

(1999) 03 GAU CK 0022
In the Gauhati High Court
Case No : Civil Rule No. 3746 of 1997

Prafulla Chandra Hazarika

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 23-03-1999

Acts Referred:

Assam Services (Pension) Rules, 1969 — Rule 21, 22, 22(1)
Constitution of India, 1950 — Article 226

Citation : (1999) 1 GLT 578

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : S.C. Biswas, K. Bhattacharjee, M.K. Majumdar, A.B. Bhattacharjee and N.D. Sarma, for the Appellant; A.K. Goswami, G.A. Assam, for the Respondent

Judgement

A.K. Patnaik, J.—This application under Article 226 of the Constitution has been filed by the Petitioner for a direction on the Respondents to release pension, gratuity, leave encashment and other retirement benefits to the Petitioner.

2. The facts briefly are that the Petitioner was working under the Directorate of Agriculture, Government of Assam and retired from service on 31.3.95 as Additional Director of Agriculture, Diphu. Just before his retirement, an explanation was called for from the Petitioner by letter dated 5.1.95 of the Joint Secretary to the Government of Assam, Agriculture Department, in respect of various financial irregularities and administrative lapses on the part of the Petitioner. The Petitioner furnished his explanation by his letter dated 19.1.95 to the Joint Secretary to the Govt. of Assam, Agriculture Department. Notwithstanding the said explanation, the Petitioner was placed under suspension pending drawal of departmental proceeding against him by order dated 21.3.95 of the Secretary to the Government of Assam, Agriculture Department. A few days thereafter on 31.3.95, the Petitioner retired from service. The grievance of the Petitioner in this writ petition is that he has not been paid his pension, gratuity, leave encashment and other retirement benefits and that although he

was paid provisional pension for a few months, the payment of such provisional pension has also been stopped.

3. Mr. SC Biswas, learned Counsel for the Petitioner, submitted that although the Petitioner was placed under suspension, no charges have yet been framed against the Petitioner and, therefore no disciplinary proceeding has been initiated against him. Thus withholding of pension and other retirement benefits of the Petitioner was not permissible under Rule 21 of the Assam Services (Pension) Rules, 1969, (for short "the Rules"). He further contended that at any rate under Rule 22(1) of the Rules, the Petitioner was entitled to be paid provisional pension but such provisional pension though paid initially for a few months, is not being paid now. Mr. Biswas, therefore, submitted that it is a fit case in which this Court should direct the authorities to pay pension, gratuity, leave encashment and other retirement benefits to the Petitioner within a stipulated time.

4. In reply Mr. A.K. Goswami, G.A. Assam, relying on the averment made in the counter-affidavit filed by the State Respondents, submitted that investigations into manifold irregularities alleged to have been committed by the Petitioner are almost complete and that show cause notice will soon be served on him. He contended that once the departmental proceeding was initiated or a government servant was suspended in contemplation of departmental proceeding, the government servant was entitled to only provisional pension under Rule 22(1) of the Rules. He explained by referring to the language of Rule 21 of the Rules that the order for withholding or withdrawing a pension is passed by the Governor of Assam only after the departmental proceeding is completed and the government servant is found guilty of grave misconduct or negligence during the period of his service. According to Mr. Goswami, therefore, no order is required to be passed by the Governor of Assam under Rule 21 of the Rules withholding or withdrawing pension in the case of Petitioner as the departmental proceedings have not been completed against him. He relied on the provisions of Rule 22(1) of the Rules for his submission that where a departmental proceeding initiated against a government servant prior to his retirement is continued he is not entitled to pension but he is entitled to provisional pension. Mr. Goswami further referred to the averments made in para-10 of the affidavit-in-opposition to the effect that the provisional pension for further period in favour of the Petitioner will be sanctioned after observance of necessary formalities.

5. Rules 21 and 22 of the Rules are extracted herein below:

21. The Governor of Assam reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if in a departmental or judicial proceeding the pensioner is found guilty of grave misconduct or negligence during the period of his service, including, service rendered upon re-employment after retirement provided that:

(a) Such departmental proceeding, if instituted while the officer was in service, whether before his retirement or during his reemployment, shall, after the final retirement of the officer, be deemed to be a proceeding under this rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the officer had continued in service;

Explanation - The continuation of the proceeding after the final retirement of the officer shall be automatic under Sub-rule (a) of Rule 21 and no fresh decision of the Governor and/or the Appointing Authority nor any show cause notice to the person concerned shall be necessary.

The power under Rule 21 shall be exercisable not only in case of causing pecuniary loss to Government but also in all other cases.

(b) such departmental proceeding, if not instituted while the officer in service, whether before his retirement or during, his reemployment:

(i) shall not be instituted save with the sanction of the Governor of Assam;

(ii) shall not be in respect of any event which took place more than 4 years before such institution; and

(iii) shall be conducted by such authority and in such place as the Governor of Assam may direct and in accordance with procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the officer during his service;

(c) no such judicial proceeding, if not instituted while the officer was in service, whether before his retirement or during his reemployment, shall be instituted in respect of a clause of action which arose or an event which took place more than 4 years before such institution; and

(d) the Assam Service Commission shall be consulted before the order are passed.

Explanation - For the purpose of this rule:

(a) a departmental proceeding shall be deemed to be instituted on the date on which the statement of charges is issued to the officer or pensioner; or if the officer has been placed under suspension from an earlier date, on such date; and

(b) a judicial proceeding shall be deemed to be instituted:

(i) in the case of a criminal proceeding on the date on which the complaint or report of police officer, on which the Magistrate takes cognizance, is made, and:

(ii) in the case of a civil proceeding, on the date of presentation of the plaint in the Court.

22.(1) Where any departmental or judicial proceeding is instituted under Rule 21 or where a departmental proceeding is continued under clause (a) of the proviso

thereto against an officer who has retired on attaining the age of compulsory retirement or otherwise, he shall be paid during the period commencing from the date of his retirement to the date on which upon conclusion of such proceeding, final orders are passed, a provisional pension not exceeding the maximum pension which would have been admissible on the basis of his qualifying service up to the date of retirement, or if he was under suspension on the date of retirement, up to the date immediately preceding the date on which he was placed, under suspension; but no gratuity or death-cum-retirement gratuity shall be paid to him until the conclusion of such proceeding and the issue of final orders thereon.

(2) Payment of provisional pension made under clause (1) shall be adjusted against the final retirement benefits sanctioned to such officer upon conclusion of the aforesaid proceeding but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period.

A reading of the explanation () of Rule 21 would show that for the purpose of the rule a departmental proceeding shall be deemed to be instituted, if the officer has been placed under suspension, from the date of such suspension. Hence, although Mr. Biswas is right that normally a departmental proceeding is said to have been instituted when the charges are framed against the government servant by the disciplinary authority, for the purpose of Rule 21, a departmental proceeding is deemed to be instituted even where statement of charges are not furnished to the government servant and the government servant has been merely placed under suspension pending drawal of departmental proceeding against him. The provision in explanation (a) of Rule 21 of the Rules is a deeming provision and a statutory fiction and as per settled law of the Apex Court such statutory fiction as created by the law making authority has to be accepted by the Court even though the fiction is controversy to our common notions. The contention of Mr. Biswas that Rule 21 of the Rules cannot be invoked by the authorities for the purpose of withholding the regular pension of the Petitioner is, therefore, not correct.

6. But the opening words of Rule 21 states that the Governor of Assam reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period. Unless the Governor of Assam exercises such right reserved to himself, pension cannot be withheld or withdrawn permanently or for a specified period automatically. This would also be clear from the provisions of Rule 21 to the effect that powers under Rule 21 "shall be exercisable" not only in case of causing pecuniary loss to the Government but also in all other cases. The aforesaid provision clearly indicates that it is a power which is exercisable in a given case and may not be exercised in some cases and that action under Rule 21 withholding or withdrawing pension permanently or for a specified period is not automatic. A further reading of Rule 21 will show that the right to withhold a pension is different from the right to

order the recovery from pension any pecuniary loss caused to the Government which can be exercised by the Governor only if in a departmental or judicial proceeding the pensioner is guilty of some misconduct or negligence during the period of service, whereas the right of withholding pension can be exercised by the Governor even before the conclusion of the departmental proceeding. Unless, therefore, the competent authority in a given case applies his mind to the facts of the case and passes specific orders withholding or withdrawing pension or any part of it whether permanently or for a specific period for some good reasons, pension or any part thereof of a government servant cannot be withheld by the authority automatically.

7. Coming now to Rule 22(1) of the Rules on which reliance was placed by Mr. Goswami for his contention that where a departmental proceeding was continuing against a government servant, he was entitled to only provisional pension, the said provision entitles a government servant to payment of provisional pension in a case where departmental proceeding was continued against him but does not confer any power or right on the Governor of Assam to withhold pension of a government servant. The said provision in Rule 22(1) further does not state that the payment of regular pension to a government servant will be automatically stopped where a departmental proceeding is continued against a government servant. The claim of the Petitioner in this writ petition is payment of regular pension and if the State Respondents are to take any defence against payment of such regular pension, they can only rely on Rule 21 of the Rules which confers only a right on the Governor of Assam to withhold pension and does not automatically stop payment of pension in a case a departmental proceeding is continued against a government servant.

8. Since no orders have been specifically passed by the competent authority under Rule 21 of the Rules withholding the pension of the Petitioner for a specified period, more particularly the period when departmental proceeding against the Petitioner is continuing, the Respondents will within two months from the date of receipt of a certified copy of this judgment from the Petitioner release the regular pension of the Petitioner and grant him other retirement benefits unless a specific order is passed by the competent authority in the meanwhile under Rule 21 of the Rules for good reasons withholding pension of the Petitioner. I further direct that in case any such order is passed by the competent authority under Rule 21 of the Rules for good reasons withholding the pension of the Petitioner for a specific period, and in particular for the period till conclusion of departmental proceeding against the Petitioner, the Petitioner will be paid by the Respondents provisional pension both current and arrear within the aforesaid period of two months from the date of receipt of certified copy of this judgment from the Petitioner. No costs.