

GAHC010011222018



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/620/2018

NARENDRA PRATAP SINGH AND 4 ORS
S/O LT. VISHWANATH SINGH
RETIRED PROFESSOR,
KOKRAJHAR,
GOVERNMENT COLLEGE, (PREVIOUSLY KOKRAJHAR COLLEGE), P.O.
AND DIST. KOKRAJHAR, ASSAM

2: SRI RADHENDU RAI CHOUDHURY
S/O LT. RANENDRA RAI CHOUDHURY
RETIRED LECTURER
KOKRAJHAR
GOVT. COLLEGE (PREVIOUSLY KOKRAJHAR COLLEGE)

P.O. AND DIST. KOKRAJHAR
ASSAM

3: SRI BIRENDRA KUMAR BRAHMA
S/O LT. RAMAN SINGH BRAHMA
RETIRED HEAD OF THE DEPARTMENT

DEPARTMENT OF BOTANY
KOKRAJHAR GOVT. COLLEGE (PREVIOUSLY KOKRAJHAR COLLEGE)
P.O. AND DIST. KOKRAJHAR
ASSAM

4: SRI SURATH NARZARY
S/O LT. PATHAK CHANDRA NARZARY
RETIRED PRINCIPAL
KOKRAJHAR GOVT. COLLEGE (PREVIOUSLY KOKRAJHAR COLLEGE)

P.O. AND DIST. KOKRAJHAR
ASSAM

5: SMT. BELA DAS

W/O LT. S.C. DAS
RETIRED HEAD OF THE DEPARTMENT
DEPARTMENT OF CHEMISTRY
KOKRAJHAR GOVT. COLLEGE
(PREVIOUSLY KOKRAJHAR COLLEGE
P.O. AND DIST. KOKRAJHAR
ASSAM

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
EDUCATION (HIGHER) DEPARTMENT, ASSAM, DISPUR, GUWAHATI-6.

2:THE DIRECTOR OF HIGHER EDUCATION

ASSAM
KAHILIPARA
GUWAHATI -19.

3:THE ACCOUNTANT GENERAL (A AND E)
ASSAM

4:THE DIRECTOR OF PENSION

GOVT. OF ASSAM

5:THE PRINCIPAL KOKRAJHAR GOVT. COLLEGE

KOKRAJHAR
P.O.
P.S. AND DIST. KOKRAJHAR
ASSA

Advocate for the Petitioner : MR. M U MAHMUD

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT AND ORDER(ORAL)

Date : 21-03-2023

Heard Mr.M.U. Mahmud, the learned counsel appearing on behalf of the

petitioner. Mr. K Gogoi, the learned counsel appears on behalf of the respondent Nos. 1 and 2, Mr. R.K. Talukdar, the learned counsel appears for the respondent No.3, Mr. S. R.Baruah, the learned counsel appears for the respondent No. 4.

2. The petitioners herein who are five in numbers have the following date of birth:-

Sl. No.	Name of the Petitioners	Date of Birth
1	Sri Narendra Pratap Singh	01/07/1945
2	Sri Radhendu Rai Choudhury	01/09/1945
3	Sri Birendra Kumar Brahma	01/09/1495
4	Sri Surath Narzary	01/10/1945
5	Smt. Bela Das	01/11/1945

3. The petitioners were earlier employed in the Kokrajhar College, Kokrajhar which was a deficit grant-in-aid College. Thereupon the State Legislature with a view to provincialise the services of the employees of non-Government colleges in receipt of deficit grant-in-aid from the Government of Assam enacted the Assam College Employees' (Provincialisation) Act, 2005(hereinafter for short referred to as "the Act of 2005").

4. For the purpose of the instant case, it is relevant to take note of that in terms with Section 2(c) of the Act of 2005, the term "existing employees" means an employee of the college both teaching and non-teaching appointed substantively against a sanctioned post and who is or has been in service on or

after 01/01/2005.

5. In terms with Section 2 (f) of the Act of 2005, the term “provincialisation” has been defined to mean taking the liabilities for payment of salaries including dearness allowances, medical allowances and such other allowances as admissible to the Government employees of the similar category and gratuity, pension, leave encashment, etc as admissible, under the existing Rules, to the employees of the State Government serving under the Government of Assam.

6. Section 2(h) of the Act of 2005 has been defined to mean an employee who has retired on attaining the age of superannuation or otherwise. Section 3 of the Act of 2005 relates to employees who are to be provincialised. It has been mentioned in the said Section that subject to the provisions of Article 30 and 309 of the Constitution all employees of colleges, save and except the employees who exercise the option to continue in the existing terms and conditions of service under Section 3(d) of the Act of 2005, shall be deemed to have become the employees of the Government on and from the date on which the colleges have been brought under the deficit system of grants-in-aid on the terms and conditions mentioned in Section 3 of the Act of 2005.

7. Section 3(d) of the Act of 2005 is pertinent for the purpose of the instant dispute which stipulates that the existing employees who want to continue in

the existing terms and conditions of service shall give an option in writing to the Director, Higher Education, Assam within a period of three months from the date of coming into force of the Act of 2005. The proviso to the said Section stipulates that once the option exercised by an existing or retired employee may be withdrawn by him at any time, if he wants to come under the Act of 2005 subject to refund of the amount of the Government's share of the Contributory Provident Fund with interest thereon upto the date of refund of the Government's share of the Contributory Provident Fund with interest. It has also been mentioned in the second proviso to Section 3(d) that the withdrawal of option shall be effective on the date of refund of the amount of the Government's share of the Contributory Provident Fund with interest thereon.

8. Section 8 of the Act of 2005 is relevant for the purpose of the instant dispute and the same is extracted herein below :

“8. Mode of pension to employees who retired/died prior to 1st January, 2005— Employees who retired/died, as the case may be, prior to 1st January, 2005 shall be given only superannuation pension or the family pension, as the case may be applicable under the existing pension Rules of the Government. They shall not be entitled to any other pensionary benefits :

Provided that the payment of such superannuation or family pension, as the case may be, are subject to refund of the Government's share of their Contributory Provident Fund within six months from the date of coming into force of the Act :

Provided further that if the Government's share of the Contributory Provident Fund is not refunded in respect of a retired/deceased employee within the aforesaid stipulated period no superannuation pension or family pension shall be admissible in respect of such employee.”

9. A reading of the above quoted Section shows that the employees who

retire/die as the case may be prior to 1/1/2005 shall be given only superannuation pension or the family pension as the case may be under the existing pension rules of the Government. It has been specifically mentioned that such employees shall not be entitled to any other pensionary benefits. The first proviso to Section 8 stipulates that the payment of such superannuation pension or family pension, as the case may, are subject to refund of the Government share of their Contributory Provident Fund within 6 months from the date of coming into force of the Act of 2005. This aspect of the matter would be relevant while taking into account the facts involved in the instant case. The second proviso to Section 8 stipulates that if the Government share of Contributory Provident Fund is not refunded in respect of retired/deceased employee within the aforesaid stipulated period, no superannuation pension or family pension shall be admissible in respect to the said employee. It therefore appears from the reading of the said Section 8 of the Act of 2005 that those employees who have retired or died prior to 01/01/2005 shall only be entitled to superannuation pension or family pension in terms with the existing Rules of the Government which in the instant case would be the Assam Service (Pension) Rules, 1969. It has been categorically mandated that such retired/deceased employee shall not be entitled to any other pensionary benefits. The second proviso to Section 8 makes it absolutely clear that without refunding the

Government share of the Contributory Provident Fund, there shall be no superannuation pension or family pension in terms with the main provision of Section 8.

10. Section 9 stipulates the age of superannuation. The same being relevant for the purpose of the instant dispute is extracted herein below :

“9. Age of Superannuation --- The provincialised employees shall go on superannuation on attaining such age at which a Government servant similarly situated superannuates.”

A perusal of Section 9 categorically shows that the provincialised employees shall go on superannuation on attaining such age at which a Government servant similarly situated superannuates meaning thereby that the age of the superannuation of the provincialised employees would be same which a government servant similarly situated superannuates.

11. Section 12 of the Act of 2005 empowers the State Government to make Rules except for the purpose of payment of pension which shall be otherwise governed under the Rules of 1969. It may be relevant to take note of that by virtue of Section 12 of the Act of 2005 the Assam College Employees (Provincialisation) Rules, 2010(for short “the Rules of 2010”) were framed.

12. In terms with Rule 21 of the Rules of 2010, it has been categorically stipulated that the existing Rules and orders applicable to the State Government employees for pension, GPF, leave, TA etc will be applicable in case of

Provincialised College Employees. It further stipulates that the existing employees as defined under Section 2(c) of the Act of 2005 shall also be governed by the existing Pension Rules of the Government except those who have joined on or after 1/2/2005 which is otherwise the cut off date for the New Defined Contributory Pension Scheme, 2004 coming into force.

13. This Court before further proceeding, finds it relevant to take note of the Assam Aided College(under deficit system) Employees Gratuity Rules, 1992(for short 'the Rules of 1992'). These Rules have been made for giving benefit of gratuity to the college employees both teaching and non-teaching of aided colleges under the deficit system.

14. Rule 3 of the Rules of 1992 stipulates the modalities as to how the gratuity is to be payable. Relevant herein is to take into account Rule 3 (6) which stipulates that the maximum gratuity which can be paid in terms with the said Rules of 1992 shall not exceed Rs.72,000/-.

15. In the backdrop of the above, let this Court therefore take into account the facts involved in the instant case. The petitioners as stated hereinabove were Lecturers in the Kokrajhar College under the Assam Aided College Employees Rules 1960(for short referred to as 'the said Rules of 1960'). At that relevant point of time when the petitioners were in service, the service conditions were

regulated under the said Rules of 1960. In terms with Rule 11 of the said Rules of 1960, an employee of an aided college shall retire on attaining the age of 60.

16. It further transpires that upon the provincialisation of the Kokrajhar College, by virtue of which the said College became a provincialised College, the petitioners deposited the Government share of the CPF for getting the pension in terms with the provisions of the Act of 2005 read with the Rules of 1969. This aspect of the matter was brought to the attention of the Director of Higher Education by the Principal of Kokrajhar College vide a communication dated 10/6/2006. At this stage, it is further relevant to take note of that on 22nd of August, 2006, the Kokrajhar College, which was otherwise provincialised in view of the coming into effect the Act of 2005 was taken over and became a Government college in terms with the notification dated 22/8/2006.

17. It further appears from the records that on the ground that the petitioners along with three other persons were not being granted the gratuity, leave encashment and also the pension for 2 years, they approached this Court by filing a writ petition which was registered and numbered as W.P.(C) No. 136/2010. This Court vide an order dated 23/11/2013, taking note of the fact the submission of the Standing Counsel for the Education Department that a

proposal for regularising the services of the petitioners from 58 years to 60 years, was already forwarded to the Office of the Accountant General on 28/6/2013, disposed off the writ petition directing that the Office of the Accountant General to take a decision within a period of 1 month and the same would be communicated to the concerned Department for further action. It was further mentioned in the said order that if the decision of the Accountant General is not in favour of the petitioners, the Director of Higher Education shall release the gratuity, leave encashment and the entire benefits within 2 months. The Director of Higher Education was also directed to communicate the decision of the Accountant General to the petitioners immediately.

18. It appears therefore from the records that as there was non-compliance to the order dated 23/11/2013 passed in W.P.(C) No. 136/2010 by the respondents, a contempt proceedings being Contempt Case (C) No. 386/2014 was filed before this Court. The counsels appearing on behalf of the alleged contemnors gave an undertaking that within two months the order dated 23/11/2013 would be complied with and on the basis of the said undertaking the petition was closed with a liberty to the petitioners to file afresh, if the undertaking is breached.

19. Mr. M.U. Mahmud, the learned counsel appearing on behalf of the

petitioners submitted that in pursuance to the said undertaking, the Joint Secretary to the Government of Assam, Higher Education Department had issued a communication on 11/05/2015 to the Director of Higher Education to take necessary

action for release of the gratuity and the leave encashment along with other pensionary benefits to the petitioners in the light of the judgment dated 23/11/2013 passed in W.P.(C) No.136/2010. The Director of Higher Education was further informed that this will be applicable only in the instant case.

20. Pursuant thereto, the Senior Accounts Officer of the Office of the Accountant General (A & E) had issued a communication to all the petitioners dated 12/5/2015 informing that the petitioners should take up the matter with the Director of Higher Education, Assam, Kahilipara. The petitioner thereupon on the basis of the communication issued by the Senior Accounts Officer of the Office of the Principal Accountant General took steps. However, nothing was done in respect to the claim of the petitioners for which the petitioners again approached this Court in terms with the liberty granted vide the order dated 14/11/2014 and instituted a contempt proceedings which was registered and numbered as Cont. Case (Civil) No.112/2015.

21. It further appears from the record that during the pendency of the said

contempt proceedings there were certain orders being passed on 06/05/2016 and 15/06/2016 by this Court.

22. The Director of Higher Education vide an order dated 13/07/2016, taking into account that the petitioners have retired prior to 01/01/2005, held that the petitioners were not entitled to leave encashment and gratuity other than Rs. 72,000/- in terms with the Rules of 1992. This aspect of the matter was brought to the attention of this Court in the contempt proceedings i.e. Cont. Case (C) No. 122/2015. This Court vide an order dated 11/09/2017 taking into account that there has been a speaking order dated 13/07/2016 in terms with the judgment dated 23/11/2013 rendered by this Court in W.P.(C) No.136/2010 and Cont. Case (C) No. 122/2015 closed the contempt proceedings being Cont. Case (C) No. 122/2015. However, liberty was given to the petitioners to challenge the speaking order dated 13/07/2016 issued by the Director of Higher Education. It is under such circumstances that the instant writ petition was filed.

23. It appears on record that an affidavit-in-opposition was filed by the Director of Higher Education and to the same the affidavit-in-reply as well as an additional affidavit-in-reply have been filed by the petitioners. I have perused the contents of the said affidavits.

24. I have heard the learned counsels for the parties at length.

25. The primary question which arises for consideration is as to whether the petitioners herein were existing employees in terms with Section 2(c) of the Act of 2005. The age of the petitioners herein have already been noted hereinabove. It has been brought to the attention of this Court that on 25/01/2005 an Office Memorandum was issued whereby the age of the retirement of the State Government employees was increased from 58 years to 59 years w.e.f. 1st of January, 2005. The said office memorandum being relevant is reproduced herein under :

“No. AAP.115/72/Pt.I/140

Government of Personnel (Personnel A)

Assam Secretariat (Civil) Dispur, Guwahati-
781006.

OFFICE MEMORANDUM

Dated Dispur, the 25th January, 2005

Subject : Raising of the age of retirement of State Government employees from 58 years to 59 years on superannuation.

Government have been considering for sometime past the question of raising the age of superannuation of State Government employees from 58 years to 59 years. After very careful consideration of all relevant aspects it has now been decided that the age of retirement on superannuation of State Government employees other than those in whose case the age of superannuation is 60 years should be 59 years.

This decision will be applicable to all State Government employees who are due to retire after 1st January, 2005. Those employees who retired on 31-12-2004 on superannuation will not be entitled to get this benefit.

This age of retirement of Grade IV employees and other State Government employees, who are at present entitled to serve up to the age of 60 years including the new entrants, will continue to be 60 years.

Action is being taken to amend the relevant provision of rules in this regard

accordingly.

Sd/- J.P.Saikia
Commissioner & Secretary to the
Govt. of Assam Personnel (A)
Department."

26. A perusal of the said Office Memorandum would show that the age of superannuation of the State Government employees was raised from 58 to 59 years. However in the case of those State Government employees whose age of superannuation was 60 years have been reduced to 59 years. It has also been mandated that the decision would be applicable to all State Government employees who are due to retire after 01/01/2005 and those employees who retired on 31/12/2004 on superannuation will not get the benefit of the said Office Memorandum.

27. Taking into account the Office Memorandum dated 25/01/2005 and reading it with Section 9 of the Act of 2005, it would show that as on 01/01/2005 the age of superannuation for the provincialised employees would be 59 years. However, in the instant case, the age of superannuation of the petitioner Nos. 1, 2, 3, 4 and 5, if the benefits of the Office Memorandum dated 25/01/2005 is not given, the date of retirement of the petitioner Nos. 1, 2, 3, 4 & 5 would be 30/6/2003, 31/8/2003, 31/8/2003, 30/9/2003 and 31/10/2003 respectively. If the benefit of the Office Memorandum is given which is otherwise not applicable, then also the age of superannuation of the petitioner

Nos. 1, 2, 3, 4 & 5 would be 30/6/2004, 31/8/2004, 31/8/2004, 30/9/2004 and 31/10/2004 respectively. Under such circumstances, Section 8 of the Act of 2005 duly applies to the case of the petitioners as they would be deemed to have retired prior to 01/01/2005 and accordingly they would only be entitled to superannuation pension or family pension as the case may be under the Rules of 1969.

28. Mr. M.U.Mahmud, the learned counsel appearing on behalf of the petitioner has however drawn the attention of this Court to the judgment of the Coordinate Bench of this Court in the case of **Dulal Krishna Bhatta Vs. State of Assam & Ors.** reported in **(2011) SCC Online Gau 2**. This Court however is of the opinion that the said judgment would not be applicable to the present facts taking into account that the date of birth of the petitioner therein was 17/06/1946 and accordingly would have got the benefit in terms with the Office Memorandum dated 25/01/2005. Mr. M.U.Mahmud, the learned counsel for the petitioners had also made a submission to the effect that in terms with the Rules of 1960 and more particularly Rule 11 of the said Rules, the age of superannuation of the petitioners have to be taken as 60 years and as such the petitioners were existing employees in terms with Section 2(c) of the Act of 2005. He further submitted that by way of an Office Memorandum which is in the nature of an executive instruction, the age of the petitioner could not have

been reduced. In the opinion of this Court the said submission is misconceived taking into account Section 9 of the Act of 2005 which overrides Rule 11 of the Rules of 1960, the moment the College is provincialised in terms with the Act of 2005.

29. Another submission made by Mr. Mahmud, the learned counsel which is relevant to note is that the Government have duly agreed vide order dated 11/05/2015 to release the gratuity and leave encashment along with pensionary benefits to the petitioners in terms with the judgment dated 23/11/2013 passed in W.P.(C) No.136/2010 and as such it is the submission of Mr. Mahmud that the Director of Higher Education cannot go against the decision of the Government to grant the release of gratuity and leave encashment along with pensionary benefits to the petitioners. On the other hand, Mr. K. Gogoi, the learned counsel appearing on behalf of the Higher Education Department submitted that in view of the order passed by this Court dated 11/09/2017 in Cont. Case(C) No. 122/2015 whereby this Court had categorically held that the order dated 13/07/2016 is in compliance to the order dated 23/11/2013 in W.P.(C) No. 136/2010 as well as the various orders passed in the said Contempt proceedings and as such the Director of Higher Education cannot be said to be bound by the said decision of the Government. He further submitted that the rights of the petitioners to get leave encashment, gratuity as claimed have to spring from the

statute and when Section 8 of the Act of 2005 categorically mentions that employee retiring/dead prior to 01/01/2005 would only be entitled to superannuation pension/family pension and nothing else, the question of granting the leave encashment as well as gratuity as claimed by the petitioners do not arise. He submitted that it is well settled principle of law that when the Statute/Rule mandates a certain thing to be done in a certain way, the same has to be done in that way, to the exclusion of all methods of performance, or not at all is a widely accepted principle of law which was held by the Privy Council in its judgment in the case of **Nazir Ahmad Vs. King Emperor** reported in **AIR 1936 PC 253**.

30. Upon hearing the learned counsels on that aspect of the matter and taking into account that the Section 8 of the Act of 2005 categorically mandates that an employee who retires/dies prior to 01/01/2005 would only be entitled to superannuation pension/family pension and nothing else, this Court is of the unhesitant view that the petitioners cannot claim leave encashment as well as gratuity beyond the amount which has been mentioned in Rule 3 (6) of the Rules of 1992. Accordingly, this Court does not find any merit in the instant writ petition for which the same stands dismissed.

31. Before parting with record, this Court directs that on the basis of the

instant judgment, under no circumstances, the respondents shall take any coercive steps against the petitioners on account of overstay.

32. With the above observations and directions, the instant writ petition stands disposed off. No costs.

JUDGE

Comparing Assistant