

GAHC010067702018



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

Case No. : Review.Pet./150/2018

PRINCIPAL SECRETARY TO THE GOVERNMENT OF ASSAM
FINANCE DEPARTMENT, DISPUR, GUWAHATI 781006

VERSUS

ALL ASSAM RETIRED OFFICERS TEACHERS AND EMPLOYEES
COMMITTEE AND 5 ORS
S.B. HOUSING COMPLEX, TRIPURA ROAD, KHANAPARA, GHY-28, DIST
KAMRUP M, ASSAM

2:SRI BIMAN SARMAH
S/O SRI NORENDRA NATH SARMAH
RANGBHUMI GOTANAGAR
HOUSE NO 6
2ND FLOOR
PO GOTANAGAR
GUWAHATI 781033

3:SRI JATINDRA NATH BORAH
S/O LATE BHARAT CHANDRA BORAH
ANIRUDHA PATH
BASISTHAPUR PATH NO 2
GUWAHATI 781028

4:THE STATE OF ASSAM
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVERNMENT OF
ASSAM
DISPUR
GUWAHATI
ASSAM 781006

5:COMMISSIONER AND SECRETARY

TO THE GOVERNMENT OF ASSAM
PENSION AND PUBLIC GRIEVANCES DEPARTMENT
DISPUR
GUWAHATI 781006

6:COMMISSIONER AND SECRETARY
TO THE GOVERNMENT OF ASSAM
PERSONAL DEPARTMENT
DISPUR
GUWAHATI 78100

Advocate for the Petitioner : MR. D SAIKIA

Advocate for the Respondent : GA, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

JUDGMENT

Date : 14.03.2023

Heard Mr. R. Borpujari, learned counsel for the review petitioner. Also heard Mr. M.K. Choudhury, learned senior counsel assisted by Mr. M. Sarma, learned counsel for the respondents.

2. This is an application under Article 215 of the Constitution of India for review of the judgment and order dated 28.04.2016, passed by this Court in WP(C) 61/2011.

3. The respondents were the writ petitioners in the said WP(C) 61/2011. In the writ petition, the case of the respondents herein, in brief, is that the Govt. of Assam constituted Pay Commission in the year 2008, which submitted its report on 15.10.2009. The Govt. of Assam by notification dated 26.10.2009 constituted a committee to examine the report of the Assam Pay Commission, 2008. In due course, the Govt. decided to implement the

recommendation of the Assam Pay Commission, 2008 w.e.f. 01.01.2006. However, by virtue of clause 42(A)(i) of the report under heading "General Decisions", it was indicated that no arrear shall be paid to employees who retired during the period from 01.01.2006 to 31.03.2009. However, it is submitted at the bar by the learned counsel for the petitioner that notional benefit was granted to those employees and therefore, only the payment of arrear for the period from 01.01.2006 to 31.03.2009 was not paid. However, the employees, who retired from 01.04.2009 onwards got such benefit.

4. Accordingly, this Court took note of the distinction that was created between two classes of retired employees, firstly, those who were retired prior to 01.01.2006, prior to the revised pay structure coming into force w.e.f. 01.01.2006, and secondly, those who were retired after 01.01.2006 onwards and accordingly, on the premise that the Supreme Court of India in the case of *D.S. Nakara & Ors. Vs. Union of India, (1983) 1 SCC 305* held that for the purpose of pensionary benefits, pensioners formed a class and accordingly, it was held that a probationary class cannot be arbitrarily divided by fixing a eligibility criteria for the purpose of pension and accordingly, this Court also held that Article 14 was attracted when equals are treated differently without any reasonable basis, and accordingly, the writ petition was allowed in terms of the prayer made therein.

5. It may be mentioned that the facts which were presented in the writ petition was not disputed.

6. The learned counsel for the review petitioner has submitted that the impugned judgment and order dated 28.24.2016, passed by this court in WP(C) 61/2011 was against the law laid down by the Supreme Court of India in

the case of *State of Punjab & Ors. Vs. Amar Nath Goyal & Ors.*, (2005) 6 SCC 754 and accordingly, there was an error apparent on the face of record. It is submitted that there is no dispute with the ratio laid down in the case of *D.S. Nakara (supra)*, which was decided by the Constitution Bench of the Supreme Court of India. However, in a subsequent Division Bench judgment in the case of *Amar Nath Goyal (supra)*, the Supreme Court of India had considered the case of *D.S. Nakara (supra)* and by referring to various case laws on the point, held that the fixing of cut-off date on a very valid ground, namely, that of financial constraints, the contention that fixing of the cut-off date as 01.04.1995 was arbitrary, irrational or had no rational basis or that it offends Article 14, was rejected. Hence it is submitted that in the present case in hand, as the Govt. had fixed a cut-off date, from which the benefit of enhanced pension would be available to the employees, who retired between 01.01.2006 to 31.03.2009, but by giving them notional benefits comes out a situation which is squarely covered by the ratio laid down in the case of *Amar Nath Goyal (supra)*. Hence, it is submitted that this was an appropriate case to exercise review jurisdiction under Article 215 of the Constitution of India. Reference is also made to the judgment and order dated 23.02.2012, passed in *WP(C) 4920/2016, Sri Biraj Choudhury & Ors. Vs. The State of Assam & Ors.*, and order dated 24.10.2019, passed in *Review Pet. 122/2018, The State of Assam & Ors. Vs. Md. Baseruddin & Ors.*

7. In order to impress upon the Court that the review jurisdiction is available in a writ petition, reliance was placed on the case of *Board of Control for Cricket Vs. The Cricket Association of Bihar & Ors.*, (2015) 3 SCC 251.

8. By referring to the order dated 27.03.2018, passed by the Division Bench of this Court in WA 148/2017, it is submitted that the Principal

Secretary to the Govt. of Assam, Finance Department had preferred an intra-Court appeal and the Division Bench of this Court permitted the appellant to withdraw the appeal in light of Annexure-C appended to the memo of appeal as well as decision of the Supreme Court of India in the case of *Amar Nath Goyal (supra)*, which the Court found reasonable and therefore, liberty was granted to the present petitioner to withdraw the appeal and file a review petition and it was observed as follows:

“The learned senior Additional Advocate General, Assam in the light of Annexure-C (page- 73) of appeal memo and the decision of the Supreme Court in State of Punjab and others vs. Amar Nath Goyal and others, reported in (2005) 6 SCC 754, with a liberty to file review petition, prays for withdrawal of the present appeal.

We find the prayer reasonable and therefore, with a liberty to the appellants to file Review Petition, we dismiss the present appeal as withdrawn.

Needless to mention that if such a Review Petition is filed, the same shall be decided on merit and till the decision of the Review Petition, the operation of the order dated 28.04.2016 passed in WP(C) 61/2011 shall remain stayed. We expect and hope that the Review Petition shall be filed within a reasonable time but not later than 2(two) weeks from today.

The appeal is dismissed as withdrawn but with a liberty stated above.”

9. Accordingly, it is submitted that this review petition was otherwise maintainable.

10. Per contra, the learned senior counsel for the respondents has referred to the case of *Ram Sahu (Dead) Through LRs Vs. Vinod Kumar Rawat & Ors., (2020) SCC OnLine SC 896* and it is submitted that power of review would be available only to correct error apparent on the face of record, which can be identified without any elaborate argument, but such jurisdiction cannot

be exercised as an appeal in disguise. It is submitted that the power of review is not permissible for an erroneous decision to be re-heard and corrected. He has also referred to the various citations, which are referred to in the said judgment. It is also submitted that in the said judgment, the words "any other sufficient reason" appearing in Order XLVII Rule 1 has been interpreted to mean "*a reason sufficient on grounds at least analogous to those specified in the rule*", as was held in *Chhajju Ram v. Neki*, AIR 1922 PC 112, and approved in the case of *Moran Mar Basselios Catholicos v. Most Rev. Mar Poulouse Athanasius*, AIR 1954 SC 526 and accordingly, it is submitted that a review is only permissible on the ground which are available in section 114 CPC as well as Order 47 Rule 1 CPC. Hence, it is submitted that the review application itself is not maintainable in law. It is also submitted that the case of *Amar Nath Goyal (supra)* was decided on the backdrop of death-cum-retirement gratuity, whereas the case of *D.S. Nakara (supra)*, was a case which directly related to the issue of entitlement of employees' pension and accordingly, it is submitted that in light of the decision of *D.S. Nakara (supra)*, decided by the Constitution Bench, the review petition would not be maintainable under Article 215 of the Constitution of India.

11. It is seen that it is not the case of the petitioner that the case of *State of Punjab & Ors. v. Amar Nath Goyal & Ors. (supra)*, was placed by the learned counsel for the review petitioner while making his submissions. Therefore, the Court did not have the occasion to deal with the said case law. A mere discovery of a case citation, which purportedly helps the review petitioner is not a good ground to entertain a review application.

12. The learned counsel for the petitioner has not been able to cite

any provision of law or decision by a superior Court including High Courts or Supreme Court of India that a case citation, which was not referred to while the writ petition was being heard, is a good and sufficient ground for the High Court to exercise power of review. In the considered opinion of the Court, if a case has been decided without taking into consideration the relevant case law, the error can only be corrected in appeal and not by exercising power of review.

13. The learned senior counsel for the petitioner had rightly pointed out that in the case of *Amar Nath Gopal (supra)*, the respondents, who were the employees of the Government of Punjab and had retired during the period between 31.07.1993 to 31.03.1995, were seeking the benefit of a circular dated 13.12.1996 under which the State Government employees who had retired or died on or after 01.04.1995 were entitled to get retirement/ death gratuity on the basis of addition of certain portion of the dearness pay to the basic pay, which was refused to them. However, the subject of the case of *D.S. Nakara (supra)*, was for claiming revision of non-contributory retirement pension scheme. As per the impugned OM No. F-19(3)-EV-79, the formula for computation was liberalised but made it applicable to the government servants who were in service on 31.03.1979 and retired on and from that specified date. Thus, it was submitted that the ratio of the case of *D.S. Nakara (supra)*, was more applicable in the case of the respondents than the case of *Amar Nath Goyal (supra)*. The Court finds some force in the said submissions, but no opinion is expressed on such submissions.

14. Therefore, *prima facie*, this is not a case where the error apparent on the face of record is self evident and can be discovered without a long drawn process of reasoning and definitely, the matter cannot be decided

without in depth examination of the ratio laid down in the case of *D.S. Nakara (supra)* and *Amar Nath Goyal (supra)*.

15. The case of *Biraj Choudhury (supra)*, was also the case relating to the claim of Death-cum-retirement benefit and therefore, the said case was decided in light of the decision of the Supreme Court of India in the case of *Amar Nath Goyal (supra)*.

16. We may now refer to the case of *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, (1979) 4 SCC 389*, where the Supreme Court of India had observed as follows:-

“3. ... It is true as observed by this Court in *Shivdeo Singh v. State of Punjab (AIR 1963 SC 1909)* there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Sub-ordinate Court.”

17. Thus, in this case, the decision of the Supreme Court of India in the case of *Amar Nath Goyal (supra)*, was not cited before this Court when the proceeding of W.P.(C) No. 61/2011 was being heard and therefore, the said decision could not be considered when the said writ petition was decided. As already indicated herein before, while in the case of *D.S. Nakara (supra)*, the Supreme Court of India was in seisin of the issue relating to entitlement of

pension, whereas, in the case of *Amar Nath Goyal (supra)* and *Biraj Choudhury (supra)*, the subject matter of those *lis* was death/retirement gratuity and therefore, the present review petition cannot be decided without long drawn process of reasoning and cannot be said to be an error apparent on the face of the record.

18. The learned standing counsel for the review petitioner has referred to the case of *Md. Baseruddin & Ors. (supra)*. In the said case, review petition was entertained on the ground that owing to the ratio of the case of *Jagpal Singh & Ors. v. The State of Punjab & Ors., (2011) 11 SCC 396*, the direction contained in order dated 16.07.2009 in W.P.(C) 2142/2007 to allot VGR land is no longer permissible in law. Thus, it can be seen that the case of *Md. Baseruddin (supra)*, is distinguishable on facts, where long drawn process of reasoning was not at all required.

19. It was lastly submitted by the learned standing counsel for the review petitioner that the Division Bench of this Court in its order dated 27.03.2018, passed in W.A. 148/2017, had recorded that it had found the prayer made by the learned Senior Addl. Advocate General to withdraw the writ appeal with liberty to file review petition, this Bench was bound by the said appellate order and ought to decide the review petition on merit. In the said context, we have done exactly what has been ordered by the appellate order in reference and have ventured to decide this review petition on merit. The Division Bench had not returned any finding that the decision of *Amar Nath Goyal (supra)* was squarely applicable in this case. Thus, when this review petition has been heard and decided on merit, it cannot be claimed by the learned counsel for the petitioner that we had not decided the review petition on merit, and acted

contrary to the order dated 27.03.2018 in W.A. 148/2017.

20. Therefore, in light of the discussions above, this review petition fails and the same is dismissed, leaving the parties to bear their own cost.

JUDGE

Comparing Assistant