
(2009) 12 GAU CK 0065
In the Gauhati High Court
Case No : Writ Appeal No. 266 of 2006

Smt. Dolly Bojpujari

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 17-12-2009

Acts Referred:

Assam Services (Pension) Rules, 1969 — Rule 11, 23, 31, 68, 93
Constitution of India, 1950 — Article 148(5), 309, 310, 311, 41

Citation : (2010) 2 GLD 27 : (2010) 2 GLT 147

Hon'ble Judges : J. Chelameswar, C.J.; Hrishikesh Roy, J

Bench : Division Bench

Advocate : A.K. Bhattacharyaa, B.K. Singh, A.K. Choudhury and S. Dutta, for the Appellant; B. Goyal, GA, for the Respondent

Final Decision : Allowed

Judgement

Hrishikesh Roy, J.—Heard Mr. A.K. Bhattacharyaa, learned senior counsel appearing for the appellant (writ petitioner). Also heard Mrs. B. Goyal, learned Government Advocate on behalf of the respondents.

2. This appeal is presented against the judgment and order dated 16.6.2006 in WP (C) No. 3053/04, whereby the learned Single Judge held that the writ petitioner does not qualify for pension under the second condition of Rule 31 of Assam Services (Pension) Rules, 1969 (hereinafter referred to as the Rules) as he was not holding any post on substantive and permanent basis. By the impugned judgment the learned Single Judge by referring to the Proviso to Rule 31 which enables the Governor to relax the rigor of the rule in individual cases, remitted the claim of the writ petitioner who had rendered 14-1/2 years of service under the Assam Official Language (Translation of Central Laws) Commission (hereinafter referred to as the Commission) as the functioning of the Commission was found to be continuing and is expected to continue in foreseeable future.

3. The appellant was appointed as a Language Officer under the Commission

constituted by Notification dated 21.7.1986, for a period of 3 years or till the continuation of the Commission, whichever is earlier by appointment order dated 8.5.1987. Subsequently by promotion order dated 1.9.1990 she was appointed on promotion as Sr. Language Officer for a period upto 21.7.1991 or till the Commission continues, whichever is earlier. Continuance of appellant's service was ensured by passing of retention order from time to time, for the post held by the appellant and other employees in the Commission. The appellant served in the Commission in this fashion till 1.9.2001 when she was superannuated from service on attaining the age of 58 years. Thereafter she submitted her pension papers for granting of pension. Since no positive response was received, the appellant being aggrieved filed WP (C) 3053/04 seeking a direction from the Court for grant of pensionary benefit by contending that 14-1/2 years service rendered with the Commission should be considered as eligible for grant of pension. The said claim was opposed by the respondents by contending that the appellant was appointed on contract basis and pension for such contract service are inadmissible under the provision of Rule 23 (f) of the Rules.

4. Appearing for the appellant, it is argued by Mr. Bhattacharyaa that the Commission which was set up on 16.2.1987 for the purpose of translation of Central Laws to Assamese Language, have been functioning for last 22 years and the Commission's works being perennial, it is unlikely that the activities of the Commission would be wound up in near future and it can be construed to be a permanent establishment.

4.1. It is also pointed out that the appellant was initially appointed on contract basis for a period of 3 years, when she was promoted, the words "on contract service" was not incorporated in the promotion order dated 1.9.1990.

4.2. It is also contended that the appellant like any other Government servant received the benefit of Increments, Crossing of EBs, Revised Pay Scale, Medical Reimbursement, Earned Leave, Medical Leave etc. and her service had all the embellishment of a regular Govt. service and the same cannot be considered to be a contract service with the Government.

4.3. It is also pointed out by Mr. Bhattacharyaa that the Commission functions under the State Legislative Department and the posts under the Commission including the post of Sr. Language Officer held by the appellant have been incorporated amongst the posts under the said department in the Revision of Pay Rules and therefore the service in such posts has to be construed as substantive and permanent in nature.

4.4. The provisions of the Pension Rules have also been referred to by the learned senior counsel to contend that the service rendered by the appellant is on substantive basis against a permanent post and the disability under Rule 31 of the Rules would not come in the way of granting pension to the appellant.

4.5. Mr. Bhattacharyaa by referring to the provision of the Pension Rules submits that pension are divided into 4 classes, such as Compensation Pension, Invalid

Pension, Superannuation Pension and finally Retiring Pension. Rule 93 of the Pension Rules provide for Superannuation Pension to an officer entitled or compelled by Rule, to retire at a particular age. It is contended that as the appellant was compelled to retire on reaching of the retirement age of 58 years applicable to Assam Government Employees, the appellant must be construed to be entitled to Superannuation Pension on that basis, although she may not be entitled to Retiring Pension payable under Rule 96 of the Pension Rules.

4.6. The report of the Assam Pay Committee constituted by the Assam Government by Notification dated 24.9.1962 has also been referred to by the learned Sr. Counsel to contend that the Committee had noted that 10 years is prescribed as qualifying service for those in "Superior Service" under the Assam Government for pensionary benefit and appellant having served for more than 14 years satisfies the qualifying years of service.

5. Before proceeding any further, it may be appropriate now to refer to some of the provisions of the Assam Services (Pension) Rules, 1969.

Rule 9 defines "Pension". Rule 11 defines "Superior Service" to mean any kind of service which is not Class-IV service.

Rule 11 1 provides that service of an officer does not qualify for pension unless (i) the service is under the Government; (ii) the employment must be substantive and permanent and (iii) the servant must be paid by the Government. By the Proviso to the Rule, the Governor is empowered to declare a service to qualify for pension, even though such service does not fulfil the qualification criteria laid down under Rule 31.

Rule 36 additionally provides that unless an officer holds a substantive office on a permanent establishment, it shall not qualify for pension. It is also provided that temporary or officiating service rendered in a non-pensionable establishment shall not count towards pension.

Rule 17, inter alia indicates that an establishment which is employed for a period exceeding 6 months in a year is a permanent establishment and that service in such an establishment including the period during which the establishment is not employed qualifies for pension.

In Chapter-V of the Rules, conditions of grant of pension are prescribed. Under Rule 68, pension are divided into 4 classes and "Superannuation Pension" is dealt with by Rule 93. When an officer is compelled by a rule to retire at a particular age, "Superannuation Pension" is payable to him under Rule 93. Whereas "Retiring Pension" is granted to an officer who is permitted to retire after completing qualifying "Superior Service" as may be prescribed.

6. In the instant case, since the appellant was under service of the Commission which is an establishment under the Government, we must understand her service under the Commission, to be under the Government. It is also not in doubt that the salaries of the appellant were paid to by the Government.

Therefore the first 2 conditions of Rule 31 having been satisfied the 3rd key issue that has to be decided to qualify the service of the appellant for pension is, whether such employment is substantive and permanent.

7. The appellant, not having served in Grade-IV post has to be considered as a member of the "Superior Service". The minimum length of qualifying service after which pension becomes admissible on retirement for members of "Superior Service" has been recorded as 10 years by the Assam Pay Committee and the recommendation of the Assam Pay Committee made in the year 1964 have been resolved to be accepted by the Government of Assam. The appellant having rendered more than 14 years of service till her retirement on reaching the age of superannuation obviously fulfils the minimum qualifying service of 10 years. In this backdrop, the Court is required to decide as to whether the service of the appellant can be taken to be substantive and permanent service.

8. It has been held in *Parshotam Lal Dhingra Vs. Union of India (UOI)*, that:

...in the absence of any special contract the substantive appointment to a permanent post gives the servant so appointed a right to hold the post until, under the rules, he attains the age of superannuation or is compulsorily retired after having put in the prescribed number of years service or the post is abolished and his service cannot be terminated except by way of punishment for misconduct, negligence, inefficiency or any other disqualification found against him on proper enquiry after the due notice to him. An appointment to a temporary post for a certain specified period also gives the servant so appointed a right to hold the post for the entire period of his tenure and his tenure cannot be put an end to during that period unless he is, by way of punishment dismissed or removed from the service. Except in these two cases the appointment to a post, permanent or temporary, on probation or on an officiating basis or a substantive appointment to a temporary post gives to the servant so appointed no right to the post and his service may be terminated unless his service had ripened into what is, in the service rules, called a quasi-permanent service.

Mr. A.K. Bhattacharyaa relies upon the Supreme Court decision in the case of *P.L. Dhingra (supra)* to contend that although the appellant was initially appointed on contract basis, by virtue of the promotion granted to her and the post being substantive and permanent and the appellant continuing in such post till reaching the age of superannuation, her employment has to be construed as substantive and permanent, like in the case of other Government servants in regular establishment.

The Constitutional Bench decision of the Supreme Court in *Roshan Lal Tandon Vs. Union of India (UOI)*, is also relied upon by Mr. Bhattacharyaa to contend that the legal position of a Government servant is more one of status than of contract. The Supreme Court has declared herein that "the hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the

Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee, although Article 311 imposes constitutional restriction upon the power of removal granted to the President and the Governor under Article 310". The Apex Court further says that "the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant and the legal relationship is something entirely different something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence, status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned."

9. The decision of the Supreme Court in *Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others*, is also cited on behalf of the appellant to contend that if the appointment is to a post and the capacity in which the appointment is made is of indefinite duration, one can reasonably hold that post is being held on substantive basis.

10. The celebrated case of *D.S. Nakara and Others Vs. Union of India (UOI)*, is relied upon on behalf of the appellant to contend that pension cannot be denied by the employer at its sweet will as it is a payment in recognition of the service rendered prior to superannuation and is a social welfare measure to provide for the old age of a retired Government servant and therefore is a vested right. Accordingly it is argued that since the appellant rendered 14-1/2 years service and the relationship of master and servant ended only with the appellants reaching the age of superannuation just like a Government servant and the post being a permanent post where even now other incumbents are working, there cannot be any justification to deny the appellants claim for pension.

11. Mrs. B. Goyal, learned Government Advocate on the other hand relies upon *Union Public Service Commission Vs. Girish Jayanti Lal Vaghela and Others*, to contend that since the appellant has been appointed on contract basis and no Service Rules normally applicable for Government servant are applicable for such appointees, it cannot be said that appellant should be construed to be holding a Government post on substantive basis.

12. From the contention raised as noticed above, the first thing that needs to be determined is the nature and character of the service rendered by the appellant with the Commission. It may be recorded that several posts under the Commission including the posts of Sr. Language Officer in which the appellant served have been incorporated as posts under the Legislative Department. This position is clear from the schedule appended to the Assam Services (Revision of Pay) Rules, 1998 (hereinafter referred to as the ROP Rules) which is produced by Mr. Bhattacharyaa. Now if the post under the Commission is accepted to be post under the Legislative Department of the State under the ROP Rules 1998, and

the appellant having served with the Commission till her retirement on 1.9.2001, it would be reasonable to conclude that she served in a post under the Legislative Department of the Government.

13. Next it has to be determined as to whether the appellant served in such Government posts on substantive and permanent basis. On this aspect, it is contended by the respondent that since the appellant was initially appointed on contract basis, she cannot be said to be serving in a substantive or permanent post. But should the initial appointment be the decisive factor in determining the character of the appellant's service or whether we can consider the said service to be on substantive basis as the appellant was made to superannuate from the post, not because of any specific obligation arising out of the so called contractual appointment, but because the appellant was compulsorily superannuated after reaching the age of superannuation applicable for Government servant. Having regard to the decision laid down by the Supreme Court in P.L. Dhingra (supra) and Roshan Lal Tandon (supra) the appellant though drafted into the service of the State by a contract such service later transformed into status. At least some of the conditions of service including the cessation of service by Superannuation are determined by the statutory Rules applicable for those who are posted on substantive and permanent service of the Government.

14. While in service the appellant received pay from the Government as per the Scale prescribed by the ROP Rules, 1998, she also received the benefits of increments, cross the EBs, leaves etc. and was made to go on superannuation after reaching the retirement age and this significant characteristics of the service of the appellant, in our view, confers a substantive status on the service rendered by the appellant.

15. As is already noticed that the Commission is expected to function practically for all time to come as it is entrusted with the responsibility of translating into vernacular, the Laws of the Country and since law making process in India is never ending, we can reasonably conclude that the employment under the Commission is permanent for the employees and they are entitled to serve till reaching the age of retirement or unless their services are shortened by way of dismissal, removal etc. in accordance with the Disciplinary Laws applicable for Government servants.

16. The history and the philosophy behind the grant of pension is discussed by the Supreme Court in D.S. Nakara and Others Vs. Union of India (UOI), . At para 19 the Supreme Court posed the following questions:

19. What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose,... We need seek answer to these and incidental questions so as to render just justice between parties to this petition.

The Supreme Court relying upon Deokinandan Prasad Vs. The State of Bihar and

Others, declared at para 20 as follows:

20. The antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in *Deoki Nandan Prasad v. State of Bihar and Ors.* (1) wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in *State of Punjab and Anr. v. Iqbal Singh*.

It went on to analyse the purpose and the object underlying the payment of retirement pension by the Government to its employees. After tracing out the history of the various kinds of pension payable in this country at para 28 the Supreme Court held:

28. Pension to civil employees of the Government and the defence personnel as administered in India appear to be a compensation for service rendered in the past. However, as held in *Douge v. Board of Education* a person is dosely akin to wages in that it consists of payment provided by an employer, is paid in consideration of past service and serves the purpose of helping the recipient meet the expenses of living. This appears to be the nearest to our approach to pension with the added qualification that it should ordinarily ensure freedom from undeserved want.

Finally at para 31 the Supreme Court summed up as follows:

31. From the discussion three things emerge: (i) that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to 1972 rules which are statutory in character because they are enacted in exercise of powers conferred by the proviso to Article 309 and Clause (5) of Article 148 of the Constitution; (ii) that the pension is not an ex-gratia payment but it is a payment for the past service rendered; and (iii) it is a social welfare measure rendering socioeconomic justice to those who in the heyday of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch. It must also be noticed that the quantum of pension is a certain percentage correlated to the average emoluments drawn during last three years of service reduced to ten months under liberalised pension scheme. Its payment is dependent upon an additional condition of impeccable behaviour even subsequent to requirement, that is, since the cessation of the contract of service and that it can be reduced

or withdrawn as a disciplinary measure.

17. Under the Rules, members of "Superior Service" are entitled to pensionary benefits if they served for 10 years or more and the appellant having served for 14-1/2 years with the Commission between 21.7.1986 to 1.9.2001, she has to be considered as eligible for grant of pension.

18. In the present case the entire defence of the State is that the appellant is not governed by any Rules framed by the State under Article 309 and her service was purely contractual. The State also argued that the post which was occupied by the appellant (for a long 14-1/2 years) was a temporary post and therefore, appointment of the appellant was not in a vacancy which is substantive in nature and, therefore, the appellant is not entitled to the benefits of pension. We are of the opinion that the entire exercise of the State is an exercise in semantics. If the stand of the State is that the service of the appellant is not governed by any statutory Rule framed under Article 309 and purely contractual it is not understood as to how the appellant could be said to have retired on attaining the age of superannuation. Admittedly no contract stipulating the age of superannuation is placed before the Court. On the other hand, the appellant was made to retire on reaching the age of superannuation prescribed for all other employees of the State of Assam whose service are otherwise regulated by Rules framed under Article 309. If the service of the appellant is purely contractual to our mind the only known mode of putting an end to the service is either by efflux of time stipulated by the contract or by termination of the contract by an appropriate procedure. We are also not convinced with the submission that the employment of the appellant is purely temporary in view of the fact that the appellant was employed for long period of 14-1/2 years and since the retirement of the appellant, another person is appointed to the same post which was held by the appellant. Obviously the work and the need to employ somebody to do the work continues. The employment remains "contractual" only because the State was either lazy not to frame appropriate Rules under Article 309 or mischievously omitted to frame statutory Rules governing the service of the appellant. In either case it would be an arbitrary omission on the part of the State to discharge a constitutional obligation flowing from Article 41 of the Constitution.

19. Rule 93 of the Rules provides for "Superannuation Pension" for such category of employees, we declare that the appellant is entitled to "Superannuation Pension" as she had served under the Government in a substantive and permanent capacity for 14-1/2 years, till she was superannuated.

20. In view of the foregoing discussion, we are unable to agree with the conclusion reached by the learned Single Judge that appellant was not holding a post on substantive and permanent basis and therefore was disqualified under Rule 31 to receive pension. We hold that the appellant was holding a post on substantive and permanent basis and disqualification under Rule 31 would not apply to the service of the appellant.

21. Accordingly this Appeal stands allowed and the impugned judgment dated 16.6.2006 is interfered with and consequently the respondents are directed to grant "Superannuation Pension" benefits to the appellant. As the appellant has retired from service and is not receiving any pensionary benefits since the year 2001, the requisite exercise in this regard should be carried out expeditiously and within the out limit of 6 months from today.

22. This Appeal stands allowed in terms of the above.

_____ 1 ("Superior service" means any kind of service which is not Class-IV.)