

GAHC010239392022



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

Case No. : WA/133/2023

THE STATE OF ASSAM AND 6 ORS.
REPRESENTED BY ITS PRINCIPAL SECRETARY TO THE GOVERNMENT OF
ASSAM, PANCHAYAT AND RURAL DEVELOPMENT DEPARTMENT, DISPUR,
GUWAHATI-6.

2: THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF
ASSAM
PENSION AND PUBLIC GRIEVANCES DEPARTMENT
ASSAM
DISPUR
GUWAHATI-6.

3: THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF
ASSAM
FINANCE DEPARTMENT
DISPUR
GUWAHATI-6.

4: THE COMMISSIONER
PANCHAYAT AND RURAL DEVELOPMENT DEPARTMENT
JURIPAR
PUNJABARI
GUWAHATI- 37.

5: THE DIRECTOR OF PENSION
ASSAM
HOUSEFED COMPLEX
GUWAHATI-6.

6: THE CHIEF EXECUTIVE OFFICER

DHUBRI ZILLA PARISHAD
P.O. AND DISTRICT- DHUBRI
ASSAM

PIN- 783101.

7: THE TREASURY OFFICER
DHUBRI TREASURY
P.O. AND DISTRICT- DHUBRI
ASSAM
PIN- 783101

VERSUS

NUR HUSSAIN MOLLAH B
S/O. MEZER UDDIN MOLLAH, VILLAGE- MADAIKHALI, P.O.-
ASHARIKANDI, DISTRICT- DHUBRI, ASSAM, PIN- 783331.

Advocate for the Petitioner : ADDL. AG, ASSAM

Advocate for the Respondent : MR. M ISLAM

BEFORE

HONOURABLE THE CHIEF JUSTICE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellants : Mr. K. Konwar.
Additional Advocate General, Assam.

For the Respondent : Mr. M. Islam, Advocate.

Date of Hearing : 21.07.2023.

Date of Judgment : 05.08.2023.

JUDGMENT & ORDER (CAV)

(A.D. Choudhury, J)

1. Heard Mr. K. Konwar, learned Additional Advocate General, Assam for the appellants representing the P&RD Department, Government of Assam. Also heard Mr. M. Islam, learned counsel for the sole respondent.

2. The factual background of the case:

I. The present intra court appeal is directed against the Judgment and Order dated 05.08.2022 passed by the learned Single Judge in WP (C) No. 4397/2022.

II. The sole respondent, who is a Gaon Panchayat Secretary, approached the Single Bench by filing the aforesaid writ petition seeking a writ of certiorari for setting aside and quashing an order dated 28.03.2018 issued by the Secretary to the Govt. of Assam, P&RD, by which the State authorities accorded ex-post-facto approval for creation of 1272 numbers of post of Gaon Panchayat Secretary with effect from 30.05.2003 to 03.02.2016. However, it was provided that such creation of post shall not be treated for the purpose of the Gaon Panchayat Secretaries to receive pension and other retiral benefits. This part of the communication dated 28.03.2018 is the offending part as pleaded by the writ petitioner.

III. The learned Single Judge allowed the writ petition and directed the appellants to pass necessary order on the entitlement of the petitioner for pension by taking note of law laid down by a Division Bench of this court in its order dated 24.03.2010 passed in Writ Appeal No. 145/2009 (***The State of Assam –Vs- Syed Md. Fazlay Rabbi***).

3. The arguments advanced on behalf of appellants State:

Mr. K. Konwar, learned Additional Advocate General, Assam assailing the impugned judgment advances the following arguments:-

I. The respondent was initially engaged on 08.10.1993, on daily wage basis and such wage was paid by the Panchayati Raj Institutions (PRIs) created under Assam Panchayati Raj Act, 1986 (hereinafter referred to as Act, 1986) and such engagement was not permissible under the Act, 1986 inasmuch as the mandate of the said Act was that Gaon Panchayat Secretaries were to be appointed by the State Government. Therefore, the appointment of the petitioner was itself illegal.

II. The Government of Assam by a notification dated 04.02.2006, regularized the service of the petitioner along with similarly situated Gaon Panchayat Secretaries and such order of regularization clearly mandates that such regularization shall be prospective in nature, which shall be effective from the date of their joining in the post pursuant to such order. Therefore, the initial appointment on daily wage basis cannot be counted for giving them the benefit of the Assam Services Pension Rules, 1969 (hereinafter referred to as Rules, 1969), rather they shall be covered by the New Defined Contribution Pension Scheme, 2005 (hereafter referred as to the New Pension Scheme), which came into effect on 01.02.2005. Such fact has been overlooked by the learned Single Judge.

III. As the posts in question were created in the year 2006, therefore, even if the petitioner was working in the PRI without a valid sanctioned post, such period cannot be treated as service under the Government.

IV. As the initial entry of the service of the respondent is without

any due selection process and was adhoc appointment, there cannot be any question of regularization of such appointment. In support of his contention, Mr. Konwar, places reliance on the judgments of the Hon'ble Apex Court in the case of **Ashwani Kumar &Ors –Vs State of Bihar** reported in **(1997) 2 SCC 1** and **Umarani –Vs- Registrar, Cooperative Societies and Others** reported in **(2004) 7 SCC 112** and also **Secretary, State of Karnataka and Ors –Vs- Umadevi and Ors** reported in **(2006) 4 SCC 1**.

V. The initial engagement of the respondent was in derogation of the provision of Section 10 (6) of the Act, 1986 inasmuch as the appointment was not made by the Government. The appointment was made by an incompetent authority. In support of such contention, Mr. Konwar, relies on the decision of the Hon'ble Apex Court in the case of **Renu and Others –VS- District and Sessions Judge** reported in **(2014) 14 SCC 50**.

VI. It is the further contention of Mr. Konwar, learned Additional Advocate General, Assam that the respondent was not an employee as defined under Section 2(d) of the Assam Panchayat Employees (Provincialization) Act, 1999 (hereinafter referred as to Act, 1999) till the order of regularization dated 04.02.2006 inasmuch as the respondent was not appointed against regularly sanctioned post and therefore, the Pension Rules, 1969 is not applicable to the respondent.

VII. As the respondent has accepted the notification dated 04.02.2006, he is estopped from raising the plea as raised in the writ petition. In support of such contention, Mr. Konwar, relies on the decision of the Hon'ble Apex Court in the case **M. P. Palanisamy&Ors –Vs- A. Krishnan &Ors** reported in **(2009) 6 SCC 428**.

VIII. The qualifying service entitling the respondent Gaon Panchayat

Secretary for payment of pension and retiral benefits would have to be counted from 04.02.2006 and therefore, the respondent shall be entitled for pension and other retiral benefits under the New Defined Contribution Pension Scheme' inasmuch as the respondent was not appointed in a substantive post and his service was not under the Government. In support of his contention, Mr. Konwar relies on the decisions of the Hon'ble Apex Court in the case of ***Baleshwar Dass –Vs- State of UP and Others*** reported in ***(1980) 4 SCC 226*** and in ***Ramesh K Sharma and Others –Vs- Rajasthan Civil Services and others*** reported in ***(2001) 1 SCC 637*** as well as in ***OP Singla and Another –Vs- Union of India and Others*** reported in ***(1984) 4 SCC 450***.

IX. The impugned notification dated 28.03.2018 was issued pursuant to the judgment passed in WP(C) No. 2578/2000 (***Pranoy Kumar Deb &Ors –Vs- The State of Assam and Ors***) by a learned Single Judge, inasmuch as in the aforesaid judgment, a direction was given to the government to consider whether services rendered by Gaon Panchayat Secretaries between 2004-2006 shall be counted for the purpose of enabling the persons concerned to receive pension and other retiral benefits.

X. The decision dated 24.03.2010, of this Court in ***Fazlay Rabbi (supra)*** is distinguishable from the present case in hand and cannot be applied as a binding precedent inasmuch as in the case of ***Fazlay Rabbi (supra)***, the Coordinate Bench was dealing with the case of the employees of PRIs, who entered into their services prior to enactment of the Act, 1999 and on the other hand, the Act, 1999 was already in force when the respondent was engaged. Further in ***Fazlay Rabbi (supra)***, this Court left open the issue of "Employee" as defined in Section 2(d) of the Act, 1999. Therefore, the learned Single Judge has erroneously

placed reliance upon the decision rendered in ***Fazlay Rabbi, (supra)***.

4. The arguments advanced on behalf of sole respondent:

Per contra Mr. Islam, learned counsel for the sole respondent advances the following arguments:-

I. The arguments of the appellant State is totally misconceived and having no legs to stand inasmuch as similarly situated GP Secretaries, including the petitioner, were regularized by a communication dated 30.05.2003 with effect from the date of issuance of consequent order by the Chief Executive Officer of the respective Zilla Parishads. Pursuant to such communication dated 30.05.2003, the Chief Executive Officer, Dhubri Zilla Parishad issued the consequential order on 10.06.2003 appointing the respondent as Gaon Panchayat Secretary. Therefore, for all meaning and purport the respondent entered into government service/joined the government service with effect from 10.06.2003, even if, his earlier appointment in the year of 1993 is ignored. Such communication dated 30.05.2003 still holds the field. Therefore, the argument advanced by the learned Additional Advocate General, Assam is not having any relevance to the facts of the present case.

II. The decision rendered in ***Pranoy Kumar Deb (Supra)*** relates to nonpayment of scales of pay prior to issuance of the order dated 30.05.2003 and 04.02.2006, inasmuch as such writ petition relates to 2000. Therefore, such decision cannot be applied to deprive the respondent from his legitimate and vested right.

III. The decision rendered in ***Fazlay Rabbi (supra)***, squarely covers the case of the respondent for the reason that the respondent had entered into government service prior to coming into effect of the New

Defined Contribution Pension Scheme. Accordingly, the learned Single Judge has rightly allowed the writ petition.

IV. Though the decision in ***Fazlay Rabbi (supra)*** was challenged before the Hon'ble Apex court but the same was dismissed by the Honble Apex Court in SLP No. 19351-19360/2010 by an order dated 02.08.2010. Even on 17.03.2011 the Government issued a notification pursuant to the decision rendered in ***Fazlay Rabbi (supra)*** in compliance of the said judgment.

V. It is the case of the respondent that in the year 1991, number of Gaon Panchayat in Assam is increased from 663 to 2486 due to re-organization of the panchayat which necessitates the GP Secretaries and accordingly, 1707 of number GP Secretaries including the petitioner were appointed during the year 1993- 1994 as employees of the PRIs.

VI. According to him, 435 persons were appointed against vacant sanctioned posts and remaining 1272 numbers were appointed against non-sanctioned posts. In support of such contention, Mr. Islam relies on the paragraph 3.20 of the report of the Second Assam Finance Commission published in August, 2003 and urges that the report itself reflects that engagement of GP Secretaries is already regularized. Therefore, according to Mr. Islam, the State is precluded from raising an issue at this belated stage that the petitioner entered into the service in the year 2006 pursuant to notification 04.02.2006.

VII. Relying on OM dated 09.06.2009 issued by the State in Finance Department, the learned counsel contends that as per this O.M., even work- charged employees, who entered the Government service prior to 1.02.2005 but their services had been regularized after 01.02.2005, have been declared entitled for pension and other retiral benefits under the Rules, 1969. Therefore, even if for the sake of arguments the submission

of Mr. Konwar is accepted, still the petitioner is entitled for benefits under the Rules of 1969.

5. Determination made by this Court:-

We have given our thoughtful consideration to the arguments advanced by the learned counsels for the parties. Mr. K. Konwar, learned Additional Advocate General, Assam by placing heavy reliance on the notification dated 02.04.2006, on the decision rendered in ***Pranoy Kumar Deb (Supra)*** and on the Act, 1999, tried to project that the service of the petitioner having been regularized after coming into effect of the New Pension Scheme, he is not entitled for Pension and other retiral benefits under the Rules, 1969. On the other hand, Mr. M. Islam, learned counsel for the respondent placed heavy reliance on the communication dated 30.05.2003, the decision rendered by the Coordinate Bench in ***Fazlay Rabbi, (supra)***, report of the Finance Commission of the year 2003, and also on a part of the order dated 28.03.2018 to impress upon this Court that the service of the petitioner stood regularized in the year 2003 and therefore, the New pension Scheme cannot be made applicable to him and that he is entitled to the benefits of 1969 Rules.

In the backdrop of aforesaid arguments advanced by the learned Counsels for the contesting parties, now let this Court deal with arguments in the following manner:

I. Order dated 30.05.2003 and report of Finance Commission 2003:

- A. The State of Assam in the Panchayat and Rural Development Department issued the communication dated 30.05.2003 addressing all the Chief Executive Officers of Zilla Parishad, with the subject "regularization of services of engaged GP Secretaries".
- B. From the aforesaid communication, it is clear that the Government of Assam has conveyed its approval to regularize services of 1710 numbers of engaged Gaon Panchayat Secretaries with a definite scale

of pay, whose names were enlisted and annexed with the Communication dated 30.05.2003.

C. It is also discernible that such regularized employees would be treated as employees of Panchayat Raj Institution and they would receive salary from their respective PRIs and the Government of Assam would reimburse the entire expenditure of salary out of budgetary provisions.

D. The regularization of service will be effective from the date of issue of office order by the Chief Executive Officer of the respective Zilla Parishad.

E. The Finance Commission report, 2003 which was published in the month of August, 2003 at para 3.20 also recognizes regularization of 1707 posts of Gaon Panchayat Secretaries and concluded that over and above 683 sanctioned provincialised posts, 1707 numbers of Gaon Panchayat Secretaries, who were engaged at a fixed remuneration were being regularized. There are 2390 sanctioned posts of Gaon Panchayat Secretaries, including 1707 Gaon Panchayat Secretaries regularized by Zilla Parishad. Such commission was constituted on 18.04.2001 by the State Government and the report was published in the month August, 2003 i.e. much prior to issuance of the notification dated 04.02.2006.

II. Decision in Pranay Kumar Deb (Supra) and the communication dated 04.02.2006

A. Prior to such regularization dtd.30.05.2003, some of the GP Secretaries approached this Court in the year 2000 by filing the writ petition (Pranay Kumar Dev) seeking a direction for regular scales of pay. The subject matter of the said writ petition was claim for benefit of provincialization/ scales of pay. Their case was that those GP

Secretaries, who were working against sanctioned posts were sought to be regularized and those who were working against non-sanctioned posts were sought to be deprived of the benefit under the Act, 1999. During the pendency of the writ petition, the communication dated 30.05.2003 came to be issued.

B. It is also recorded in the said decision that pursuant to regularization dated 30.05.2003, the Secretaries were receiving their salaries in the scale of pay determined, however, suddenly such payments were stopped from January, 2004 and assailing such action, a writ petition was filed by some other GP Secretaries, which was registered as WP(C) No. 869/2003 and in the said writ petition, the Government took a stand on affidavit that services of all Gaon Panchayat Secretaries stood regularized on the basis of communication dated 30.05.2003 and in view of such admission, the said writ petition being WP(C) No. 869/2003 was allowed.

C. A mention was made in the order passed in *Pranay Kumar Dev (supra)* that the order dated 04.02.2006 was put to challenge in ***Pranay Kumar Dev (supra)***, however, this court finds that neither any determination nor was the said order subjected to judicial review. In other words, the validity of such order was not determined in the ***Pranay Kumar Dev (supra)***. It is also discernible that while dealing with the communication dated 04.02.2006, the court directed that respondent shall pay the Gaon Panchayat Secretaries their salaries from 01.04.2004 till February, 2006 as and when third Finance commission makes provision in this regard.

D. The Government was also directed to consider the services of the Gaon Panchayat Secretaries for services rendered between January, 2004 and February, 2006 for the purpose of enabling them to receive

pension and other retiral benefits.

E. In view of the aforesaid factual background, this court is of the considered opinion that the order dated 04.02.2006 is to be read conjointly and harmoniously with communications dated 30.05.2003 and 28.03.2018.

F. In terms of the communication dated 04.02.2006, the services of the GP Secretaries were regularized with prospective effect. Such communication neither made any reference nor indicated about the communication dated 30.05.2003 nor the communication dated 04.02.2006 was issued in supersession of the order dated 30.05.2003.

G. The further interesting fact, discernible from the communication 28.03.2018 is that the Government consciously decided that the period of service rendered by the GP Secretaries with effect from 30.05.2003 (the date of first regularization) to 03.02.2006 (the date prior to issuance of communication dated 04.02.2006), shall be treated as Regular Service. The communication dated 28.03.2018 further clarifies that such ex-post-facto approval has been accorded in order to treat the 1272 numbers of GP Secretaries in regular service under the Government against sanctioned posts for the period effective from 30.05.2003 to 03.02.2006. That being so upon a conjoint reading of the communication dated 30.05.2003, communication dated 04.02.2006 and communication dated 28.03.2018 leaves no room of doubt that these 1272 numbers of GP Secretaries are treated to have entered into Govt. service w.e.f. 30.05.2003 inasmuch as the word ex-post-facto shall mean "any act that has retrospective effect".

H. Thus, from the aforesaid, it is clear that not only the Government, without any ambiguity regularized the services of the Gaon Panchayat

Secretaries by the communication dated 30.05.2003 but also admitted on oath in the proceeding of WP(C) No.869/2003 that the services of Gaon Panchayat Secretaries stood regularized by virtue of the notification dated 30.05.2003.

I. The learned Single judge in ***Pranay Kumar Dev (supra)***, took note of the fact that the service of the GP Secretaries stood regularized with effect from 30.05.2003. However, an observation was made that the order dated 04.02.2006 shall be an obstruction to the GP Secretaries in getting regular pension under the old pension scheme. But, the learned Bench did not deal with the impact/implication of the order dated 30.05.2003 and 04.02.2006. Therefore, in the considered opinion of this court such judgment rendered by the learned single Judge shall have no bearing on the issue that has been raised in the present lis.

J. It is also a considered opinion of this Court that the decision rendered in ***Pranay Kumar Deb (supra)***, in view of the facts of the said case cannot be construed to have laid down a ratio that by virtue of the communication dated 04.02.2006, the respondent herein shall not be entitled for pension and other retiral benefits inasmuch as in the aforesaid decision, the order dated 04.02.2006 was neither discussed, and/ or interpreted nor judicially reviewed. Therefore, the expression rendered by the learned Single Judge that the order dated 04.02.2006 shall be a bar for the Gaon Panchayat Secretaries to get pension and other retiral benefits, in the considered opinion of the Court is not a ratio decidendi but an obiter dicta.

K. In view of above determination, this Court has no hesitation in holding that the entry in the service of the petitioner (respondent herein) as Gaon Panchayat Secretary under Government in PRI is

required to be treated with effect from the date of issuance of consequential orders by the CEOs in terms of the order dated 30.05.2005.

III. Order dtd.28.03.2018:

A. Coming to the order impugned in the writ petition, it is abundantly clear that Government by the aforesaid communications expressed its ex-post-facto approval for creation of the posts in question which relates to the appointments made pursuant to communication dated 30.05.2003 and such ex-post-facto approval was effective for the period 30.05.2003 to 04.02.2006.

B. It is also clarified in the said communication by the State that the aforesaid 1272 numbers of GP Secretaries should be treated "**in regular service against sanctioned posts for the period with effect from 30.05.2003 to 04.02.2006**". On 04.02.2006, the posts were created ex- post- facto. Therefore, the natural corollary is that the petitioner had entered into service prior to coming into effect of the New Defined Contribution Pension Scheme' 2005.

C. Therefore, the argument of Mr. Konwar that communication dated 04.02.2006 clearly shows that the petitioner shall not be entitled for the pension and other retiral benefits under the Pension Rules, 1969 inasmuch as on that date the new pension scheme was holding the field, is hereby rejected.

IV. Decision in Fazlay Rabbi -WA(C) No. 145/2009 (supra)

A. The Co-ordinate Bench in **Fazlay Rabbi**, was dealing with a decision of a learned Single Bench which upheld the entitlement of pension and other retiral benefits of some Gaon Panchayat

Secretaries, who were working on the date of coming into force of the Act'1999 on a challenge being made by the State in Panchayat and Rural Development Department.

B. In the aforesaid adjudication, the petitioners were retired employees, who were appointed prior to the coming into effect of the Act, 1999. Their period of pensionable service was sought to be calculated with effect from 01.10.1991, when the Act was given effect to. On a challenge made to such attempt of the State, the learned Single Judge as well as the Co-ordinate Bench negated the same by holding that if such an action is allowed, the same will defeat the very purpose of the Act,1999 of having continuity of the services of the employee on and from the date of their initial appointments. Accordingly, the learned Co-ordinate Bench held that the benefit of provisions of the Act,1999 including pension and other retiral dues would be available to the provincialized employees on and after 01.10.1991, on the basis of length of their service to be reckoned from the date of their initial appointments. Therefore, the argument of Mr. Konwar, learned Additional Advocate General, that the decision rendered in ***Fazlay Rabbi (supra)*** is not applicable in the present case does not find favour of this court.

V. Pension Rules 1969;

A. Rule 31 of the Assam Services Pension Rule, 1969 entitles a person for pension when the service is under Government, secondly, the employment is substantive and permanent and thirdly, the servant must be paid by the Government. In the case in hand as discussed and determined hereinabove, the service of the GP Secretaries are required to be treated to be a service under the Government with

effect from 30.05.2003 and / or from the date of issuance of respective office order by Chief Executive Officer pursuant to communication dated 30.05.2003.

B. A conjoint reading of the communications dated 30.05.2003, 04.02.2006 and 28.03.2018 leaves no room of doubt that posts were created by the State ex-post-facto with effect from 30.05.2003 and therefore, it can safely be concluded that the service of the petitioner is to be treated as an appointment in a substantive post with effect from 10.06.2003.

C. The aforesaid communications, more particularly the communication dated 30.05.2003 clearly discloses that the salary of the GP Secretaries are to be paid by the Government. In view of such factual backdrop, the case of the petitioner shall be covered by the Assam Services Pension Rule, 1969.

VI. New Defined Pension Scheme:

A. The New Defined Contribution Pension Scheme is made applicable to all new entrants joining the Government services on regular basis against vacant sanctioned posts on or after 01.02.2005.

B. In the case in hand, in no unambiguous terms in the communication dated 30.05.2003, it was made clear by the Government that the employees will be treated as regular employees of the Panchayati Raj Institution. The communication dated 28.03.2018 also in no unambiguous term discloses that 1272 numbers of posts were created with effect from 30.05.2003 to 03.02.2006 and the ex-post-facto creation of such posts was accorded to treat the GP Secretaries in regular service against sanctioned posts for the period

with effect from 30.05.2003 to 03.02.2006. In view of such decision of the Government and resultant ex-post-facto appointment with effect from 30.05.2003, the communication dated 04.02.2006 automatically loses its prospective nature as discussed hereinabove. Nothing is discernible from the records why the second order of regularization dated 04.02.2006 was necessary when the services in question stood regularized by virtue of communication dated 30.05.2005. Therefore, the writ petitioner cannot be treated as a "new entrant" joining State Government services subsequent to introduction of New Pension Scheme. Resultantly, the petitioner cannot be brought under New Defined Contribution Pension Scheme.

C. The ratio laid down in the judgments relied on by Mr. Konwar, learned Additional Advocate General, in the considered opinion of this court, is not applicable in the facts and circumstances of the present case inasmuch as the legality and validity of the engagement of the petitioner cannot be and is not a subject matter of adjudication more particularly it is an unambiguous stand of the appellant that service of the petitioner was regularized though the dispute has been raised regarding the date of giving effect to such regularization.

VII. Conclusion:

A. In view of the aforesaid discussions and reasons, this court cannot but held that the offending portion of the order dated 28.03.2018 issued by the Secretary to the Govt. of Assam, P&RD i.e. "the ex-post-facto creation of posts shall not be treated for the purpose of enabling the person concerned to receive pension and other retiral benefits," is perverse and not legally sustainable and therefore, liable to be struck down, which is accordingly done.

B. In view of the aforesaid decision, discussion and reason, this court dismisses the present writ appeal being devoid of any merit and resultantly uphold the impugned decision dated 05.08.2022 rendered by the learned Single Judge in WP(C) No. 4397/2022. Parties to bear their own costs.

JUDGE

CHIEF JUSTICE

Comparing Assistant