

GAHC010225332021



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

Case No. : WA/1/2022

UJALA NARZARY
W/O- LATE RWKWMSE NARZARY, R/O- VILL. NO. 3 JAINARY, P.O.
SIMBARGAON, P.S. AND DIST.- KOKRAJHAR, BTR, ASSAM, PIN- 783370.

VERSUS

THE STATE OF ASSAM AND 4 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM,
PWD (R) DEPARTMENT, DISPUR, GUWAHATI-06.

2:THE EXECUTIVE ENGINEER
PUBLIC WORKS DEPARTMENT
KOKRAJHAR ROAD DIVISION
KOKRAJHAR
ASSAM

3:THE ASSTT. EXECUTIVE ENGINEER
PWD
KOKRAJHAR RURAL ROAD DIVISION
KOKRAJHAR
BTR
ASSAM

4:THE DIRECTOR OF PENSION
ASSAM
DISPUR
GUWAHATI-06.

5:THE ACCOUNTANT GENERAL (A AND E)
ASSAM
MAIDAMGAON
BELTOLA
ASSAM-28

Advocate for the Petitioner : MR. M U MAHMUD

Advocate for the Respondent : GA, ASSAM

Linked Case : WA/9/2022

PRANITA BASUMATARY
W/O LATE KARAN SING BASUMATARY
VILL DOBGAON
PART-II
P.O. AND P.S. KOKRAJHAR
DIST. KOKRAJHAR
ASSAM
PIN 783370

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PRESENT
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE KARDAK ETE

For the petitioner : Mr. M.U. Mahmud, Advocate.
Mr. S.H. Mahmud, Advocate.

For the State of Assam : Mr. D. Saikia, Advocate General, Assam.
Ms. R.B. Bora, Government Advocate. Assam.

For the PWD Department : Mr. P. Nayak, Standing Counsel, BTC.

For respondent No. 5 : Mr. S.K. Medhi, Mr. R. Dhar, Advocates.

Date of hearing & order : 13th of March, 2023.

:: ORDER ::

(Kardak Ete, I)

The questions of fact and law involved in both the appeals being identical, we propose to dispose of the same by this common order.

2. We have heard Mr. M.U. Mahmud, learned counsel for the writ appellants/writ petitioners. We have also heard Mr. D. Saikia, learned Advocate General, assisted by Ms. R.B. Bora, learned Government Advocate representing the respondent Nos. 1 & 4 and Mr. P. Nayak, learned Standing Counsel, PWD, representing the respondent Nos. 2 and 3 as well as Mr. S.K. Medhi, learned counsel for respondent No. 5.

WA No. 01 of 2022

3. This writ appeal is preferred by the appellant/writ petitioner challenging

the validity of the order dated 24-11-2021, passed by the learned Single Judge, in WP(C) No. 6193/2021, by which writ petition filed by the appellant/writ petitioner has been dismissed.

4. The facts leading to this appeal are that the husband of the appellant/writ petitioner was appointed as Work-Charged Sectional Assistant on 12-05-1997, vide Office Order No. 46, dated 12-05-1997, and was working in Kachugaon (R) Sub-Division, under Kokrajhar P.W.D. (R) Division, in the scale of pay of Rs.1065/-20-1225-30-1345-EB-30-1435-40-1635-50-2035-60-2095/- per month. Thereafter, the service of the appellant's husband was extended and renewed from time to time until he passed away on 06-05-2017, while still in service. Thus a prayer was made seeking a direction upon the respondent authorities to prepare and pay pension and other unpaid retirement benefits like gratuity, Group Insurance, Pension etc., by filing WP(C) No. 6193/2021.

WA No. 09 OF 2022

5. This writ appeal has been filed by the appellant/writ petitioner challenging the validity of the order dated 13-12-2021, passed by the learned Single Judge, in WP(C) No. 6356/2021, by which writ petition filed by the appellant/writ petitioner has been dismissed.

6. The case of the appellant/writ petitioner in this appeal is that her husband was engaged as Muster Roll Worker by the respondents on 22-04-1993. He expired on 01-05-2014 after serving as a Muster Roll Worker for 21 years. The appellant/writ petitioner being the wife of the deceased Muster Roll Worker, sought a direction upon the respondent authorities to prepare and pay pension and other unpaid retirement benefits like gratuity, Group Insurance, Pension etc., by filing WP(C) No. 6356/2021.

7. Mr. Mahmud, learned counsel for the appellants, referring the appointment order, dated 12-05-1997 and the engagement order dated 22-04-1993 of the husband of the appellants/writ petitioners has submitted that the appellants are entitled for pension and other retirement benefits under the law as both the husbands of the appellants were continuously working under the respective Departments on being appointed/engaged by the respondent authorities. Therefore, the learned Single Judge has not appreciated the issue in proper perspective.

8. In support of his case, Mr. Mahmud, learned counsel for the appellants/writ petitioners has referred to the following decisions of the Hon'ble Supreme Court as well as of this Court:

(a) **State of Karnataka and others vs. M.L. Kesari and others**, reported in **(2010) 9 SCC 247**;

(b) **A.P. Srivastava (Dead by LRS) vs. Union of India and others**, reported in **(1995) 6 SCC 227**;

(c) **Commissioner Of Central Excise vs M.P.V. & Engg. Industries** reported in **(2003) 5 SCC 333**;

(d) **Sanjit Roy & Ors. Vs. State of Assam & Ors.**, reported in **2019 (2) GLT 805**; and

(e) The order dated 21-09-2016, passed in WA No. 322 of 2016, (**The Chairman Cum Managing Director, Assam Police Housing Corporation Ltd. vs. Mahbub Ahmed Laskar**).

9. Mr. Mahmud, learned counsel for the appellants, relying the above decisions of the Hon'ble Supreme Court as well as of this Court has submitted that the appellants/writ petitioners are entitled to the pensionary benefits.

10. Mr. D. Saikia, learned Advocate General, Assam, appearing on behalf of

the State respondents submits that since the husbands of the appellants were not regular Government employees at any point of time and have never been served in any substantive capacity or against any sanctioned post, pension cannot be granted to them. He further submits that under the relevant Pension Rules, a person who is not a regular Government servant, serving against a sanctioned post, is not entitled to pension. Therefore, both the writ appeals need to be dismissed.

11. Mr. P. Nayak, learned Standing Counsel, PWD, for the respondent Nos. 2 and 3 and Mr. S.K. Medhi, learned counsel for respondent No. 5 have adopted the submissions made by the learned Advocate General, Assam.

12. The rival submissions of the parties have duly been considered.

13. The appointment, vide Office Order No. 46, dated 12-05-1997, in respect of the husband of the appellant/writ petitioner in WA No. 1 of 2022 clearly stipulates that the appointment of the husband of the appellant was purely temporary and could be terminated at any time without showing any reason thereof. The husband of the appellant/writ petitioner in WA No. 9 of 2022 was engaged as a Muster Roll Labourer vide Memo No. 2/37/85-86, dated 22-04-1993. The prayer made in both the writ petitions is for a direction to pay pension and other service benefits. The case of the appellants is not for regularisation of the services of the husbands of both the appellants/writ petitioners.

14. On perusal of both the appointment order, dated 12-05-1997 and the engagement order dated 22-04-1993 nothing is discernable that the appointment or engagement orders were made against any sanctioned post(s).

15. In the case of **M.L. Kesari** (supra), the Hon'ble Supreme Court has

observed and held as follows:

“It is evident from the above that there is an exception to the general principles against “regularization” enunciated in Umadevi (3), if the following conditions are fulfilled :

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.”

16. Though the prayers in the writ petitions were not for regularisation of the services, but for a direction to pay pensionary benefits, the writ appellants/writ petitioners have failed to show that the husbands of the writ appellants had worked against any sanctioned post.

17. Mr. Mahmud, learned counsel for the appellants initially relied upon the paragraph 11 of the case of **M.L. Kesari** (supra), which further explains one time measure for regularisation rendered by the Constitution Bench in the case of **Secretary, State of Karnataka and others vs. Umadevi (3) and others**, reported in **(2006) 4 SCC 1**. Subsequently, Mr. Mahmud, learned counsel for the appellants fairly submits that he is not relying or referring the judgment of the Apex Court in **M.L. Kesari** (supra) in support of his case.

18. In the case of **Sanjit Roy** (supra), the petitioners were initially appointed as Muster Roll Labourers, but subsequently regularised and were superannuated from service after completion of 20 years of service. There are Office Memorandums dated 20-05-2009 & 06-09-2003 providing that the period of Muster Roll service of initial 6 years will be deducted for the purpose of pension.

It was held that fixing of 20 years of continuous service is not found to be arbitrary but the deduction of 6 years is unreasonable. Therefore, same cannot be applied in the present case.

19. The decision of this Court rendered in WA No. 322 of 2016 is also not applicable inasmuch as, the issue in the said case was relating to raising of retirement age for regular employee. The Board decided to raise the retirement age to 60 years as per Assam Government's Circular dated 20-11-2007 and kept unchanged the 58 years' age criterion for the Work-Charged category.

20. In the case of **A.P. Srivastava** (supra), the issue was whether an employee, who was a temporary Government servant, loses his right to receive pension when the employer exercises its option and retires the employee after he attains the age of 55 years in accordance with Rule 56(j)(ii) of the Fundamental Rules, even though the employee might have completed more than 20 years' service. In that case, the Hon'ble Apex Court considered whether there is any rationale behind the rule disentitling pension to the Government servant when an order of compulsory retirement is passed in exercise of power under Rule 56(j) of the Fundamental Rules and it was held that an order of compulsory retirement is not a punishment and pension is a right of the employee for services rendered. Therefore, no justification for denying such right to a temporary Government servant merely on the ground that he was required to retire by the employer in exercise of power under Rule 56(j) of the Fundamental Rules and accordingly it was held that the temporary Government servant would be entitled to pension after he has completed more than 20 years of service even if he is required to retire by the employer in exercise of power under Rule 56(j) of the Fundamental Rules. Therefore, we are of the view that the decisions of Hon'ble Apex Court as well as of this Court, relied on by the

learned counsel for the writ appellants/writ petitioners were rendered on entirely a different fact scenario; are clearly distinguishable and cannot be applied in the facts and circumstances of the present case.

21. Rule 31 of the Assam Services (Pension) Rules, 1969 provides for condition of qualifying service for pension and reads as under:

“31. 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 service 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 any officer to count for pension.”

22. The said Rule clearly provides that service of an officer does not qualify for pension unless it conforms to the three conditions, namely, the service must be under Government; the employment must be substantive and permanent and the service must be paid by Government.

23. Rule 36 of the Assam Services (Pension) Rules, 1969 provides that service does not qualify unless the officer holds a substantive office on a permanent establishment - provided that continuous temporary or officiating service under the Government of Assam, followed without interruption by confirmation in the same or any other post, shall count in full as qualifying service except in respect of – (a) Periods of temporary or officiating service in non-pensionable establishment, and (b) Periods of service paid from contingencies.

24. In view of above position of law and the decision of the Hon'ble Apex Court rendered in **M.L. Kesari** (supra), we are of the view that the writ

appellants/writ petitioners are not entitled to the pension or any relief as claimed in the writ petition and no interference is called for in the impugned order dated 24-11-2021, passed by the learned Single Judge, in WP(C) No. 6193/2021 and the order dated 13-12-2021, passed by the learned Single Judge, in WP(C) No. 6356/2021.

25. The writ appeals are accordingly dismissed. No costs.

JUDGE

CHIEF JUSTICE

Comparing Assistant