
(2023) 05 GAU CK 0022
In the Gauhati High Court
Case No : Writ Appeal No. 73 Of 2019

State Of Assam

APPELLANT

Vs

Md. Hussain Ali

RESPONDENT

Date of Decision : 12-05-2023

Acts Referred:

Assam Services (Pension) Rules, 1969 — Rule 31, 44
Assam Registration Service Rules, 2010 — Rule 13

Citation : (2023) 05 GAU CK 0022

Hon'ble Judges : Sandeep Mehta, CJ; Mitali Thakuria, J

Bench : Division Bench

Advocate : R. Borpujari, R. Islam, D.N. Sarma, S.K. Das

Final Decision : Dismissed

Judgement

Sandeep Mehta, CJ

1. This intra-Court writ appeal is directed against order dated 22.09.2014 passed by the learned Single Bench, whereby, WP(C) No.3551/2013 filed by the respondent/writ petitioner was accepted and the appellant/State was directed to count the services rendered by the respondent/writ petitioner as Sub-Registrar on commission basis prior to his regularization against the said post and to grant him the benefits under the Assam Services (Pension) Rules, 1969 (hereinafter referred to as "Rules of 1969").

2. Brief facts relevant and essential for disposal of the appeal are noted hereinbelow.

3. The respondent/writ petitioner was appointed as a Sub-Registrar at Mukalmua in the then undivided district of Kamrup on commission basis by a notification dated 28.04.1984 issued by the Deputy Secretary to the Government of Assam, Registration Department. He joined the post on 03.05.1984. It may be stated here that when the respondent was so appointed as a Sub-Registrar, there were no rules governing the services of Sub-Registrars in the Registration Department,

Government of Assam. The commission based Sub-Registrars did not receive any salary/remuneration from the Government but their services were utilized and compensated by paying them commission of certain percentage from the amount of registration fees collected.

4. A Cabinet decision dated 05.04.2007 was taken whereby, the commission based Sub-Registry Office at Mukalmua was converted into a full-fledged Government Sub-Registry and a notification dated 22.06.2007 was issued to this effect. As a consequence, the posts of Sub-Registrar, Junior Assistant, Extra-Writer, Peon and Night Chowkidar were sanctioned vide letter dated 25.04.2008. Vide another notification of the same date, i.e. 25.04.2008, the services of the persons referred to supra including the respondent/writ petitioner were regularized in their respective posts.

5. The Government of Assam decided to introduce a New Pension Scheme vide order dated 25.01.2005 whereunder, it was provided that the Government servants joining the service of State Government on or after 01.02.2005 would not be governed by the existing Rules of 1969 and the orders issued thereunder from time to time but by the new Contributory Pension Scheme. Fresh recruits joining the service of the State Government on or after 01.02.2005 would be required to furnish an undertaking that they would not claim to be governed by the Rules of 1969.

6. The respondent was set to retire on attaining the age of superannuation w.e.f. 31.03.2013. Accordingly, he moved an application to the Commissioner & Secretary to the Government of Assam, Revenue and Disaster Management (Registration) Department to consider the period of service rendered by him on commission basis as a qualifying service for entitlement to pension. The period of service rendered by the respondent from the date of regularization, i.e. 25.04.2008, till his superannuation, i.e. 31.03.2013, did not entitle him to pension as the length of regular service fell well short of the requisite qualifying period. No decision was taken on the above prayer of the respondent on which, he filed the WP(C) No.5044/2011. Pursuant to an interim order passed in the said writ petition, the representation of the respondent was considered and rejected by the order dated 05.12.2011. Accordingly, the WP(C) No.5044/2011 was closed.

7. The respondent thereafter, filed the WP(C) No.1614/2012 assailing the legality and validity of the order dated 05.12.2011. In the affidavit filed by the Finance Department in this writ petition, it was portrayed that the department would have no objection to examine any proposal to notionally fix the writ petitioner's (respondent herein) pay under FR-22 as Sub-Registrar with effect from the date of his joining on commission basis till his regularization on notional basis if such a proposal was submitted by the parent department.

8. Accordingly, the WP(C) No.1614/2012 came to be disposed of by order dated 19.10.2012 and the case of the respondent was remanded to the Revenue

Department and the Finance Department to examine the same in light of the observations made in the order and to pass a speaking order thereafter. The respondent superannuated on 31.03.2013. The views of the Finance Department and Pension & Public Grievances Department were received and claim of the respondent was rejected by order dated 04.05.2013 which came to be assailed by way of the captioned writ petition, i.e. WP(C) No.3551/2013, which has been allowed as stated above.

9. The appeal preferred by the State of Assam was initially dismissed by this Court on account of unexplained delay of 404 days as the Interlocutory Application No.1579/2016 seeking condonation of delay was rejected. The State preferred SLP (Civil Appeal No.1648/2019) before the Hon'ble Supreme Court for challenging dismissal of its appeal on the technical ground of being delayed. The Hon'ble Supreme Court, set aside the order rejecting the appeal and remitted the matter to the High Court for consideration on merits with a cost of Rs.25,000/- by order dated 11.02.2019 whereafter, the instant appeal has come up for hearing.

10. Mr. R. Borpujari, learned Government counsel representing the appellant, vehemently and fervently contended that the view taken by the learned Single Bench while accepting the writ petition of the respondent is on the face of it illegal and thus unsustainable. He contended that the respondent herein was not even born into the cadre of the Registration Department before the year 2008 and thus, the direction to count the services rendered earlier on commission basis is absolutely unjustified. He contended that the assignment given to the respondent as a commission based Sub-Registrar for carrying out registration of documents was purely contractual in nature and as such, the services rendered by the respondent during this period could not have been counted to qualify him for grant of pensionary benefits under the Rules of 1969. He urged that the notification dated 25.04.2008, whereby, services of the respondent were regularized clearly indicates that the regularization was being done with effect from the date of creation of the post. He urged that the said notification not having been challenged by the respondent, he cannot be now allowed to rake up the issue of counting his past services for the purpose of pension because the order of regularization clearly conveys that the same would be have effect from the date of issuance, i.e. 25.04.2008.

11. He further submitted that the passing observations made by the learned Single Judge in the order dated 19.10.2012 passed in WP(C) No.1614/2012 that the Finance Department was ready to examine the case of the petitioner for giving him the benefit of notional benefits under FR-22 would not imply that there was any concession on the part of the State to grant the relief sought for by the respondent. He urged that the respondent, while working as a Sub-Registrar on commission basis was not holding a civil post and thus, he cannot claim the benefit of the past services for the purpose of pension. He placed reliance on a judgment of the Hon'ble Supreme Court in the case of State of

Punjab & Ors. v. Ishar Singh & Ors. (2002) 10 SCC 674 and urged that at best, the services rendered by the appellant during the period he worked on commission basis could be considered adhoc services and the same could not be legally counted as qualifying service for the purposes of pension. On these grounds, learned Government counsel, implored the Court to accept the appeal and set aside the impugned order passed by the learned Single Judge.

12. Learned Government advocate also referred to Rule 31 of the Rules of 1969, which reads as follows:-

"31. Conditions to qualifying service. – 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 servant 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."

He urged that in view of the clear language of this Rule, the respondent is precluded from claiming pensionary benefits under the Rules of 1969 because his employment as a Sub-Registrar on commission basis was neither substantive nor permanent. He also referred to clause (iv) of Note 2 of Rule 44 of the Rules of 1969, which stipulates that the Government servants who are not in receipt of pay but are remunerated by fees or commission in lieu of their services, such tenure cannot be considered as pensionable service. On these grounds, Mr. Borpujari, implored the Court to accept the appeal and set aside the order passed by the learned Single Bench.

13. Per contra, Mr. R. Islam, learned counsel representing the respondent vehemently and fervently opposed the submissions advanced by the appellant's counsel. He placed reliance on a Division Bench judgment of this Court in the case of Dolly Borpujari v. State of Assam & Ors. 2010 (2) GLT 147 and urged that in an almost identical situation, the Division Bench of this Court considered the case of the appellant therein who was appointed as a Language Officer without there being any encadred post and extended the relief of having her service before regularization counted as qualifying service for the purpose of pension. He further submitted that there were no service rules governing the employees of the Registration Department before the year 2010. Such Rules were framed for the first time in 2010. He referred to Rule 13 of the Rules of 2010 which reads as below:-

"13. Subject to suitability as may be decided by the Board and by the Appointing Authority in consultation with the Commission the following persons may be appointed to the cadre of Sub-Registrar of the service:-

(a) A Sub-Registrar employed on commission basis who-

(i) has rendered continuous service on commission basis Sub-Registrar for a period of not less than 8 years on 1st January of the year of Selection.

(ii) holds a Bachelor degree in Arts, Science or Commerce from a University recognized by Government;

(iii) is below 45 years of age on the first January of the year of Selection."

He urged that as per this Rule, a Sub-Registrar employed on commission basis who had rendered continuous service for a period of not less than 8 years would be entitled to be appointed to the cadre of Sub-Registrar under the newly promulgated service rules. He further submitted that the respondent herein was regularized in service even before coming into force of the Rules considering the fact that the services offered by him on commission basis were perennial in nature. He referred to the observations made in para 15 of the order dated 19.10.2012 passed in WP(C) No.1614/2012 and urged that the Finance Department virtually conceded to the claim of the respondent for grant of pensionary benefits. Fervent reliance was placed by the respondent's counsel on the judgment rendered by Hon'ble Supreme Court in the case of State of U.P. & Ors. v. Chandra Prakash Pandey & Ors. (2001) 4 SCC 78 wherein, it was held that Kurk Amins appointed on commission basis stand on the same footing as that of Kurk Amins appointed on salary basis and that they hold civil posts and would be entitled to the same salary as is payable to Kurk Amins of the Revenue Department.

14. It was also submitted by Mr. Islam that the ratio of the said judgment was followed by the Hon'ble Supreme Court in the case of Shakti Prasad Bhatt & Ors. v. State of Uttarakhand & Ors. AIR 2018 SC 2724. He pointed out that in the said case, the appeal of the Uttarakhand High Court was dismissed with cost of Rs.1,00,000/-. On these submissions, Mr. Islam implored the Court to dismiss the appeal and affirm the impugned judgment.

15. We have given our thoughtful consideration to the submissions advanced at Bar and have gone through the impugned judgment and the material placed on record.

16. Needless to say that the fact regarding the State Government having appointed the respondent as a Sub-Registrar on commission basis vide notification dated 28.04.1984 is admitted. There is no dispute that at that particular point of time, neither any service rules for Registration Department were in force nor was there any parallel cadre for post in which the respondent rendered his services. The respondent continued to render duties as a Sub-Registrar on commission basis without a demur from 1984 till 02.04.2008. The

State Government did not pay salary or any other benefits to the respondent for the services rendered by him and his remuneration was totally dependent on commission from registration fees collected. Thus, the respondent performed duties as a regularly appointed Sub-Registrar for almost 24 years without causing any direct burden to the State exchequer.

17. Considering the services rendered by the respondent and his peers in total of five Sub-Registry offices to be perennial, satisfactory and indispensable, a notification dated 22.06.2007 was issued by the State Government converting the 5 existing commission-based Sub-Registry Offices into departmental ones and the commission system was discontinued thereafter. This included Mukalmua Sub-Registry office, where the respondent was serving. The services of the respondent were regularized on 25.04.2008. However, the rules governing the services of the respondent, i.e. Assam Registration Service Rules, 2010 came to be promulgated even much later, i.e. on 18.11.2010. The notification dated 28.04.1984 whereby, the respondent was appointed as a Sub-Registrar on commission basis, clearly indicates that he would not be allowed to take any other employment during the period of his incumbency as commission based Sub-Registrar. The nature of appointment indicated in this order was perennial and the respondent was committed to perform duties as a Sub-Registrar on full time basis and was precluded from taking any other job during the period of his engagement as a Sub-Registrar.

18. In the earlier round of litigation i.e. WP(C) No.1614/2012, the Finance Department gave its concurrence that it was ready to consider the case of the employee subject to the condition that the parent department forwarded the same. Thus, there was almost a tacit agreement of the Finance Department regarding the pension claim of the respondent. The stand now taken by the State in this appeal is clearly in divergence with the stand taken in the earlier round of litigation. The Hon'ble Supreme Court in the case of Chandra Prakash Pandey (supra) relied upon by the respondent's counsel held that Kurk Amins appointed on commission basis by different District Magistrates/Collectors within the State of U.P. for realization of outstanding dues of the various cooperative societies were Government servants holding civil posts. The view taken in the said judgment was reiterated in the case of Shakti Prasad Bhatt (supra). Almost identical controversy was examined by the Division Bench of this Court in the case of Dolly Borpujari (supra). The Division Bench accepted the claim for pension laid by the appellant therein who was appointed as a Language Officer on coterminous basis with the Assam Official Languages (Translation of Central Law) Commission. Finding that the functioning of the Commission was continuing and was expected to continue in forceable future, the Division Bench held that the service rendered by the appellant therein under the Commission was a service under the Government and thus, such tenure was considered to be constituting qualifying service for the purpose of pension. The situation of the respondent herein stands on a better footing because he was appointed as a Sub-Registrar by the State Government way back in the year 1984 to render services

as such on commission basis. The services rendered by the respondent were unquestionably perennial in nature. As per the appointment order, the respondent was not entitled to take up any other employment during his tenure as a Sub-Registrar. The Office of the Sub-Registry, where the respondent was working, was departmentalized in the year 2008 and thereafter, his services were regularized. Needless to say that regularization can only be done of a person who is already in Government service.

19. A Constitution Bench of the Supreme Court in the case of *State of Assam v. Kanak Ch. Dutta* AIR 1967 SC 884 held that a Mouzadar appointed in the Assam Valley for collection of land revenue was a holder of civil post under the State even though he received remuneration by way of commission. The said judgment was relied upon by the Hon'ble Supreme Court in the case of *Chandra Prakash Pandey* (supra). Thus, there is ample material on the record of the case to affirm that the respondent upon being appointed as a Sub-Registrar on commission basis w.e.f. 28.04.1984 was definitely serving against a civil post and that his past services were of a perennial nature.

20. Note 2 sub-clause (iv)(a) to Rule 44 of the Rules of 1969 on which, reliance was heavily placed by learned Government counsel, stipulates that the Government servant who is not in receipt of pay but is remunerated by fees or commission would not be entitled for pension. Manifestly, the said restriction would not come in the way of the respondent because on the date of superannuation, he was no longer receiving remuneration by way of commission but was drawing regular scale of pay after regularization of his services w.e.f. 25.04.2008. As a consequence, we are of the firm view that the regularization of services of the respondent for the purpose of counting the service for pension benefits would have effect from the date of his initial appointment vide the notification dated 28.04.1984 issued by the State Government.

21. In wake of the discussion made herein above, we are of the firm view that the learned Single Bench was absolutely justified in holding that the services rendered by the respondent for a period of almost 24 years as a Sub-Registrar on commission basis w.e.f. 28.04.1984 are required to be accounted for the purpose of computation of his pensionable service and all other consequential terminal benefits. The impugned judgment dated 22.09.2014 passed by the learned Single Bench in WP(C) No.3551/2013 does not suffer from any infirmity warranting interference.

22. Hence, the appeal preferred by the State fails and is dismissed as being devoid of merit.

23. No order as to costs.