

(2011) 03 GAU CK 0116
In the Gauhati High Court
Case No : Writ Petition (C) No. 4783 of 2003

Shri Dhiraj Chandra Roy

APPELLANT

Vs

The Assam Minirities Development Board and Others

RESPONDENT

Date of Decision : 29-03-2011

Acts Referred:

Constitution of India, 1950 — Article 12, 226

Citation : (2011) 4 GLT 147

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : B. Kalita and A. Khanikar, for the Appellant; I. Ahmed and R. Chakraborty, Sr. G.A., for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—Heard Mr. B. Kalita, learned senior Counsel assisted by Mr. A. Khanikar, learned Counsel for the Petitioner as well as Mr. I. Ahmed, learned Counsel appearing for the Respondents No. 1 and 2. I have also heard Ms. R. Chakraborty, learned Addl. Sr. Govt. Advocate, Assam appearing for the Respondent No. 4.

2. By means of this writ petition, the Petitioner has prayed for a direction to the Respondents to provide him with the pay scale of Upper Division Assistant (UDA) of Heads of Department establishment as prescribed under various ROP Rules framed by the Govt. of Assam. Another prayer made in the writ petition is that he should be allowed to continue in service till the age of superannuation i.e. 60 years and all other retirement benefits like CPF, leave encashment and gratuity, etc.

3. The Petitioner was an employee of the Govt. of Arunachal Pradesh in the Public Works Department. He had been serving under the State Government as LDA till 30.6.1987 when he took voluntary retirement.

4. In response to the Annexure-B employment notice dated 16.7.1988 issued by

the Director, Assam Minorities Development Board (Respondent No. 1) for the post of UDA in the time scale of Rs. 675 - 1100/-, the Petitioner Responded to the same by offering his candidature. Be it stated here that in the advertisement, there was no prescription of upper age limit and even the retired employees who retired during last 3 years could also apply.

5. The Petitioner was appointed pursuant to the aforesaid advertisement. Such appointment was in the year 1988. However, the copy of the appointment order has not been annexed to the writ petition. With such appointment in the Board, the Petitioner continued in his services. He retired from service on attaining the age of superannuation prescribed by the Board i.e. 58 years on 28.2.2002. To that effect, the letter dated 28.2.2002 (Annexure-K) was addressed to the Petitioner by the Director of the Respondent Board. After such retirement, the Petitioner filed the writ petition on 20.6.2003, claiming continuation in service upto the age of 60 years and also the scale of pay as admissible to the UDAs of Heads of Departments establishment. He has also claimed retirement benefits of CPF, leave encashment and gratuity, etc.

6. According to the Petitioner, the Respondent Board being an authority within the meaning of Article 12 of the Constitution of India and being under deep and pervasive control of the State Government, is entitled to all such service benefits, as are admissible to State Government employees.

7. In paragraph 4 of the writ petition, the Petitioner has stated that the Respondent Board is a Society registered under the Societies Registration Act, 1860 and that it is entirely financed and controlled by the State Government. In paragraph 5 of the writ petition, the Petitioner has indicated the pay scales of LDA and UDA as admissible to the State Government employees. It is the stand of the Petitioner that while the LDAs working in the Board have been extended with the pay scale of the Heads of Departments establishment, the Petitioner working in the post of UDA has been denied the scale of UD As of Heads of Departments establishment. In this connection, the Petitioner has referred to the Annexures H and J letters dated 28.9.92 and 22.11.99, addressed to the Government of Assam in the Political Department and Welfare of Minorities Department respectively by the Director of Respondent Board. In the said two letters, it was stated that while the LDA working in the Board had been sanctioned the scale of pay applicable to Heads of Departments establishment, the UDAs had been provided with the scale of pay applicable to District and Subordinate establishment level.

8. The Respondents have filed their counter affidavit denying the claim of the Petitioner. It has been stated that the Respondent Board is a registered society and there are no permanent Officers in the Board. All the officers are deputed by the Government as and when required by the Board. It has been stated that the Board is like a nodal agency and only some staff are directly recruited by the Board. The pay scale of the staff are also fixed by the Board. In the affidavit, the Respondents have referred to the aforementioned advertisement dated 14.7.88,

pursuant to which the Petitioner was appointed as UDA. The Respondents have also annexed the copy of the application which the Petitioner had submitted in response to the said advertisement. Thus, according to the Respondents, the Petitioner having accepted the services of the Board with his eyes wide open, he cannot now turn around the same and that too after retirement from service, so as to claim the service benefits like that of State Government employees.

9. In the counter affidavit, the Respondents have also stated that the pay scale of the staff appointed by the Board are fixed by the Board of Directors. On the other hand the deputed Govt. Officers and other staff are entitled to receive their salary in the time scale of pay prescribed by the Government.

10. In paragraph 7 of the counter affidavit, it has been stated that the Respondent Board is a registered society under the Societies Registration Act, 1860 and the management of the Board is vested with the Board of Directors. The Board has never passed any resolution regarding admissibility of the scale of pay of the Govt. of Assam to the employees of the Board and so also enhancement of the retirement age upto 60 years. In paragraph 9 of the counter affidavit, the Respondents have stated that the Petitioner was not entitled to the benefits like that of State Govt. employees, such as leave encashment, gratuity etc as he was appointed by the Board and not by the State Government. It has also been stated that the facilities which are not provided by the Board to any of the employees of the Board, the same cannot be extended to the Petitioner on the basis of his claim. It has further been stated that the Respondent Board being a society, its employees are governed by the service conditions formulated by the Board and cannot claim that they should also be treated at par with the State Govt. employees.

11. The Respondent Board was not set up by any statute nor its activities are statutorily controlled. A writ under Article 226 lies only when the Petitioner establishes that his/or her fundamental right or some other legal rights has been infringed. The test to determine whether the Respondent Board is a "State" is whether on facts, the Board can be said to financially, functionally and administratively dominated by, or under the control of the Government. Such control must be particular to that and must be pervasive. However, mere regulatory control, whether statutory or otherwise, is not sufficient to bring a body within the meaning of Article 12 of the Constitution of India. As has been held by the Apex Court in Pradeep Kumar Biswas and Others Vs. Indian Institute of Chemical Biology and Others, simply by holding a legal entity to be an instrumentality or agency of the State, it does not necessarily become an authority within the meaning of "other authorities" in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to public.

12. In Supriya Basu and Others Vs. West Bengal Hsg. Board and Others, the Apex Court held that the writ petition would be maintainable only if it is established that a mandatory statutory provision of a statute has been violated.

Mere fact that the Society in question is governed by a statute, was held not to be enough.

13. In the instant case, the Petitioner was appointed pursuant to the Annexure-B advertisement dated 16.7.88, in which the scale of the post was clearly indicated. The advertisement was issued by the Director of the Respondent Board. In the advertisement, it was also indicated that retired persons who had retired during the last 3 (three) years could also apply. Same was because of the fact that the advertisement was issued by the Respondent Board not following the terms and conditions of employment in Govt. services. The appointment of the Petitioner was following the said advertisement and he continued in his service enjoying the salary paid by the Board. It is only after his retirement, he invoked the writ jurisdiction of this Court by filling the aforesaid writ petition, claiming the aforesaid relief.

14. It will have to be borne in mind that when the Petitioner was appointed under the Board, he had already retired from govt. service and the advertisement had also provided that the eligibility of retired persons who retired during last 3 (three) years of issuance of the advertisement. Had it been a case of following the terms and conditions of the Government employment, no such clause could have been there in the advertisement.

15. As regards the plea of the Petitioner that LDAs having been provided with the time scale of pay as admissible to the LDAs of Heads of Departments establishments, the UDAs of the Board should also be provided with the time scale of pay admissible to the heads of departments establishment and that the Petitioner could not have been provided with the scale applicable to the District and subordinate establishment level, suffice is to say that the Board has disclosed in the counter affidavit that the Board is run by the deputationists and the employees appointed by the Board. In case of the employees on deputation from the State Govt., depending upon the pay scale in which they have already been appointed, they will be entitled to receive their salary in the said time scale of pay. On the other hand, the Board employees having been provided with the salary in the Board's time scale of pay, it cannot be said to be a case of discrimination.

16. The Respondents being a society registered under the Societies Registration Act and it having not adopted the Govt. rules and regulations and terms and conditions of appointment, this Court exercising its power of judicial review under Article 226 of the Constitution of India, cannot issue any direction to the Board to provide the Petitioner all service benefits like that of State Government employees. Consequently no direction also can be issued to enhance the retirement age upto 60 years like that of other Govt. establishment.

17. For all the aforesaid reasons, I do not find any merit in the writ petition and accordingly it is dismissed. There shall be no order as to costs.