(2018) 12 GAU CK 0003

In the Gauhati High Court

Case No : Writ Petition (C) 1089 Of 2015, WP(c) 7015, 6968, 4127, 250 of 2016, WP(c) 5017, 3024 of 2017, WP(c) 6668 of 2013

Sanjita Roy — APPELLANT

Vs

State Of Assam 4 Ors — RESPONDENT

Date of Decision : 04-12-2018

Acts Referred:

Assam Services (Pension) Rules, 1969 — Rule 31, 67, 108, 108B
Constitution Of India, 1950 — Article 14, 31(1)

Citation : (2018) 12 GAU CK 0003

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : M Deka, D. Doley, Md.Arif, P P Dutta, U Choudhury, R Bora, H R A Choudhury, A Ahmed, U K Nair

Final Decision : Disposed Off

Judgement

1. Heard Mr. H. Talukdar, learned counsel for the petitioner in WP(C) No.1089 of 2015 and WP(C) No.6668 of 2013, Mr. D. Borah, learned counsel for the petitioner in WP(C) No.250 of 2016, Mr. K.R. Patgiri, learned counsel for the petitioner in WP(C) No.4127 of 2016, Mr. P.P. Dutta, learned counsel for the petitioner in WP(C) No.6968 of 2016, Mr. N. Haque, learned counsel for the petitioner in WP(C) No.7015 of 2016 and Mr. F.U. Borbhuiya, learned counsel for the petitioner in WP(C) No.3024 of 2017 and WP(C) No.5017 of 2017 are present. Also heard Mr. D. Doley, learned Standing Counsel for the PWD and Mr. U.K. Nair, learned Standing Counsel for Pension. Mr. G. Baishya, learned Standing Counsel for the Accountant General, Assam, and Mr. P. Nayak, learned Standing Counsel for Finance Department, are present.

2. All these matters being connected wherein a similar grievance is expressed and therefore, the same are taken altogether for disposal.

3. At the outset it would be necessary to state the facts of the individual cases in brief. The petitioner in WP(C) NO.1089 of 2015 was appointed as a Muster Roll

Worker on 01.10.1992. Thereafter, her service was regularized with effect from 22.07.2005 and in the order of regularization list, the name of the petitioner's appeared at serial No.107. The petitioner retired from her service on 31.03.2014 on attaining the age of superannuation and her pension papers were forwarded to the Government of Assam vide letter dated 17.07.2014 and thereafter, to the Accountant General, Assam. However, vide the impugned order dated 16.10.2014, issued by the Office of Accountant General the claim of the petitioner has been rejected.

4. In WP(C) No.5017 of 2017, there are 4 petitioners. All petitioners were initially appointed as Muster Roll Workers and were subsequently regularized vide notification dated 22.07.2005. On the retirement of the petitioners, the petitioner No.1 had completed 19 years 2 months of service with regularized service of 3 years 8 months. Likewise, the petitioner No.2 had completed 23 years 7 months of total service with regularized service of 6 years 10 months. The petitioner No.3 had total length of service of 24 years 7 months with regualrised service of 9 years 4 months and lastly, the petitioner No.4 had total length of service of 22 years 6 months with regularized service of 7 years 5 months.

5. The petitioner in WP(C) No.6968 of 2016 was appointed as a Muster Roll Worker on 07.01.1990 and was similarly regularized with effect from 22.07.2005. On his retirement on 30.11.2014, his pension papers were forwarded which were, however, rejected.

6. In WP(C) No.7015 of 2016 there is one petitioner who was appointed as Muster Roll Worker in the Department of Sericulture on 01.08.1990. His service was regularized vide order dated 14.10.2005 and upon retirement on attaining the age of superannuation on 31.01.2012, his pension proposal was submitted to the Government. However, till date there is no response. The petitioner in this case has served for a period of 21 years 5 months and his regularised service is for a period of 6 years 3 months.

7. The petitioner in WP(C) No.4127 of 2016 is the wife of the deceased employee who was appointed as a Muster Roll Worker on 03.10.1989. The service of her husband was regularized with effect from 22.07.2005 and on 02.05.2012, his service was also confirmed. The total length of service rendered by the petitioner's husband in this case was 22 years 3 months and regularised service was 7 years 6 months. It is case of the petitioner that till date, no pension has been received by her.

8. In WP(C) No.250 of 2016, the petitioner was appointed as a Muster Roll Worker on 21.05.1986 and his service was regularized vide order dated 19.10.2007. The petitioner retired on 30.11.2009 and thus, the petitioner served a total length of 23 years 6 months with regularised period of 17 years 6 months.

9. The case projected by the petitioners is that the rejection of pension by the respondent authorities is arbitrary and illegal and therefore, warrants interference. The learned counsel for the petitioners rely upon Rule 31 of Assam

Services (Pension) Rules, 1969, which is quoted herein bellow:

"31. The service of an officer does not qualify for pension unless it conforms to the following three conditions;-

Firstly, the service must be under Government;

Secondly, the employment must be substantive and permanent;

Thirdly, the service must be paid by Government:

Provided that the Governor may, even though either or both of conditions (1) and (2) above are not fulfilled-

(i) declare that any specified kind of service rendered in a non-gazetted capacity shall qualify for pension, and

(ii) in individual cases and subject to such conditions as he may think fit to impose in each case allow service rendered by an officer to count for pension."

10. The petitioners also refer to Rule 108 which is also quoted herein below:

"108. The amount of pensin shall be regulated as follows-

(a) After a service of less than ten years, a gratuity not exceeding (except in special cases, and under th4 orders of the Governor upto a maximum of 12 months' emoluments) one-half month's emoluments for each completed six monthly period of service. If the emoluments of the officer has been reduced during last three years of service, otherwise than as a penalty, average emoluments may, at the discretion of the authority which has power to sanction the gratuity, be substituted for emoluments.

(b) After a service of not less than ten years a pension not exceeding the following amounts............................."

11. Rule 31 as quoted above, gives a discretion to the Governor to relax the requirements given under Clause-1 & 2 of the said Rule and declare that any specified kind of service rendered in a non-gazetted capacity will qualify for pension and that in an individual case, it allowed service rendered by an officer to give for pension subject to such condition as deemed fit. Rule 108 (b) talks about pension which is admissible for rendering service of not less than 10 years.

12. A gist of the submission is that nowhere in the pension Rules, 20 years of qualifying service has been prescribed and therefore, the requirement of 20 years is not in accordance with law. However, vide the Office Memorandum dated 06.09.2003, the Government has introduced requirement of 20 years of continuous service as a pre-requisite for being entitlement for pension. It is also brought to the notice of the Court that vide Office Memorandum dated 20.05.2009, it has been directed that 6 years of service rendered prior to regularization would be deducted from the total length of service while calculating 20 years of continuous service to be entitled for pension. The

grievance of the petitioners are that though the petitioners' total length of service are more than 20 years, it is because of the deduction of 6 years that they failed to meet the bench mark of 20 years and such deduction is absolutely arbitrary and illegal. It is further submitted by learned counsel for the petitioners that in the actual calculation so for arising at the figure of 6 years, the actual figure is 5.91 years, which have been rounded up to 6 years, as the same has caused prejudice to the petitioners who belong to the economical lower strata of the society. Though, the learned counsel for the parties admit that normally while rounding up, anything about 0.5 is regardless counting, in the instant case, since such rounding up is considered, the pensionery benefit of the petitioners, who have retired as Muster Roll Workers, a higher figure of 6 years should not have been taken.

13. It is the case of the petitioners that in many similarly situated matters, the Government in its own had exercised the discretion and had granted pension. The petitioners have specifically mentioned certain instances, namely, one Sri. Dharmeswar Hazarika, whose total length of service after deduction was 16 years 8 months and Sahidur Rahman Laskar, whose qualifying service was less than 10 years. In some of the cases many other similarly situated persons got the benefit in terms of the order of this Court and in those cases, discretion was exercised by the Government suo moto.

14. Learned counsel for the petitioners submit that in similar cases of Muster Roll Workers, who had rendered less than 20 years of qualifying service i.e. after deduction of 6 years have been given the benefit of pension. Attention has been drawn to the Office Memorandum dated 02.04.1991 in which pension has been defined in Paragraph-2 to be the amount of pension of the Government servant who retired from service on or after 31.01.1989 shall be determined @ 50% of the last 10 months emoluments which have qualifying service of 33 years or more. For Government servant who rendered qualifying service of 10 years or more but less than 33 years, the amount of pension will be proportionately less than the maximum admissible amount. It is the submission of the petitioner's counsel that as per this notification, it is clear that the qualifying period for pension entitled to a pensioner is 10 years of service. It is further submitted that the Office Memorandum dated 20.05.2009, which provides for deduction of 6 years, could not have been issued without amending Rule 31 of the Pension Rules. In any case, the benefit of Rule 31 has been given to many similarly situated persons even after publication of the Office Memorandum dated 20.05.2009 and therefore, the petitioners are entitled to a similar treatment.

15. In support of their contentions, learned counsel for the petitioners rely upon the following decisions:

(i) AIR 1958 SC 36 Parshotam Lal Dhingra vs. Union of India

(ii) AIR 1967 SC 1889 Roshan Lal Tandon vs. Union of India

(iii) (1971) 2 SCC 330 Devkinandan Prasad vs. State of Bihar

(iv) (1980) 4 SCC 226 Baleshwar Dass. vs State of U.P

(v) (1983) 1 SCC 305 D.S. Nakara vs. Union of India

(vi) 1997 (1) GLT 589 Kabiram Rajbongshi vs. State of Assam

(vii) 2000 (3) GLT 206 Kalicharan Rabidas vs. State of Assam.

(viii) 2005 (1) GLT 602 All Manipur Pensioners Association & Anr. Vs. State of Manipur & Ors.

(ix) 2010 (1) SCC 639 State of U.P. & Ors. vs. Committee of Management, Mata Tapeshwari Saraswati Vidya Mandir & Ors.

(x) (2014) 16 SCC 72 S. Seshachalam & Ors. vs. Chairman, Bar Council of Tamil Nadu & Ors.

(xi) (2015) 10 SCC 681 Union of India vs. M/S N.S. Rathnam & Sons.

(xii) 2003 (1) GLT 523 Noman Ch. Kalita vs. State of Assam & Ors.

(xiii) 2014 (5) GLT 718 R. Lalkhum vs. State of Manipur & Ors.

(xiv)Judgment rendered in Civil Rule 828 of 1997 Chabaram Boro vs. State of Assam

(xv) Judgment rendered in WP(C) No.1986 of 1999 Sri Phalik Das. vs. State of Assam.

16. In the cases cited above rendered by the Hon'ble Apex Court, the action of the State in making a differentiation between similarly situated persons have been held to be arbitrary. In the case of DS Nakara (Supra) which specifically deals with the subject of payment of pension, the action of the State in fixing a particular date to form 2 categories has been held to be discriminatory and violative of Article 14 of the Constitution of India.

17. Reliance has also been placed in the judgment dated 26.04.2013, rendered by this Court in the case of Monsing Tisso vs. State of Assam reported in (2013) 3 GLT 328. In the said case, this Court held 10 years service to be a qualifying service for being entitled to pension and accordingly, directed for payment of pension to the petitioners in that case. Attention of this Court is also drawn to the admitted position of the Pension Department, which is reflected in Para-6 of the affidavit-in-opposition, field on 12.06.2018 in WP(C) No.5017 of 2017. Learned counsel points out that in paragraph-6 there is an admission that pension was granted to certain Muster Roll Workers who had not completed qualifying service which was as per orders of the Gauhati High Court.

18. It is also submitted that in one of the cases which was initially filed before this Court of a similarly situated persons, benefit of pension was granted to him as per the terms arrived in the mediation held pursuant to a reference by this Court. The gist of the submission made on behalf of the petitioners summed up

as follows:

i) Pension is a legal entitlement and not a bounty or grace and cannot be denied to the petitioners who have admittedly been employed for more than 10 years of service which according to the petitioners is a qualifying service.

ii) Nowhere in the Pension Rules qualifying service of 20 years has been prescribed and hence, the impugned Office Memorandum cannot contravene the Rules

iii) By the impugned Office Memorandum an unreasonable classification is sought to be made without there being any nexus to the object sought to be achieved, resultantly there is utter violation of Article 14 of the Constitution of India.

iv) Even assuming that 20 years period is held to be qualifying service, deduction of 6 years is most arbitrary and unreasonable, which has caused immense prejudice to the petitioners. If the petitioners are deprived from their pension, the object of regularizing the service would be futile and meaningless.

v) The petitioners belong to the economically lower strata of the society and if, after retirement on attaining the age of superannuation after rendering the regularized service, no pension is paid to them, they will suffer immensely.

vi) Persons who are similarly situated have been given the benefit of pension with and without intervention of this Court and therefore, the petitioners cannot be left out from the same benefit.

vii) Rule 31 of the Pension Rules is wide enough to accommodate the cases of the petitioners by exercising the discretion in a positive manner, considering the fact that the petitioners belong to the economically lower class of the society.

19. Per contra, learned counsel for the respondents have denied the claim of the petitioners. Mr. P. Nayak, learned Standing Counsel for the Finance Department, opening up the submission on behalf of the respondents submits that pension can be deemed to be a matter of right only when the rules prescribe to buttress his submission. Mr. Nayak relies upon the decision of the Apex Court reported in AIR 1971 SC 1409. In other words, it is the submission of Mr. Nayak that payment of pension to a retired employee is not a matter of course and the said employee has to fulfill the prescribed conditions to be entitled to pension.

20. Referring to the Office Memorandum dated 22.08.2005, more specifically paragraoh-5 thereof, Mr. Nayak submits that the post held by the petitioners are personal to them and they are not holding any cadre post and for this reason the services of the petitioners cannot be confirmed. Referring to the Office Memorandum dated 06.09.2003, Mr. Nayak submits that the said O.M. lays down the prescription of 20 years of continuous service. As regards the Office Memorandum dated 20.05.2009, Mr. Nayak submits that the same was duly issued after approval by the State Cabinet. He further submits that though, the second proviso to Rule 31 confers a discretion to the Government, this Court

cannot direct for exercise of the discretion in a particular manner. As regards the case of Monsing Tisso (Supra) disposed of on 26.04.2013, Mr. Nayak submits that the said case is clearly distinguishable, inasmuch as, a bare reading of the judgment reveals that the Court was under impression that the qualifying service was 10 years and since in that case, though the petitioner had rendered qualifying service of less than 20 years, but more than 10 years, the Court being under the said impression, had granted relief to the petitioner. Therefore, the ratio laid down in the case of Monsing Tisso (Supra) is not at all applicable in the present cases.

21. Mr. Nayak further relies upon the judgment of this Court dated 28.08.2017 passed in WP(C) No.2977 of 2011 Jatila Bharali vs. State of Assam. In that case, it has been laid down that Muster Roll Workers retiring before 20.05.2009 i.e. the date of the notification, will not get the benefit of the said notification.

22. Mr. Nayak while summing up his submissions contends the following:

(i) There is no vested right of the petitioners to claim pension,

(ii) The impugned notification is prospective in nature and therefore, petitioners retiring prior to the said notification will not get the benefit of the same.

(iii) Though a discretion is conferred by Rule 31 of the Pension Rules, the said discretion cannot be directed to be applied in a particular manner.

23. Mr. U.K. Nair, learned Senior Counsel, appearing for the Pension and Public Grievance Department, while supporting the contentions made on behalf of the Finance Department makes the following additional submissions.

24. The regularization exercise for Muster Roll Workers were under taken for the first time in the year 2005, wherein, Rule 31 of the Pension Rules was applied to them as a class. The Office Memorandum dated 20.05.2009 is issued following the decision of this Court rendered in the case of Kabiram Rajbongshi and Kalicharan Rabidas. Post held by the petitioners are personal to them and therefore, the petitioners are not holding any cadre post. Mr. U.K. Nair, learned Senior Counsel, further submits that the decision rendered in the case of Monsing Tisso (Supra) decided on 26.04.2013 should be read in the context of the pleaded case in that writ petition. Supporting the submission of Mr. Nayak, Mr. U.K. Nair submits that the Office Memorandum dated 20.05.2009 is prospective in nature. Mr. Nair submits that the cases cited by the petitioners are distinguishable, especially the decision of Monsing Tisso (Supra), which should be read in the context of the fact of the case. Summing up his submission Mr. Nair contends that:

i) The Office Memorandum dated 20.05.2009 is published in exercise of power under Rule 31 of the Pension Rules.

ii) The Muster Roll Workers, who were regularized in the year 2005, is a class by itself and the qualifying service of a Muster Roll Worker is prescribed to be 20 years after deduction of 6 years from their causal period.

iii) The post held by the petitioners are personal to them and not cadre post.

iv) The judgment rendered in Monsing Tisso (Supra) is wholly distinguishable as in that case, the Court proceeded only on presumption that qualifying service is 10 years.

25. Mr. G. Baishya, learned counsel appearing on behalf of the Accountant General, Assam, submits that except in one writ petition. the Office Memorandum Dated 20.05.2009 is not under challenge. The deduction of 6 years from the causal service rendered is arrived at after application of mind and in matters, involving technicalities, the Court should generally refrain from interfering with. It is further submitted by Mr. Baishya that individual cases of Muster Roll Workers can be considered by exercise of powers under Rule 67 of Pension Rules. Mr. Baishya further submits that about 7,000 Muster Roll Workers have already been benefited by the Office Memorandum and only for few exceptional case like that of the petitioners, there should not be any interference by the Court. As regards the submission of the petitioners, that similarly situated persons have also been granted the benefit of pension with or without the intervention of the Court. Mr. Baishya submits that Article 14 cannot be applied in negative manner. Further submission of Mr. Baishya is that if the cases of the petitioners are allowed it would lead to a floodgate causing huge financial burden on the State.

26. Mr. Baishya further submits that fixing of a cut-off date is a policy decision and there should be judicial restraint in interfering with such policy decision as the said cutoff date has been fixed after due application of mind. Mr. Baishya reiterates that in fixation of such cut-off date, some persons are likely to be adversely affected but for such persons, the entire decision cannot be faulted with. He further submits that the petitioners while entering into the services knew that there was no provision of pension and therefore, they cannot claim, as a matter of right, for pension. As regards the submission of the petitioners regarding applicability of Rule 108 (b), Mr. Baishya submits that the same provision of the Rules are meant only for Government servants holding substantive post and it is the admitted case of the parties that the petitioners are holding the post of Muster Roll Workers which are personal to them.

27. In reply to the submissions of the respondents, learned counsel for the petitioners submit that the plea that giving benefit to the petitioners may open a floodgate is not tenable and in this connection the above referred case of R. Lalkhum (Supra) has been cited.

28. In the said case of R. Lalkhum (Supra), this Court was dealing with a similar subject of denial of pension to the deceased husband of the petitioner. In paragraph-14 of the said judgment referring to a Constitution Bench judgment of Hon'ble Apex Court it has been held that the pension is not a bounty payable on the sweet-will and pleasure of the Government and on the other hand, the right

to pension is a valuable right vesting in a Government servant and right to receive pension is a property under Article 31(1) and by mere executive order the State has no power to withhold the same. On the point of apprehension raised by the Department that grant of pension to the petitioner may open a floodgate causing a huge financial burden on the Department, this Court held that only because floodgates of cases may be opened, itself cannot be a ground to close the doors of the Court of justice. Referring to an earlier decision of the Hon'ble Apex Court reported in 2003 (7) SCC 564 (Guruvayur Devaswom Managing Committee and Anr. vs. C.K. Rajon & Ors.), the Court held that the doors of the Court must be kept open. Further, one may gainfully refer to the observations of the Hon'ble Apex Court in the case of 2007 (9) SCC 625 (Coal India Pvt. Limited vs. Saroj Kr. Mishra) and also 2009 (5) Supreme 4 N Kannadasan vs. Ajoy Khose and others, wherein arguments made on behalf of the State on opening of a floodgate have been negated. The Court held that only because there is a possibility of floodgate of litigation, a valuable right of a citizen cannot be taken away and the Court is bound to determine the respective rights of the parties.

29. Rival submissions of the parties have been duly considered. The decision to grant pension to casual Muster Roll Workers whose services were regularized and have completed 20 years of total service cannot, per se, be termed as arbitrary. The question which rises for determination is whether the decision contained in the Office Memorandum dated 20.05.2009, to deduct 6 years of service meet the test of reasonability under Article 14 of the Constitution of India. While determining the aforesaid question, the Court is reminded of the fact that the petitioners belong to the economically lower strata of the society. As has been held by various judicial pronouncements, it has been laid down that pension is not a bounty or a grace but valuable right accruing by an employee if he fulfills the conditions to be entitled for such pension. The conditions imposed in the instant case for the petitioners who are Muster Roll Workers is completion of a total period of continuous service of 20 years. While this Court, as has been observed above, does not hold that fixation of 20 years of continuous service an arbitrary, the deduction of 6 years does not appear to be reasonable and fair. This Court does not find force that the exercise, in publishing the notification dated 20.05.2009 itself was an under Rule 31 of the Rules and therefore, further exercise is not permissible. It will be wholly unfair and unreasonable to deny a Muster Roll Worker who is admittedly completed 20 years of continuous service of pension in terms of Office Memorandum dated 06.09.2003. However, deduction of 6 years or for that matter, any period to calculate 20 years of continuous service, does not appear to be reasonable. The entire exercise of issuing the notification should be in a positive manner so as to ensure that maximum benefit is given to the incumbents who undoubtedly belong to the economically lower strata of the society. It should have been the endeavour of the State not to make a further classification of Muster Roll Workers who have completed 20 years of continuous service by introducing the condition of

deduction of 6 years of casual service. Admittedly, there is no difference at all between the services rendered by the petitioners while they were employed in a casual manner or after the regularization.

30. In view of such position, it is held that deduction of 6 years from their services while calculating 20 years of continuous service does not appear to be reasonable and fair. As regards the decision of this Court rendered in the case of Monsing Tisso (Supra), this Court is in agreement with the submission of Mr. Nair that the decision should be read in the context of the pleadings. It appears that an impression was given to the Court that 10 years of continuous service was the condition precedent for being eligible for pension. However, even without taking recourse to the said decision this Court has considered the present writ petitions in the forgoing manner.

31. In view of above discussion and by taking into consideration the various judicial pronouncements on the subject, the writ petitions are disposed of directing the respondent authorities to determine the continuous length of service of the petitioners as a Muster Roll Workers and if such service meets the bench mark of 20 years without any deduction, the benefit of pension should be made available to them. While carrying out said exercise, the respondent authorities are also directed to take recourse Rule 67 for those petitioners who fail to meet the bench mark of 20 years by 12 months or less. No order as to cost.

