutory Rules adversely effecting their pension with retrospective effect.

21. In the present case in hand, the question is slightly different. There is no dispute in the present case that the petitioner's date of birth is 01.03.1939. There is no dispute that the age of superannuation is 58 years. Thus, the petitioner was to have retired on 01.03.1997. However, due to mistake and negligence on either of the parties, which cannot be pin-pointed, the petitioner was allowed to retire only on 31.03.2001, i.e., after having served an additional 4 years of service.

22. In the case of Radha Kishun Vs. Union of India (UOI) and Others, (1997) 4 JT 116 : (1997) 1 LLJ 1165 : (1997) 2 SCALE 616 : (1997) 9 SCC 239 : (1997) SCC(L&S) 1185 : (1997) 2 SCR 582 , the case of the petitioner in that case was that though he was to retire on 31.05.1991, he remained in office till 31.05.1994 enjoying all the benefits of service. It was held in paragraph 4 as follows:-

"4. It is then contended that the petitioner would have conveniently secured gainful employment elsewhere and having worked, he cannot be denied of the legitimate salary to which he is entitled. Though the argument is a luring, we cannot accept the contention and given legitimacy to the illegal action taken by the authorities. If the contention is given acceptance, it would be field day for manipulation with impunity and one would get away on the plea of equity and misplaced sympathy. It cannot and should not be given countenance."

23. In the present case, the State respondents have decided not to recover the excess amount of salary paid to the petitioner due to his over stay in service.

However, in respect of the pension payable to the petitioner, the respondents have taken the petitioner's date of superannuation to be 01.03.1997, which to my mind is the correct decision as there is no dispute with regard to the petitioner's date of birth and which has been correct. In fact, even assuming that the petitioner had exercised his option to continue in service beyond 58 years as per Rule 4(3) of the Assam Classical Institution (Sanskrit and Pali Prakrit) Provincialization Act, 1996, then also the petitioner could have worked only upto 01.03.1999, when he would have attained 60 years. However, the petitioner has worked till the age of 62 years. The petitioner, in my opinion should have been truthful and responsible and informed the authorities that he was to retire on 01.03.1997 and retired gracefully. However, the petitioner chose to remain silent.

24. As the Supreme Court has held in Radha Kishun (supra) that the petitioner who was not entitled to the salary for the excess period of service, it logically follows that the petitioner is not entitled to have his pension fixed on the basis of the salary received for the period on which he had over stayed in service.

25. Accordingly, I hold that the petitioner's pension should be fixed by taking the average monthly emoluments in the last 10 months of service prior to the date on which he should have retired, i.e., 01.03.1997.

26. Consequently, the writ petition is dismissed due to the above reasons.