

GAHC020000022023



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

Case No. : WP(C)/2/2023

ER. PUKRONEIZO KERA
SON OF LATE TEPUNOL KERA, AGED ABOUT 56 YEARS, RESIDENT
OF HOUSE NO. 120, LOWER BAYAVU HILL, KOHIMA, NAGALAND -
797001,
CURRENTLY SERVING AS CHIEF ENGINEER, PWD(NATIONAL
HIGHWAYS, KOHIMA

VERSUS

THE STATE OF NAGALAND AND 2 ORS REPRESENTED BY THE
SECRETARY, WORKS AND HOUSING DEPARTMENT, GOVERNMENT
OF NAGALAND, KOHIMA

2:THE COMMISSIONER AND SECRETARY PERSONNEL AND
ADMINISTRATIVE REFORMS DEPARTMENT GOVERNMENT OF
NAGALAND KOHIMA

3:ER. YANBEMO LOTHIA CURRENTLY SERVING AS CHIEF
ENGINEER POLICE ENGINEERING PROJECT KOHIMA

Advocate for the Petitioner : Mr. R. IRALU, SR. ADV

Advocate for the Respondent : Mr. V. Zhimomi, GOVT ADV. NL

Advocate for respondent No.3 : Mr. C.T. Jamir, Sr. Adv.

**BEFORE
HON'BLE MRS. JUSTICE MARLI VANKUNG**

JUDGMENT & ORDER (CAV)

Date : 16-06-2023

Heard Mr. R. Iralu, learned senior counsel for the petitioner along with Mr. V. Zhimomi, learned Government Advocate for the State respondents and Mr. C.T. Jamir, learned senior counsel for the private respondent.

2.] Mr. R. Iralu, learned Sr. counsel for the petitioner submits that the brief facts of the case leading to the filing of this writ petition under Article 226 of the constitution for issue of the appropriate writ is that, the respondent No.3 (private respondent) was appointed on contract basis with a scale of pay as Junior Engineer (JE) (Civil) under the office of the Chief Engineer, PWD, Kohima vide order dated 14.10.1987 and his services were extended to 13.07.1989 on 31.01.1989. While the contractual service of the private respondent was continuing, he along with the petitioner appeared in an examination conducted by the Nagaland Public Service Commission/NPSC, and got selected for the post of Assistant Engineer (Civil) under the Works & Housing Department, PWD. The NPSC issued a letter on 08.03.1989 to the private respondent recommending his selection as Assistant Engineer (Civil). In pursuance thereof, the private respondent submitted a hand written resignation letter

on 09.03.1989 to the Chief Engineer, PWD requesting the Chief Engineer to enable him to join his new post. Thus it was with a condition to enable him to join his new post. Consequently, by notification dated 17.04.1989 the petitioner and the private respondent were appointed as Assistant Engineer (Civil). Their appointment came into effect retrospectively from 08.03.1989, which was the date of recommendation given by the NPSC. As per the merit list prepared by NPSC, the private respondent is senior to the petitioner, therewith, the seniority of the petitioner and the private respondent has been counted *w.e.f* 08.03.1989. Thereafter, the Government released the private respondent from service *w.e.f* 31.10.2022 in terms of section 3(1) and 3(2) of the Nagaland Retirement from Public Employment Act, 1991 (Retirement Act) on completion of 35 years of service in the Government. The period of 35 years of service of the private respondent was computed from the date of joining Government service as Junior Engineer, *i.e.*, 15.10.1987. However, a representation was submitted by the private respondent seeking rectification of his date of entry into Government service *w.e.f* 17.04.1989, *i.e.*, the date of issuance of the appointment notification as Assistant Engineer (Civil) by claiming that there was no continuity in his service between his appointment as Junior Engineer and Assistant Engineer

(Civil). Thereafter the State respondents issued the impugned notification dated 22.12.2022, wherein the retirement order of the private respondent was revoked and by virtue of the impugned notification dated 22.12.2022, the petitioner's right to be considered for further promotion has been gravely affected since he is next in seniority after Respondent No.3. Hence, this writ petition.

3.] Mr. R. Iralu, Sr. Adv. for the petitioner submits that the impugned notification dated 22.12.2022 was issued without any application of mind, in complete violation of section 3(1) read with section 2(1) of the Nagaland Retirement from Public Employment Act, 1991 and the OM dated 31.08.2017, which specifically states that contract service will be counted for pension purpose if it was followed by regular appointment without any break in service, or any gap in service except resignation, shall be treated as public under the Nagaland Retirement from Public Employment (2 Amendment) Act. When the private respondent was regularly appointed as Assistant Engineer (Civil) *w.e.f* 08.03.1989 vide notification dated 17.04.89, on that date he was still in Government service as Junior Engineer. There is no record of the appointing authority accepting his resignation dated 09.03.1989, which was with a condition that he may be allowed to join his new post. As such, there was no break

in service and the Government had rightly released the private respondent from service *w.e.f* 31.10.2022 in terms of section 3(1) and 3(2) of the Nagaland Retirement from Public Employment Act, 1991 (Retirement Act) since there was no break of service and the post of J.E is thus a pensionable post. This is squarely covered by clause 6 of the OM dated 31.08.2017, which provides as under -

"6. Now, therefore, it has been decided that the period of service rendered on adhoc/contract/work-charged/substitute, basis, which is followed by regularization or regular appointment without break; or any gap in service except resignation, shall be treated as public. [sic public employment] under the Nagaland Retirement from Public Employment (2nd Amendment) Act, 2009."

4.] The learned Sr. counsel for the petitioner submits that the private respondent submitted his resignation on 09.03.1989. Assuming, but not admitting, the same has been accepted on 09.03.1989, the private respondent was still in Government service on 08.03.1989, which would count as public employment. As such, on the crucial date of 08.03.1989 when the private respondent was regularly appointed as Assistant Engineer (Civil), he was also serving as JE. Therefore, the inescapable conclusion is that there was no break in service. In light thereof, the

impugned notification dated 22.12.2022 revoking the retirement of the private respondent is miserably bad in law for offending section 2(1) read with section 3(1) of the Retirement Act and clause 6 of the OM dated 31.08.2017.

5.] The learned Sr. counsel for the petitioner further submits that the so-called resignation letter of the private respondent dated 09.03.1989 is not resignation in the eyes of law in the absence of any record accepting the resignation letter by the appointing authority. Thus, the private respondent has all along been in continuous service since 14.10.1987. His public employment, as such, ought to have been over on 31.10.2022. Therefore, the impugned notification dated 22.12.2022 is violative of the Retirement Act.

Also, the purported resignation letter dated 09.03.1989 does not specify any date for resigning while the private respondent tacitly sought permission in his letter to join his new post. As such, the resignation cannot also be said to be a resignation simpliciter that would entail forfeiture of past service. Such a resignation would therefore be covered under Rule 26(2) of the Central Civil Service (Pension) Rules, 1972. Rule 26 specifies as under -

"26. Forfeiture of service on resignation.- (1)

Resignation from a service or a post, unless it is allowed to be withdrawn in the public interest by the appointing authority, entails forfeiture of past service.

(2) *A resignation shall not entail forfeiture of past service if it has been submitted to take up, with proper permission, another appointment, whether temporary or permanent, under the Government where service qualifies."*

6.] The learned Sr. counsel by referring to the advice rendered by the P&AR department which was relied upon while passing the impugned notification dated 22.12.2022, submits that the advise was in connection with a case pertaining of seniority and submits that it is settled law that seniority is counted only from the date a person is borne into the cadre. As such, the seniority of the private respondent could not have been counted from 14.10.1987 as he was serving only on contract basis then, however, the issue of seniority has no bearing while counting service years for pension. On 14.10.1987 and thereafter till the private respondent's regular appointment as Assistant Engineer, he was on contract service. Thus, for the purpose of pension the contractual service of the private respondent would necessarily be counted, which is the import of clause 6

of the OM dated 31.08.2017. Yet, in complete contrary to its own OM, the respondent No.2 has acted with inherent biasness and issued the impugned notification dated 22.12.2022 which deserves to be set aside.

7.] The learned Sr. counsel also submits that in issuing the impugned notification dated 22.12.2022 the P & AR Department was not competent in itself to have made a decision to revoke the retirement order of a Government employee. That revoking the retirement of a member of a Government servant would constitute an important alteration in his/her condition of service, retirement being a condition of service. By the impugned notification, the private respondent has been given a fresh lease of service life for a period of 18 (eighteen) months, as he would be retiring only on 31.04.2024, *i.e.*, more than 36 years of public employment. Such an action would require the approval of the Cabinet as per clause 24 of the Second Schedule to the Rules of Executive Business, 2020 (hereinafter referred to as 'the Executive Business').

Clause 24 of the Second Schedule provides as under -

"24. Proposals involving any important alteration in the conditions of service of the Members of any All India Service or the State Service or in the Method of recruitment to the Service or Post to which appointment is made by the Government."

Therefore, such case ought to have been referred to the Cabinet for its approval. There is no order of the Chief Minister in this instant case.

8.] The learned Sr. counsel also submits that granting private respondent, 18 months of additional service would incur additional expenses for the State and affect its finances thereof. Rule 10(1) specifies that no Department shall, without previous consultation of the Finance Department, authorize any order which either immediately or by its repercussion will affect the finances of the State and the authorization of the Finance Department shall be required. Nowhere does it suggest that the Finance Department was consulted. Therefore, the impugned notification dated 22.12.2022 is unsustainable in law.

9.] Mr. R. Iralu, learned senior counsel has relied the following judgments in support of his submissions in:

- 1. R.T. Asang Jamir @ R. Tsudensangba Jamir Vs. State of Nagaland and Ors.** reported in **(2012) 5 GLT 675 (Pending before Apex Court)**
- 2. Neise Mich vs. The State of Nagaland & Ors.** reported in **Case No. W.A. 177/2012/ W.A. 178/2012/ W.A. 179/2012/ W.A. 180/2012/W.A. 181/2012 dated 20.07.2012**

3. The State of Nagaland vs. Mrs. Sashikala, reported in **W.A. No. 5 (K) of 2017**

4. Smti Imtirenla Jamir vs. The State of Nagaland and anr. in Case No. **W.A./94/2020 & W.A/95/2020** date **24.02.2021**.
(Pending before the Apex Court)

5. Asangla T. Aier vs Thungdeno Mozhui and Ors. reported in **(2021) 3 Gauhati Law Reports 238**

10.] Mr. V. Zhimomi, learned Government Advocate on the other hand submits that the instant writ petition is not maintainable either on facts or in law. The instant writ petition is nothing but an afterthought in view of the Notification dated 08-12-2022 by which Er. Kahuli Sema was allowed to go on voluntary retirement *w.e.f.* 21-01- 2023 whereby the post of Engineer-in-Chief falls vacant *w.e.f.* 21-01-2023. That the writ petition involves the issue of retirement and pension in respect of the Respondent No. 3 for which the Accountant General ought to have been impleaded as a party respondent, without whom proper adjudication pertaining to retirement and pension may not be possible to arrive to a logical conclusion and as such, the instant writ petition is not maintainable for Non-joinder of necessary parties.

11.] The learned Government Advocate further submits that on getting the information about the selection by the NPSC for the post of Assistant Engineer (Civil), PWD the respondent no.3 submitted his resignation letter to the Chief Engineer, PWD, Nagaland, Kohima on 09-03-1989. The said resignation letter was received by the office of the Chief Engineer on the same date *i.e.* 09-03-1989. After which there were series of communication regarding the resignation letter however no such record can be produced due to the shifting of the office of the concerned department. However, any person who is selected by the NPSC for appointment to any post, such recommendation is forwarded to the concerned Department so that necessary steps for appointment can be taken by the concerned Department. Since the respondent No. 3 was selected as Assistant Engineer (Civil), PWD, the same was intimated to the Department of Works and Housing by the NPSC. If the Respondent No.3 was in the office, as per norm the Department would have intimated the same officially but the Offer letter was addressed as a private individual and was send to private address, which is amply proof that the Respondent No. 3 was not a government servant at the time of issuance of job offer and the said was addressed to the Respondent No. 3 in the C/o of Sebastian H., Civil Secretariat, Education Department, Kohima.

12.] The learned Government Advocate submits that the Respondent No. 3 received the letter from the NPSC on 08-03-1989 by which he was recommended for appointment as Assistant Engineer (Civil). On getting the letter dated 08-03-1989, the Respondent No. 3 submitted his resignation on 09-03- 1989 and after his resignation, the respondent No. 3 was not in active service of the Government till 17-04-1989 when he was appointed as Assistant Engineer (Civil) by Notification dated 17-04-1989 and joined in the afternoon on the same date. The Pay Slip was also issued by the Accountant General making the substantive pay *w.e.f.* 18-04-1989. The appointment order dated 17-04-1989 was made with retrospective effect from the date of recommendation by the NPSC *w.e.f.* 08-03-1989 for the purpose of counting seniority only. Thus, the fact remains that from 09-03-1989 to 16-04-1989 the Respondent No. 3 was neither a Junior Engineer nor Assistant Engineer (Civil) and during this period he was never employed under the Government of Nagaland. Therefore, from the date of resignation on 09-03-1989 from the post of JE and upto the date of appointment as Assistant Engineer on 17-04-1989, since the Respondent No. 3 was not in active service of the Government no salary was also paid during this period. Therefore, pensionable service of the Respondent No. 3 commences from the date of Regular

appointment as Asst. Engineer (Civil) Public Works Department, vide order dated 17.04.1989 made *w.e.f.* 08.03.1989 within the purview of Section 2 of the Nagaland Employment Act, 2009 as amended and also in terms of the finding of the Full Bench Judgment and Order by this Hon'ble Court on 22-01-2021 in **Writ Appeal No. 198/2019 Smti. Asangla Aier Vs. Smti Thungdeno Mozhui.**

[13] The learned Government Advocate further submits that the order dated 19.07.2022 was issued by mistake and duly rectified by the subsequent impugned order dated 22.12.2022. The stand taken by the state government in their advice dated 22.12.2022 on consultation with the Law & Justice Department, is with reference to their affidavit in opposition in another case in Civil Rule 120(K) 1993 with regards to the seniority of the parties in the above mentioned case, wherein the instant respondent no.3 was placed at sl. No.21 and the petitioner at sl.no.22 in the seniority list and their date of appointment as SDO was on 08.03.89, which was counted as their initial appointment. The learned Government Advocate thus states that the state government now cannot take a different date for the date of initial appointment of the Respondent No.3 and is precluded from taking a different stand under principle of estoppel.

14.] The learned Government Advocate also submits that on completion of the probation period, the respondent No. 3 submitted an application on 09-09-1991 to the Chief Engineer R&B Nagaland, Kohima praying for regularization of SDO post. In the said application, the respondent No. 3 have categorically mentioned about his joining in service in April 1989. Thereafter by a notification dated 07-10-1994, the services of the petitioner as well as the respondent No. 3 along with Seven (7) others were regularized after completion of their probation period of 2 years in their services from 08.03.1989. In the latest Civil List of 2020 as well as the PIMS it is shown all along, that the respondent No.3 and the State Government have accepted the entry date of respondent No. 3 as 08-03-1989. This clearly shows that for determination of length of service for pensionable service, the effective date of leave account becomes relevant and necessary and in the case of the respondent No. 3 which is 08-03-1989, from which date the pensionable service of respondent No.3 has to be computed, in terms of the Retirement Act, 1991 and O.M. dated 31.08.2012.

15.] Mr. C.T. Jamir learned Sr. Counsel for the private respondent No.3 submits that there has been series of litigation in the application of the Nagaland Retirement from Public Employment Act, 1991 (Retirement

Act), wherein the retirement of Government servant initial was to retire after completion of 33 yrs of service or reached the age of 57 yrs, which was then challenged but upheld by the Division Bench. Thereafter the Act was amended in 2007 and 2009 and the age for retirement on superannuation was raised to 60 yrs and the length of service required to be completed was raised to 35 yrs. This was again challenged by a group of Govt. employees Welfare Association which was dismissed and subsequently upheld by the Apex Court. That the instant case is not to do with the length of service to be counted as 35 years but whether the dates to be taken in computing the length of service of 35 yrs should be counted from 14.10.1987 when the respondent no.3 was appointed on contract basis as J.E (Civil) PWD, Kohima or from 08.03.1989 when the respondent no.3 was appointed as Asst. Engineer (Civil) vide notification dated 17.04.1989 *w.e.f* 08.03.1989.

16.] The learned counsel submits that what needs to be looked into is the definition of 'Public employment under section 2 of the Public Employment Act, 1991 (Retirement Act), wherein on reading of section 2(1) read with 3 (1) the Nagaland retirement from public employment Act, 1991 Section 2(1) states that **"Public Employment"** *means appointment to any pensionable State Public Service or posts connection with the*

affairs of the State of Nagaland held by persons prior to their absorption, under the Public Service of the State of Nagaland and the Nagaland Legislative Assembly which counts for the purpose of pension.

While section 3. (1) mentions that notwithstanding anything contained in any rule or orders for the time being in force, a person in public employment shall hold office for a term of thirty three years (later increased to 35 yrs by subsequent amendment) from the date of his joining public employment or until he attains the age of fifty seven years 60 yrs. by subsequent amendment) whichever is earlier.

Thus what is required is that the service has to be a pensionable service, but the act has not defined what was pensionable service. However the fundamental rule is that there should be no break in the service and the service should be continuous. The state of Nagaland has also adopted the CCS Pension rules 1972. Rule 13 and 14 of the CSS rules wherein a person is not eligible for pension if there is an interruption in the service.

The learned Sr. counsel also submits that in non of the judgments cited by the learned counsel for the petitioner, the court has not stated that pension should be counted even if there is break of service and none of the judgments cited has said that there can be a break in the service

for counting the pension.

17.] The learned Sr. Counsel for respondent no.3 thus submits that the respondent no.3 had submitted his resignation letter on 09.03.1989 and therefore he was not in service after the resignation letter till his appointment as Asst. Engineer (Civil) vide notification dated 17.04.1989 *w.e.f* 08.03.1989. What was the post he was holding after his resignation and before his appointment is not known and does not make sense to say that he was in service after his resignation after 09.03.1989. On 15.03.1989 there was an offer of appointment to the post of Assistant Engineer, thereafter he was appointed as Assistant Engineer vide notification dated 17.04.1989 *w.e.f* 08.03.1989. That the date 08.03.1989 was only for the purpose of seniority. On 17.04.1989 the respondent no.3 submitted his assumption of charge from which the pensionable date should be counted. The Act requires that the service should be a pensionable and the Accountant General/AG is the proper authority to clarify from which date the service of the respondent is to be counted for the purpose of pension. However, the A.G. has not been made a party. He submits that public employment should be a pensionable service and should count for pension from the date he was issued his pay slip which was from 18.04.1989 in the instant case.

18.] The learned Sr. counsel further submits that on 09.09.1991 the respondent no.3 submitted a prayer for regularization of his service from April 1991 since he has completed 2 years of probation from April 1989. The respondent was thus regularized vide notification dated October 94 where date of joining was taken as on 08.03.1989. The leave account was also maintained from 18.04.1989 by the AG. The learned Sr. Counsel also submits that the PIMS records and the State Civil List dated 01.01.2020 issued by P&AR Department shows that the initial appointment of respondent no.3 is recorded as on 08.03.1989 Nowhere has there been a mention of 14.10.1987 as the initial appointment of respond no.3 into government service, which suggest that his resignation letter to the post of Junior Engineer was officially accepted.

19.] The learned Sr. counsel has also brought to the notice of the court the order dated 19.07.2022 whereby the date of first entry into service of Respondent no.3 is show as 15.10.1987 and he was made to retire on 31.10.2022 after completion of 35 yrs of service. This order was not intimated to respondent no.3 immediately and on getting to know about this notification he submitted his representation on 28.09.2022 against the release order dated 19.07.2022. The Department on considering the issue involved had endorsed the matter to P&AR

Department for examination and recommendation. That the P&AR Department after thoroughly examining the issue and in consultation with Justice and Law Department had given its decision that the service of Respondent No. 3 should be counted from the date of taking over the charge as Assistant Engineer (SDO) *w.e.f.* 08.03.1989 as such, there is no legal infirmity as far as the Department issuing the impugned revocation of the retirement order of respondent No. 3 by Notification dated 22.12.2022 is concerned.

20.] The learned Sr. counsel for respondent No. 3 further submits that, the case of respondent No. 3 is not a case of alteration in the conditions of service, however, it is just a correction to any order by which respondent No. 3 was pre-maturely release from service as such, it does not attract Clause 24 of the Second Schedule to the Rules of Executive Business, 2020 referred by the petitioner as 'the Executive Business'. Further, the Notification dated 22.12.2022 is just an office order making a wrong done right and for which it does not violates Rule 10(1) and Rule (10)(6)(i) of the Executive Business as alleged by the petitioner.

21.] The learned Sr. counsel also submits that rule 12 &14 of CCS

Pension Rules states that commencement of qualifying service is from the date he takes charge without interruption by substantive appointment. Substantive appointment of the respondent no.3 was on 17.04.89, the earlier appointment as JE was a contract appointment and not pensionable post. That rule 28 CCS Pension rules also has provided for condonation for interruption of service however this condonation shall not apply to interruption caused by resignation dismissal or removal from service. The gap mentioned in in the OM dated 31.08.2017, paragraph No. 6, is with regards to technical break in the service and does not mean a break in service due to resignation.

22.] The learned Sr. Counsel further submits that the respondent No. 3 was serving as Junior Engineer on contract however, as soon as the NPSC declares its result and intimated him he had resigned and he was given fresh appointment as Assistant Engineer by Notification dated 17.04.1989, which is after a gap of 37 days from the date he had submitted his resignation on 09.03.1989, from the post of Junior Engineer which he was holding on contract basis. Hence, there is a service break resulted by resignation as provided by O.M dated 31.08.2017. On the other hand, the post of Junior Engineer held by Respondent No. 3 was not a pensionable post as the same was on contract.

23.] The learned Sr. Counsel submits that the contention that there is no specific order accepting the resignation submitted by Respondent No. 3, could imply that the respondent no.3 was still holding the post of J.E (Civil) till date which is not logical, whereas, the Notification dated 08.10.1994, the PIMS records and in the State Civil List dated 01.01.2020 issued by P&AR Department where his initial appointment is recorded as 08.03.1989, would which suggest that his resignation letter to the post of Junior Engineer was officially accepted.

24.] The learned Sr. Counsel also submits that even assuming but not admitting that there is continuity in service followed by regularization of the service of as stated by the petitioner, it is apparent from the salary statements, which shows that the respondent No.3 did not draw any salary for the month of March 1989, only from the month of April 1989, he had drawn his salary amounting to Rs.1092.90 as Assistant Engineer/SDO *w.e.f.* 18th April 1989 to 30th April and subsequently, he had drawn his salary for the month of May 1989.It is evident from the salary statement and several communication letters, that there is a gap in service between the contract period of Junior Engineer and the regular service of Assistant Engineer/SDO as such, the impugned Notification dated 22.12.2022 was not issued in contravention to the retirement Act as alleged by the

petitioner. That the respondent No.3 tendered resignation on 09.03.1989 to the post of J.E (contract), followed by intimation letter dated 13.03.89 and subsequently took over the charged of Assistant Engineer/SDO on 17.04.1989, on the same date the Notification dated 17.04.1989 for appointment was issued by the respondent with retrospective date *w.e.f* 08.03.1989/~~the~~ the date of recommendation made by the NPSC solely for the purpose of counting seniority.

25.] In support of his submissions the learned Sr. Counsel relied on the decisions of the Apex Court herein;

1. **2021 (2) GLT 710 para 21 &22 [Asangla T. Aier Vs Thungdeno Mozhu and Ors.]**
Continuity in service for counting past service
2. **2020(1) GLR 149 para 66 & 67 [Benjongtoshi and Ors. Vs State of Nagaland and Ors.]**
Continuity in service for counting past service.
3. **2012 (5) GLR 675 para 177 & 178 [R.T. Asang Jamir Vs State of Nagaland]**
Continuity in service for counting past service
4. **W.A, 177/2012 [Neise Mich Vs. State of Nagaland and Ors.]**
Continuity in service for counting past service

5. **1975 (4) SCC 7 para 8 [Shri Anil Kumar Chowdhury Vs. State of Assam and Others.]**

A miss is as good as a mile

6. **2006(2) SCC 482 para 21 [Union Public Service Commission Vs. Girish Jayanti Lal Vaghela and others]**

Contractual employee not Government servant.

7. **2019(4) SCC 479 para 22 [Senior Divisional Manager, Life Insurance Corporation of India Limited and others Vs Shree LalMeena]**

Definition of resignation.

8. **2004 (9) SCC 461 para 10 [Reserve Bank of India and another Vs Cecil Dennis Solomon and another]**

Definition of resignation

9. **2008(2) SCC 750 para 32 [Union of India and another Vs Narendra Singh]**

Mistakes can be corrected.

10. **Civil Appeal No.1789 of 2023 para 7 [Director General, Doordarshan Prasar Bharti Corporation of India & anr Vs. Smt. Magi H. Desai]**

Service rendered as casual/contractual cannot be said to be service rendered on substantive appointment.

11. **2022 SCC ONLINE GAU 940; (2022) 6 GAU LR 709 Imtirenla Jamir Vs. State of Nagaland. [Para 28]**

12. **(2010) 7SCC 643 para 17 Nagaland Senior Government Employees Welfare Assn.**

26.] I have heard and considered the submissions made by the learned counsels for both the parties.

27.] On reading of section 2(1) read with 3 (1) the Nagaland retirement from public employment Act, 1991 which is reproduce here below:-

2(1). "Public Employment" means appointment to any pensionable State Public Service or posts connection with the affairs of the State of Nagaland and the Nagaland Legislative Assembly and includes any appointment under the Government of India, any other State Government, Central or State Public Sector under taking and local authority held by persons prior to their absorption, under the Public Service of the State of Nagaland and the Nagaland Legislative Assembly which counts for the purpose of pension."

The Nagaland Retirement from Public Employment (Second Amendment) Act, 2009 at section 3 states that, *"the existing entry shall be substituted by the following section 3 (1): Notwithstanding anything contained in any rule or orders from the time being in force, a person in Public employment shall hold office for a term of 35 years from the date*

of joining public employment or until he attains the age of 60 years. Whichever is earlier. Section 3 (2): A person under public employment shall retire on the afternoon of the last day of the month in which he attains the age of 60 years, or in which he completes 35 years of public employment, whichever is earlier.

The Office Memorandum dated 31.08.2017 dealing with "Counting of contract/Adhoc/Work charged/substitute period for retirement purpose" more particularly paragraph-6, which reads as follows.

"Now, therefore, it has been decided that the period of service rendered on adhoc/contract/work charged/substitute, basis, which is followed by regularization or regular appointment without break; or any gap in service except resignation, shall be treated as public under the Nagaland Retirement from Public Employment (2nd Amendment) Act, 2009".

28.] From the above relevant sections of the Act and Office Memorandum dated 31.08.2017, the main point for consideration that emerges is that after the appointment of respondent 3, on contract basis as Junior Engineer (JE) (Civil) on 14.10.1987, whether, there was a break of service when the respondent no.3 submitted his resignation letter dated 09.03.1989 till the date when the respondent no.3 joined service as Assistant Engineer (Civil) on 17.04.1989 which was made *w.e.f.*

08.03.1989 (date of recommendation for selection as Assistant Engineer (Civil), thus whether there was a break of service between 09.3.1989 to 17.04.1989 which is 37 days. This court finds that if there is a break of service between 09.3.1989 to 17.04.1989 then the service rendered by the respondent 3 as J.E (Civil) from 14.10.1987 will not be pensionable posts, however, if it is without break of service it can be counted as pensionable post for retirement purposes after his regular appointment as Assistant Engineer on 17.04.1989 *w.e.f* 08.03.1998 .

29.] The impugned notification dated 22.12.2022 has set aside the notification 19.07.2022 whereby the date of first entry into service of Respondent no.3 is shown as 15.10.1987 and he was made to retire on 31.10.2022 after completion of 35 yrs of service. The impugned notification dated 22.12.22 was issued on the observation made by P&AR department in consultation with the Law department dated 20.12.2022. A perusal of the advice rendered by P&AR Department dated 20.12,2022 in consultation with the Law and Judicial department shows that the P & AR Department in an Affidavit in opposition filed by the state Government before the Gauhati High Court Kohima Bench on 07.09.2011 in Case No. Civil Rule 120(K) of 1993 wherein the state government had sworn that

the respondent no.3 had joined the service on 08.09.1989, relying on a notification dated 07.10.1994 which showed his date of joining of service *w.e.f* 08.03.1989. Thus the respondent was denied to compute length of his service and seniority from his first appointment as Junior Engineer on 14.10.1987.As a result the respondent was denied the privilege of being already as Engineer-in-chief. This shows that the state had considered the resignation letter of the respondent. The P & AR Department also stated that the state was not precluded by the principle of Estoppel to retract that the incumbent had joined service on 14.10.1987.The P&AR department also observed that "on perusal of the copy of the note at P.107/clears that on 08.03.1989, the NPSC has conveyed the recommendation of the name of respondent No.3 for the post of Asst. Engineer (SDO) under PWD. Thereafter, he tendered resignation on 09.03.1989 and although his name was recommended on 08.03.1989 he took over charge of Asst. Engineer (SDO) only on 17.04.1989 and thus the service of respondent no.3 may be referred to reckon the service of respondent no.3 from the date he took over charge *i.e* 17.04.1989.

30.] It is however noted that the above observation and advice dated 22.12.2022 rendered by the P&AR Department was made with regards to

the claim of seniority, wherein the respondent No.3 had claimed his seniority by counting his past service from the date of his appointment as J.E (Civil) on 15.10.1987 on contract basis. The state government and had however taken the stand that a notification dated 07.10.1994 showed his date of joining of service *w.e.f* 08.03.1989. Thus this court finds that the context under which the advice of the P& AP department was sought is quite different and should not have been relied upon for setting aside the notification 19.07.2022 while issuing the impugned order dated 22.12.2022.

It is also noted that the respondent No.3 in the above case had taken the stand to count length of his service for the purpose of seniority from his first appointment as Junior Engineer on 14.10.1987 which was opposed by the state. As a result the respondent was denied the privilege of being already as Engineer-in-chief.

31.] A perusal of the handwritten resignation dated 09.03.1989 reveals that he had resigned from his post as J.E(Civil) under the Estt. of SE-I PWD under the condition to enable him to join his new post as Asst. Engineer Civil PWD. No date was mentioned on which date the respondent no.3 was going to resign from his post as J.E (Civil).The appointment

order was issued only on 17.04.1989 and thus the respondent No.3 could join service as Asst. Engineer only on 17.04.1989 with was however made *w.e.f* 08.03.1998.

32.] On perusal of the judgments relied upon by the learned Mr. R. Iralu, Sr. Adv. for the petitioner, it is seen that the issues discussed in the cases are not relevant for the instant case except the decision of the Division Bench of this court in a common Judgment dated 24.02.2021 in **Smti. Intirenla Jamir vs. State of Nagaland & ors. (supra)** wherein it was observed by the learned Division bench of this Court that :

“29. The Office Memorandum dated 29.03.2017 was issued by the Government purportedly in exercise of the powers under [Section 5](#) of the Nagaland Act on the subject - 'Counting of Contract/Ad-hoc/Work-Charged/Substitute Period for Retirement Purpose', when clarifications were sought by different departments from time to time as to whether the services rendered in contract/ad-hoc/work-charged/substitute capacity prior to regular appointment made through the NPSC or Departmental Selection Board or any other prescribed procedure shall count as public employment for the purpose of calculation of length of service under the [Nagaland Act](#). Clause 6 thereof has provided that the period of service rendered on contract/ad-hoc/work-charged/substitute basis which is followed by regularization or regular appointment without any

break or gap in service shall be treated as public employment and shall be included in computation of length of service for the purpose of pension under the Nagaland Retirement from Public Employment (Second Amendment) Act, 2009. It has further clarified that in case of resignation simpliciter, the period of service rendered on contract/ad- hoc/work-charged/substitute basis shall not be counted. It has also clarified that if resignation was tendered to take up with proper permission another appointment, the period of service rendered on contract/ad-hoc/work-charged/substitute capacity shall be treated as public employment and shall be counted for the purpose of pension under the Nagaland Retirement from Public Employment (Second Amendment) Act, 2009. Though the clarifications made in the Office Memorandum dated 29.03.2017 is not specifically applicable to the case in hand in view of the fact that it involves an issue regarding counting of past service or otherwise rendered in a regular post which is a pensionable service if the employee joins another post in the State Civil Service under the same Government pursuant to selection by the NPSC but the Office Memorandum, in essence, embodies the same principle as incorporated in Rule 26 of the CCS (Pension) Rules.

36. It is settled that resignation involves a voluntary act on the part of the employee to leave service and it can be tendered at any time. A resignation may be prospective to be operative from a future date and in that event it will take effect from the

date indicated therein and not from the date of submitting the letter of resignation. In Motiram vs. Param Dev, (1993) 2 SCC 725, the concept of resignation has been interpreted as an act of giving up or relinquishing an office and in order to constitute a complete and operative resignation there must be the intention to give up or relinquish the office and the concomitant act of its relinquishment. Such act of relinquishment may take different forms or assume a unilateral or bilateral character, depending on the nature of the office and the conditions governing it. If the act of relinquishment is of unilateral character, it comes into effect when such act indicating the intention to relinquish the office is communicated to the competent authority. The authority to whom the act of relinquishment is communicated is not required to take any action and the relinquishment takes effect from the date of such communication where the resignation is intended to operate in present. A resignation may also be prospective to be operative from a future date and in that event it would take effect from the date indicated therein and not from the date of communication. In cases where the act of relinquishment is of a bilateral character, the communication of the intention to relinquish, by itself, would not be sufficient to result in relinquishment of the office and some action is required to be taken on such communication of the intention to relinquish by accepting such request and in such a case the relinquishment does not become effective or

operative till such action is taken. It has been held that as to whether the act of relinquishment of an office is unilateral or bilateral in character depends upon the nature of the office and the conditions governing it. It has been further observed that in so far as government employees are concerned, there are specific provisions in the service rules which require acceptance of the resignation before it becomes effective.

37. The nature and manner in which a government employee is seeking determination of his/her employment by way of relinquishment is also dependent upon the preceding, attending and succeeding events and circumstances surrounding such an act of relinquishment and the manner in which the same was sought to be and has been construed and treated by the parties. To be a resignation simpliciter, it must be unconditional. The intention of the employee to sever the ties with the employer must be complete without any condition attached to it and the acceptance of the same by the employer must also be without any condition for a resignation to be treated as resignation simpliciter with complete forfeiture of the past service rendered by such employee with the employer.”

33.] From the above observations it is seen that the resignation letter submitted by the respondent no3 is not a resignation simpliciter since the resignation letter is with a condition that he may be enabled to join his

post as Assistant Engineer (Civil). There is no mention of the effective date of the resignation. Thus this court is inclined to agree with the submission made by the learned Sr. counsel for the petitioner that there was no break in service when the respondent submitted his conditional resignation letter dated 09.03.1989 since, when he joined service as Asst. Engineer (Civil), PWD on 17.04.1998 it was *w.e.f* 08.03.1989. As such, the resignation cannot also be said to be a resignation that would entail forfeiture of past service. Such a resignation would therefore be covered under Rule 26(2) of the Central Civil Service (Pension) Rules, 1972 and in accordance with section 3(10 & 3 (2) of the Nagaland Retirement from Public Employment Act, 1991 & the O.M. dated 31.08.2017.

34.] It is also seen that the payslip of respondent no.3 was issued counting from the date of joining on 14.10.1998 and from the salary statements, it appears that he did not draw any salary for the month of March 1989 but this inference is taken only from the pay slip made on the appointment of Respondent no.3 as Asst. Engineer (Civil). There is no detail with regards to the pay drawn by the Respondent 3 while he was holding the post of J.E (Civil). No salary statement of Respondent no.3 as Junior Engineer has not been produced by the neither of the parties. For which this court is not inclined to discuss the issue further in view of the

above findings. This court also notes that the date of joining service in the past of SDO by the respondent No.3 was taken as 08.03.1989 for the purpose of seniority and for regularization of the service of respondent No.3 on completion of 2 years of probation. This date of joining on 08.03.1989 for the purpose of seniority need not be confused with the concept of pensionable post discussed above.

35.] For the above reasons this court is constrained to dismiss the submission made by the learned counsels for the respondents that there was a break in the service of the respondent no.3 in filing the resignation letter dated 09.03.1989 which resulted in making the appointment of respondent no.3 as J.E (Civil) an non-pensionable post, and thus quash and set aside the impugned notification dated 22.12.2022.

36.] Accordingly WP(C) No.2 of 2023 stands allowed and disposed of.

JUDGE

Comparing Assistant