
(2001) 08 GAU CK 0043
In the Gauhati High Court
Case No : WP (C) No. 5645 of 1999

Upendra Nath Sarma

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 07-08-2001

Acts Referred:

Assam Services (Pension) Rules, 1969 — Rule 108, 114

Citation : (2003) 3 GLR 70 : (2002) 2 GLT 342

Hon'ble Judges : A.H. Saikia, J

Bench : Single Bench

Advocate : A. Roy, A.J. Aita and S.D. Choudhury, for the Appellant; N.C. Phukan, for the Respondent

Final Decision : Dismissed

Judgement

A.H. Saikia, J.—Heard Mr. A. Roy, learned senior counsel for the petitioner assisted by Mr. A.J. Atia, learned counsel. Also heard Mr. N. C. Phukan, learned Addl. Senior Govt. Advocate appearing on behalf of the State of Assam.

2. The legality and validity of the impugned order dated 30.12.1998 issued by the Director of Pension, Assam to the Director of Secondary Education, Assam, directing to recover the excess drawal of pay by the petitioner while holding the charge of the higher post of Headmaster, has been challenged in this writ petition.

3. The facts briefly stated are that the petitioner was appointed as Asstt. Head Master on 19.3.1959 in Choukhunty High School in the district of Barpeta. On 22.3.1977 the petitioner was regularly selected for Headmaster but instead of absorbing him as full fledged Headmaster, on 6.3.1991 the petitioner was allowed to hold the charge of Headmaster of the school in which he had been working in addition to his own duties of Asstt. Headmaster. While he was continuing as in-charge Headmaster, on 6.10.1995 the petitioner was allowed to officiate as Headmaster in the said school in the pay scale of Rs. 1785-4200/- per month as prescribed for Headmaster's salary. In the meantime while the

petitioner was officiating as Headmaster in the said school, he retired on 28.2.1995 from his service on superannuation.

4. After the retirement of the petitioner the Director of Secondary Education, Assam by her order dated 21.12.1995 allowed the petitioner to officiate as Headmaster in the school mentioned above with effect from 1.1.1991 retrospectively instead of 6.3.1991 on which date he was made incharge Headmaster of the said school which clearly shows that the petitioner was allowed to officiate as Headmaster since 1.1.1991 till his retirement on 28.2.1995. Here starts the scourge of the petitioner. The retired Headmaster was compelled to run from pillar to post for his retirement benefits. At this stage, while the petitioner was desperately trying to get his retiral benefit, the authority gave him some solace after one year of the retirement, by way of granting the benefit of stagnation of his increment with effect from 1.1.1994 vide order dated 31.5.1996. But all the efforts of the petitioner to get his pension and other benefits gone unheeded and ultimately the Director of Pension, Assam by his communication dated 30.12.1998 addressed to the Director of Secondary Education, Assam took the stand that neither the regularisation of the officiating promotion with retrospective effect nor fixation benefit can be claimed by the petitioner for holding higher post referring to the so-called Circular dated 19.5.1998 which was enclosed with the said communication and directed for recovery of excess withdrawal from the petitioner.

5. This communication dated 30.12.1998 which is the subject-matter of challenge in the case in hand reads as follows :-

"Government of Assam

Office of the Director of Pension : Assam : Dispur Guwahati

No. DP/PRI/Pen-20302 Dtd. Dispur the 30th December, 1998

To,

The Director of Secondary Education, Assam, Kahilipara, Guwahati-19

Sub : Pension Case in respect of Sri Upendra Nath Sarma, Retd. H.M. under Inspector of Schools, Barpeta.

Sir,

In pursuance of Government order No. PPG(P)/98/68 dated 19.5.1998 (copy enclosed) the regularisation of officiating promotion with retrospective effect neither regular nor fixation benefit can be claimed by anybody for holding current charge of any higher post.

Thus the excess drawal thus involved may be recovered.

Yours faithfully, Sd/-Illegible Enclo : SB and connected papers Director of Pension, Assam Dispur :: Guwahati"

6. On a perusal of this letter as well as the communication or circular (as claimed by the Government) dated 19.5.1998 it would go to show that the communication/circular dated 19.5.1995 is not a circular as such but the same is a communication from the Under Secretary to the Government of Assam, Pension and Public Grievances Department to the Director of Pension, Assam regarding the non-regularisation of officiating promotion with retrospective effect of one Sri Keshav Chandra Nath, retired incharge Headmaster of certain school (not named) in the said communication.

7. I am afraid how this Communication can be a circular or under what circumstances this communication dated 19.5.1998 has any relevance in the petitioner case.

8. Mr. Roy, learned Sr. counsel appearing on behalf of the petitioner has strenuously argued that once the petitioner has made to officiate in a particular post, he is entitled to get a higher pay scale in the said post which the petitioner was given till his retirement and as such in view of such action on the part of Government, the petitioner is entitled to get his retirement benefit on the basis of the pay scale which he was drawing till his retirement.

9. In support of his submissions Mr. Roy has taken me through the provisions of FR 49 as well as Rules 108 and 114 of Assam Services (Pension Rules), 1969 (for short "Rules"). The relevant provisions so cited by the learned counsel for the petitioner are quoted below :

"FR 49--The State.....

(a) Where a Government servant is formally appointed to hold full charge of the duties of a higher post or posts which is or are in the same office as his own and in the same cadre/line of promotion, addition to his ordinary duties, he shall be allowed the pay of the higher post, or the highest post if he holds full charge of more than one post, in addition to ten per cent of the presumptive pay of the additional post or posts, if the additional charge is held for a period exceeding 39 days:

Provided that.....

(c) no additional pay shall be admissible to a Government servant who is appointed to hold current charge of the routine duties of a higher post irrespective of the duration of the additional charge ;"

"Rule 108. The amount of pension shall be regulated as follows :

(a) After a service of less than ten years, gratuity not exceeding (except in special cases, and under the orders of the Governor up to 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 the 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 succeeding the following amounts :

Completed six Monthly period of qualifying service scale of pension Maximum limit of pension

(1) (2) (3)

Rs. Rs.

20 1000th of average emoluments 2,000 a year or 166 a month

114. Emoluments and average emoluments. - (1) The term "Emoluments" as used in this part of the rules, means the emoluments which the officer was receiving immediately before his retirement and includes

(a) Substantive pay in respect of a permanent post other than a tenure post, held in a substantive capacity

(2) (a) If an officer holding a permanent post in substantive capacity -

(i) Officiates in a higher permanent post (other than a tenure post) or holds higher temporary post (other than a tenure post) borne on a cadre which includes permanent posts on the same time-scale as the temporary post, continuously for not less than three years, and retires or dies while so officiating or holding the higher post; or

(ii) is confirmed in such higher permanent post at any time during the last three years of his service after having officiated in that post continuously for three years or more.

His emoluments for pension in respect of the higher post for any period beyond three years" continuous service in that post shall be determined under Clause (i) above as if he held, in substantive capacity, a permanent post on a time-scale identical with that of the higher post."

Referring to FR 49(a) and other provisions of law above mentioned, the learned Sr. counsel for the petitioner has contended that since the petitioner was not holding any current charge as evident from the communication made by the concerned authority allowing him to officiate since 1991 till his retirement, the petitioner is entitled to his pay as per FR 49(a).

10. As regard the entitlement of his pension with his entire emoluments, Mr. Roy has relied upon the Rules 108(a) & (b) as well as 114 of the Rules as quoted above.

11. As per Rule 108 of the Rules the officer is entitled for pension after his completion of ten years in service and that pension shall be calculated on the basis 1000th of average emoluments which has already been defined under

Rules 114, wherein it is stated that emoluments means the emoluments which an officer was receiving immediately before his retirement and the officer officiating in the higher permanent post as in the present case, shall be entitled to the benefits of the higher post if he has been holding the said post for not less than three years.

12. In the present case, it is an admitted position that the petitioner has been holding the post of Headmaster on officiating basis since 1991 till 28.2.1995 for a period of more than three years. As such it candidly transpires the petitioner is entitled to all the benefits on his retirement on the basis of determination of his emoluments taking into consideration his pay which he has been receiving at the time of his retirement. Besides, drawing attention of this court of the affidavit-in-opposition filed by the Director of Pension, Assam, Mr. Roy, learned Sr. counsel has vehemently contested the same saying that this affidavit could not be taken into consideration due to the very fact that this affidavit has not come from the Government. The Director is not the competent authority to file counter on behalf of the Government. That apart, the learned counsel for the petitioner has also argued that assuming if the affidavit is accepted on its face value, the paragraphs 3, 5, 7 and 11 particularly can not stand in view of the fact that in these paragraphs on one hand the authority has admitted allowing the petitioner to officiate as Headmaster with retrospective effect 1991 till his retirement and on the other hand it has taken a stand that all these officiating promotions and payment of pay scales of Headmaster to the petitioner were erroneous.

13. A bare perusal of the aforementioned paragraphs of affidavit-in-opposition would show that the approach of the State respondents in this regard is very casual and in a routine manner. The Government has referred the case of one KC Nath mentioned in the communication dated 19.5.1998 to be circular making applicable in the case of the petitioner.

14. I have also perused that said communication dated 19.5.1998 which the authority claim to be a circular. The said communication is quoted below -

"GOVERNMENT OF ASSAM

PENSION AND PUBLIC GRIEVANCES DEPARTMENT DISPUR

No. PPG(P) 9/98/68 Dated Dispur the 19th May, 1998 From : Smti. S Goswami

Under Secy. To the Govt. of Assam Pension & Public Grievances Deptt.,

To : The Director of Pension, Assam Ganeshguri Dispur, Guwahati - 6

Sub : Pension case in respect of Shri Keshab Ch. Nath, Retd. Head Master, 1/S Nagaon.

Ref : Your letter No. DP/PR-1/Pen/18526/1 dt. 15.12.1997

Sir,

In inviting a reference to the letter cited above, I am directed to return herewith

the service Book (in original) and other relevant documents in respect of Shri Keshab Nath, Retd. Headmaster and to say that Govt. agree with your views that regularisation of officiating promotion with retrospective effect neither regular nor fixation benefit can be claimed by anybody for holding current charge of any higher post.

Since, Shri K.C. Nath was holding the current charge of the post of H.M. under statutory provisions of F.R. 49(C) from 1.4.1994 to 29.2.1996, DSE's order dated 29.8.1996 in respect of regularisation of service with retrospective effect from 1.4.1994 is not in order.

You are, therefore, requested to finalise his pension case accordingly.

This has the approval of Commissioner & Secy. Pension and Public Grievances Department."

15. From the perusal of the aforesaid circular, I do not find that same is applicable to the petitioner's case in order to make the authority entitles for recovery of excess drawal of the payment made to the petitioner while he had been enjoying at the time of working as officiating Headmaster.

16. The learned counsel for the petitioner has relied on the decision of the Apex Court in Secretary-cum-Chief Engineer, Chandigarh Vs. Hari Om Sharma and Others, wherein the Apex Court held that if a person is put to officiate on a higher post with greater responsibilities, he is normally entitled to the salary of that post and as such the writ petitioner is entitled to higher scale so paid to him while he was officiating as Headmaster.

17. Mr. N.C. Phukan, learned Addl. Senior Government Advocate appearing for the State respondent, has submitted that since the petitioner was not given the pay scale of Headmaster, he is not entitled to the salary of the Headmaster as claimed by the petitioner. Relying on the counter filed by the State Government he has also submitted that earlier actions of allowing the petitioner to officiate Headmaster with retrospective effect and subsequent benefit of stagnation of increment were all erroneous and the Government is reviewing the entire matter for which the petitioner is not being paid his regular pension yet.

18. I am afraid if such submissions are allowed to be accepted, that would be contrary to the provisions of Law. It is shocking how the Government notwithstanding the said provisions of law aforesaid, could deny the payment of salary of higher post to an officer who holds the said post as per Government's own direction either on officiating basis or in-charge capacity or stop-gap arrangement. That apart, it has become the order of the day to deny the retirement benefit to a retired person after his superannuation.

19. In the present case the petitioner retired in the year 1995 as Officiating Headmaster and till this date in 2001 the said retired school teacher is yet to get his retiral benefits. In spite of repeated directions from this court as well as by the Apex Court, the Government is yet to act upon to release the pensionary

benefit to its ex-employees. It is a settled position that pension is not a bounty and the Government being the model employer must act immediately for release of the pensionary benefits to the retired person.

20. In a recent case reported in AIR 1999 SCC 838 (Salva Raj v. Lt. Governor of Island, Port Blair and Ors.) the Apex Court held that an employee worked on higher post though temporarily and in an officiating capacity is entitled to the pay scale of higher post to which he is attached to officiate. 21. That being the position, this court is of the opinion that the petitioner is entitled to get his pension and other retiral benefits computed on the basis of the emoluments which he had drawn at the time of retirement as officiating Headmaster.

22. For the reasons, observations and discussions made above, I am very much inclined to allow the writ petition which I accordingly hereby do. The impugned order dated 30.12.1998 is hereby quashed. The State respondent Nos. 2 and 3 are directed to release the pension and retiral benefits to the petitioner computing on the basis of the emoluments drawn by him at the time of retirement on 28.2.1995 within a period of three months from the date of receipt of the order with an interest @ 12% from the date of filing this writ petition failing which the State respondents will be liable to pay an interest @ 18%.

24. This disposes of the writ petition. No costs.