(2007) 12 GAU CK 0013

In the Gauhati High Court

Case No : Writ Petition (C) No. 1940 of 2006

Nirmala Sarma Baruah APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 15-12-2007

Acts Referred:

Assam Secondary Education (Provincialisation) Act, 1977 — Section 4, 4(2)
Constitution of India, 1950 — Article 226

Citation : (2008) GLT 339 Supp

Hon'ble Judges : H.N. Sharma, J

Bench : Single Bench

Advocate : B.P. Bora and J. Borah, for the Appellant; M. Khataniar, for the Respondent

Final Decision : Allowed

Judgement

H.N. Sarma, J.—The grievance as projected in this writ petition is the refusal of the Respondents/authorities to regularize the period of 14 months of her stay in service beyond 58 years in terms of the Office Memorandum dated 12.6.97 and consequently to allow her the pensionary benefit to which she is otherwise entitled under the provisions of law.

2. Heard Mr. B.P. Bora learned Sr. counsel assisted by Ms. J. Bora, learned Counsel for the Petitioner and Mr. Khataniar, learned Standing counsel. Education Department, appearing for the Respondents.

3. The pleaded case of the Petitioner, to put in short, is that she was appointed as Asst. Teacher in North Guwahati Girl''s H.E. School, Guwahati wherein she joined on 26.8.70 and attained the age of superannuation on 30.4.99. In terms of the relevant provisions holding the field, the Petitioner exercised her option to continue in service upto 60 years for getting her pensionary benefits to which she would have been otherwise entitled, and accordingly continued in her service as Asst. Teacher beyond 58 years. However, due to her consistent ill health she could not continue beyond 30.6.2000 in service and went on superannuation with

effect from 1.7.2000 when she was released from her post. Thus she stayed for a period of 14 months beyond 58 years and the Petitioner represented to the authority to regularize this period of 14 months as per the existing policy/ guidelines of the Govt. issued vide Office Memorandum dated 12.6.97 and also provided the pensionary benefit to which she is entitled under the law. Various requests made by the Petitioner did not evoke any positive response from the authorities. Although the Director Secondary Education, forwarded the pension papers submitted by the Petitioner to the Govt. for necessary approval, the same was rejected vide impugned communication dated 21.2.06. Being unable to get necessary relief from the hands of the Respondents/authorities, the Petitioner has approached this Court by filing this writ petition.

4. The Respondents/authorities resisted the claim of the Petitioner by filing counter. The stand of the Respondents/authorities is that the Petitioner, after exercising her option to stay in service up to 60 years, could not complete the said period and over stayed till 30.6.2000 and without regularization of this period, the Petitioner is not entitled to get the pensionary benefit. The further stand of the Respondents in the counter is that the amount drawn in excess by the Petitioner as salary for the over stayed period is to be refunded from the gratuity amount in terms of the Office Memorandum dated 12.6.97 and the Govt. having regretted their inability to approve the proposal to regularize the period of over stay, the Petitioner''s claim is not maintainable. It is also contended that the age of superannuation up to 60/62 years as claimed by the Petitioner is contrary to the Rules and Regulation and hence, the Govt. regretted to regularize the period of over stay in service beyond 58 years.

5. Mr. Bora, learned Sr. counsel referring to the decision of the Apex Court rendered in Civil Appeal No. 8854/96 arising out of SLP (C) No. 10808/1995 dated 30.4.96 Assam Madhyamik Sikshak Aru Karmachari Santha Nagaon v. The State of Assam and Ors. and subsequent Office Memorandum issued by the Secretary to the Govt. of Assam, Education Department dated 12.6.97, submits that the Petitioner is entitled to her pensionary benefit as maybe fixed as per Rule and refusal to pay the same is nothing but illegal and arbitrary action on the part of the authority. Learned Sr. counsel further submits that the Petitioner has also by her application dated 19.4.2002 gave a written undertaking to the authority that she has no objection in deducting amount for the period from 1.5.99 to 30.6.2000 and in such a situation, the authority is not entitled to refuse to pay the pensionary benefit to the Petitioner. Mr. Khataniar, learned Standing counsel, however, supported the action of the Respondents and relies on the statements made in the counter affidavit.

6. I have considered the rival submissions made by the learned Counsel for the parties. The Petitioner joined in the service in the year 1970, during which period her service was guided and regulated under the Assam Aided High and Higher Secondary Employees Rule, 1960 which was applicable at that time and as per the said rule, the age of superannuation of a teacher was 60 years with further

right for consideration of extension beyond said period up to 63 years. However, this Rule has been repealed subsequently and at the time of superannuation of the Petitioner, the provision of Assam Secondary Education (Provincialisation) Act, 1977 was in force which holds the field. Section 4 of the 1977 Act provides for superannuation and pension in respect of a member of the same as under:

4. Superannuation and pension, etc. (1) Notwithstanding anything in the proceeding section all employees other than Grade-IV employees of a Secondary School coming within the purview of this Act shall, on attaining the age of 58 years, go on superannuation. Grade-IV employees shall go on superannuation on attaining the age of 60 years.

(2) All employees going on superannuation under the proceeding Sub-section shall be eligible to pension or gratuity or both in accordance with the Pension Rules applicable to the Government Servants of equivalent rank. In such a case the employer''s contribution along with accumulated interest thereon made towards the Provident Fund of the existing employee concerned before such annuation shall be paid back to an recovered by the State Government of Assam.

(3) Any existing employee, other than the Grade-IV employees, who does not intend to go on superannuation on attaining the age of 58 years shall have the option to continue up to the completion of the age of 60 years under the same terms and conditions which were applicable to him before the appointed day in which case he shall not be entitled to any pension or gratuity.

(4) Any existing employee, other than Grade-IV employees, who does not intend to go on superannuation on attaining the age of 58 years but wants to continue till the completion of 60 years shall give an option in writing to that effect in the manner prescribed within a period of three months from the appointed day. Any existing employee who does not give such option in writing within the date specified above shall be deemed to have opted for going on superannuation on attaining the age of 58 years.

7. It is an admitted position that during the relevant time there was no specific Rule as to the manner and method of providing option by a teacher to continue in service up to 60 years on attaining the period of superannuation of 58 years. It is also undisputed position that the Petitioner exercised such option to continue up to 60 years and in the process she continued till 1.7.2000. However, the situation being beyond her control she could not continue any more period and went on superannuation with effect from 1.7.2000 on which date she was released from service. Thus the Petitioner continued 14 months beyond 58 years in her service and she had also received her remuneration for this period as provided to her by the authority.

8. Assam Madhyamik Sikshak Aru Karmachari Santha, Nagaon being aggrieved by the decision of the State Govt. not to provide pensionary benefit to such teacher who exercised option to continue beyond 58 years unsuccessfully approached this Court by filing a writ petition as well as Writ Appeal No. 90/94.

Ultimately, the aforesaid Santha by filing Civil Appeal No. 8854/96 raised the issue before the Apex Court challenging the decision of this Court and the Apex Court disposed of the appeal on 30.4.96 holding in the penultimate paragraph as follows:

In view of the above resolution, it is contended by Mr. P.K. Goswami, learned senior counsel appearing for the Association, that the same benefit may be given to the teachers who continued as teachers on appointed day, namely, October 1, 1977 and those who remained in service till attaining 60 years be treated as Government employees entitled to the benefit of the pension. The admitted position is that they had already withdrawn their C.P.F. which was due to them after their attaining the age of 60 years. Such of the teachers who had withdrawn the C.P.F. should re-deposit the same to the credit of the government. On such deposit being made, the State is directed to treat them at par with the second category of teachers as per the draft Rules now made and to treat them as if they are the Government teacher on the appointed day and on that basis, they would be entitled to pensionary benefits as applicable to all the Government employees who would retire on attaining the age of 58 years and other benefits admissible to them.

9. After the decision of the Apex Court the Govt. in the Education Department accepted the aforesaid decision by issuing a Memorandum on 12.6.97. For our confidence the text of the said Memorandum in full is quoted herein below:

Pursuant to the Hon''ble Supreme Court''s order dated.30.4.96 in Civil Appeal No. 8854 of 1996 arising out of SLP (C) No. 10808 of 1995 between Assam Madhyamik Sikshak Am Karmachari Santha, Nagaon v. the State of Assam and Ors. it has been decided to regularize the period of overstay in service beyond 58 years of age upto the age of 60 years in respect of the employees/teachers of. High School/Higher Secondary Schools/High Madrassa and Higher Se. Madrassa the services of whom are covered under the provision of Section 4(2) of Assam Secondary Education (Provincialisation) Act, 1977.

Accordingly it has been decided that the employees of provincialised High School/ Higher Secondary Schools, High and Higher Secondary. Madrassa who continued as teacher/employee on the date of receiving grant-in-aid and who retired from service beyond 58 years of age upto 60 years of age will be deemed to have retired on superannuation from the due date of superannuation and the period of overstay beyond tins date will be treated as period of re-employment and pensionary benefit will be extended to these employees accordingly. During the period of such re-employment, the remunerations of such employees will be as under:

Last pay and allowances as on the due date of superannuation with non-drawl of the monthly pensions/pensionary benefit in case of those of the said employees/ teachers who have already drawn their C.P.F amount in full (i.e. the total C.P.F. which includes their own contribution and the employee''s contribution with interest accrued on both upto the date of drawal), the amount corresponding to the employer''s contribution with interest accrued thereon upto the date of withdrawal will be recovered in full. If it can be fully recovered from the D.C.R.G. amount it will be done accordingly. In case, the D.C.R.G amount does not suffice for such adjustment, the amount of D.C.R.G shall be fully adjusted towards the recovery to that extent and the balance amount will be recovered from the monthly Dearness Relief amount in regular installments to xxxxxx extent of the monthly Dearness Relief till the full liquidation of the balance amount.

9. The Petitioner thus having retired from her service with effect from 1.7.2000 approached the authority for regularization of the aforesaid period of 14 months from 1.5.99 to 30.6.2000 and to be provided her with the pensionary benefit. The Govt. in the education department in reply to the communication dt. 6.1.06 made by the Director, Secondary Education to Government intimated its inability to approve the proposal so submitted by the Director vide its letter dated 21.2.06. The aforesaid letter of the Govt. does not indicate any reason as to why the prayer of the Petitioner was turned down. After the decision of the Apex Court in Civil Appeal No! 8854/96 (supra), the Petitioner as it stands now is that the employees of provincialised High School/Higher Secondary Schools, High and Higher Secondary Madrassas who continued as teacher/employee on the date of receiving grant-in-aid and who retired from service beyond 58 years of age upto 60 years of age will be deemed to have retired on superannuation from the due date of superannuation and the period of overstay beyond this date will be treated as period of re-employment and pensionary benefit will be extended to these employees accordingly. The State Govt. also after the decision of the Apex Court decided that the period of overstay beyond 58 years is treated as re-employment and the pensionary benefit would be extended to such teachers also by issuing Memorandum No. 203(3) Section 227/93/Pt/391 . The contention of the above memorandum is herein quoted below:

Pursuant to the Hon''ble Supreme Court''s order dated 30.4.95 in Civil Appeal No. 8854 of 1996 (arising out of SLP(C)No. 10.0308 of 1995) between Assam Madhyamik Sikshak Aru Karmachari Santha, Nagaon v. the State of Assam and Ors. it has been decided to regularize the period of overstay in service beyond 58 years of age upto the age of 60 years in respect of the employees/teachers of High School/Higher Secondary Schools/High Madrassa and Higher Section Madrassa the services of whom are covered under the provision of Section 4(2) of Assam Secondary Education (Provicialisation) Act, 1977.

Accordingly it has been decided that the employees of provincialised High School/ Higher Secondary Schools, High and Higher Secondary Madarssas who continued as teacher/employee on the date of receiving grant-in-aid and who retired from service beyond 58 years of age upto 60 years of age will be deemed to have retired on superannuation from the due date of superannuation and the period of overstay beyond this date will be treated as period of re-employment and pensionary benefit will be extended to these employees accordingly. During the period of such re-employment, the remunerations of such employees will be as under:

Last pay and allowances as on the due date of superannuation with non-drawal of the monthly pension/pensionary benefit" in case of those of the said employees/teachers who have already drawn their C.P.F amount in full (i.e. the total C.P.F. which includes their own contribution and the employee''s contribution with interest accrued on both upto the date of drawl), the amount corresponding to the employer''s contribution with interest accrued thereon upto the date of withdrawal will be recovered in full. If it can be fully recovered from the D.C.R.G. amount it will be done accordingly. In case, the D.C.R.G amount does not suffice for such adjustment, the amount of D.C.R.G shall be fully adjusted towards the recovery to that extent and the balance amount will be recovered from the monthly Dearness Relief amount in regular instalments to extent of the monthly Dearness Relief till the full liquid of the balance amount.

10. Although the aforesaid memorandum also speaks about the recovery of the C.P.F. amount, if in the meantime any of the teachers/employees so drawn for refund of the same with interest, it is contended by Mr. Bora that no such amount has been drawn by the Petitioner after her superannuation.

11. The Apex Court in a catena of decisions has held that the pension to a Govt. employee is not a bounty but a right to be paid to a Govt. employee upon his/her superannuation in recognition of his/her past service to the State. This provision of pension is in recognition of the service rendered by the citizen of a country in consonance with the Constitutional Scheme of our welfare State. In order to deprive a person from the pensionary benefit there must be certain established deficiency on the part of the person concerned and in the absence thereof the same cannot be withheld. However, there is no such reason to deny with or not to provide the pensionary benefit to the Petitioner in the instant case. The alleged ground for such refusal as could be discovered from the counter of the Respondents is for non-regularization of the period of over stay of 14 months with effect from 1.5.99. The manner and method as to how this period of overstay is to be treated is indicated in the Office Memorandum quoted hereinbelow.

12. The aforesaid discussion leads me to come to the conclusion that the authority itself is not regularizing the service of the Petitioner for the aforesaid period in terms of the said Office Memorandum and on the other hand she is deprived of her pensionary benefit for want of such regularization and such inaction on the part of the authority to regularize the overstay period cannot be allowed to be treated as a valid ground to deny the benefit to the Petitioner which is her vested right. The impugned order does not disclose any reason now the materials available before me disclose any reasonable ground for denying the right of pensionary benefit to the Petitioner. In fact the Apex Court in the above referred decision has clarified the matters to treat the person who continue in service for 58 years like that of other Govt. employees.

13. The School in question is a provincialised school and the employees of the provincialised school is considered as the Govt. employee and are entitled to get the pensionary benefit under the law. The Petitioner has an undisputed right to get her pension under the provisions of law. Although the Petitioner in her letter dated 19.1.2004 has given her no objection and undertaking for deduction of the amount paid to her during the period of overstay of 14 months, but in terms of the Office Memorandum this period has to be calculated as re-employment and pension is to be calculated accordingly calculating her service upto 58 years. In view of the aforesaid discussion, I find that the Petitioner has made out a well established case for interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India and the action of the Respondents/authorities clearly disclose glaring illegality within the framework of the provisions of law denying the legitimate right of the Petitioner.

14. Accordingly, in view of the above discussion, this writ petition stands allowed and the Respondents/authorities are directed to calculate, fix and pay the pensionary benefit of the Petitioner treating the overstay period of 14 months beyond 58 years in terms of the Office Memorandum mentioned above as early as possible. Since the Petitioner has gone on superannuation on 1.7.2000 and more than 7(seven) years have already elapsed without getting her pensionary benefits, the authority shall complete the entire exercise within a period of not later than 75 (seventy five) days from the date of receipt of the certified copy of this order.

15. Writ petition stands allowed with the directions as indicated above.

16. No costs.