

GAHC010085722020



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

Case No. : WP(C)/2570/2020

HITENDRA KR. DUTTA
S/O- LATE NANDESWAR DUTTA, R/O- HINDUGAON, WARD NO.5, P.O-
NORTH LAKHIMPUR, DIST- LAKHIMPUR, ASSAM, PIN- 787001

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP. BY THE COMMISSONER AND SECRETARY TO THE GOVT OF ASSAM,
DEPTT OF AGRICULTURE, DISPUR, GUWAHATI- 06

2:THE COMMISSIONER AND SECRETARY
GOVT OF ASSAM
DEPTT OF PENSION AND PUBLIC GRIEVANCES
DISPUR
GUWAHATI- 06

3:THE DIRECTOR OF AGRICULTURE
ASSAM
KHANAPARA
GUWAHATI- 22

4:THE ACCOUNTANT GENERAL (A AND E)
ASSAM
MAIDAMGAON
BELTOLA
GUWAHATI- 29

5:THE SECRETARY POLITICAL (VIGILANCE CELL) DEPTT
GOVT OF ASSAM
DISPUR
GUWAHATI- 0

Advocate for the Petitioner : MR. P N GOSWAMI

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

ORDER

Date : 10-06-2024

Heard Mr. S. Banik, learned counsel for the petitioner as well as Ms. R. Bora, learned standing counsel for the Agricultural Department representing respondent nos.1 and 3; Ms. M. Bhattacharjee, learned Govt. Advocate appearing for the respondent nos.2 and 5 and Mr. D. Bhattacharya, learned standing counsel for the respondent no.4.

2. The case of the petitioner in brief is that while holding the post of Joint Director of Agriculture, (NZ-II), Dhemaji, he had superannuated from service on 28.02.2018. The background fact is that purportedly which is commonly known as scam for green house-cum- rain shelter scheme happened in the year 1999. A formal FIR about the said case was lodged on 02.09.2002. The Court of Special Judge, Assam took cognizance of the offence by an order dated 31.03.2012. The petitioner has approached this Court for quashing of the FIR as well as the criminal proceedings.

3. By referring to the order dated 25.06.2013 passed by the Supreme Court of India in SLP Criminal nos.5083/2013, it is stated by the learned counsel for the petitioner that the proceedings of Special case no.19/2012, which was pending before the Court of Special Judge, Assam, Guwahati, arising out of Vigilance P.S. case no.2/2004 and Special case no.24/2012 arising out of Vigilance P.S. case no.1/2004 was stayed. In the

meanwhile, as stated above, the petitioner had superannuated from service on 28.02.2018.

4. The Director of Agriculture, Assam by letter dated 25.07.2018, forwarded the pension papers of the petitioner to the Commissioner and Secretary to the Govt. of Assam, Agriculture Department and accordingly, the said authority had submitted a proposal to the Government for sanction of GIS Saving Fund of the petitioner by letter dated 30.11.2018.

5. In the meanwhile, provisional pension was sanctioned to the petitioner by order dated 18.04.2019, pending issuance of the final pension payment order by the Accountant General (A&E), Assam.

6. The learned counsel for the petitioner, by referring to the judgment and order dated 20.05.2014, passed in *WP(C) 4999/2013 – Nurul Islam v The State of Assam and ors.*, has submitted that under similar circumstances, by interpreting the provision of Rule 21 of the Assam Services (Pension) Rules, 1969, this Court had held to the effect that when a criminal proceeding pending against the petitioner is found to be barred by Rule 21(c) of the Assam Services (Pension) Rules, 1969 on the ground that it was instituted in respect of the event which had taken place for more than 10 years before his retirement, Rule 22 cannot be taken recourse to by the respondent authorities to withhold his final pension. Accordingly, this Court had interfered with the denial of final pension to the petitioner in the said writ petition. The said case is cited for granting relief because on facts, the said case is similar to the petitioner.

7. The learned counsel for the petitioner has also submitted that the observation of the Court in connection with clause-c of Rule 21 of the Assam

Services (Pension) Rules, 1969, not being applicable in the case of the petitioner under the facts of this case where cognizance has already been taken on 31.03.2012. However, he also submits that the observations made in paragraph-10 of the said order whereby this Court had observed that the seriousness or gravity of the offence for which the petitioner is charged cannot be a ground for denial of final pension payable to him under the law. The said contention is being relied upon by the learned counsel for the petitioner.

8. It was submitted that for the period during which the proceeding of Special Case no.19/2012 was stayed has to be construed as if there was no criminal proceeding pending against the petitioner. The learned counsel for the petitioner, in order to support the said contention, has placed reliance on the case of *B.P.L. Ltd. and Ors. v R. Sudhakar and ors., (2004) Supp 2 SCR 414: AIR 2004 SC 3606*.

9. It is submitted that although for the purpose of showing case pendency, the said Spl. Case no.2/2012 may be reflected as a pending matter, but the Supreme Court has interpreted that if any pending proceeding have been stayed, as the proceedings cannot continue and the parties cannot approach the Court for new order, such period will not be calculated as a period during which proceeding is pending as there was no proceeding pending before the learned trial Court.

10. Per contra, the learned standing counsel for the Agricultural Department as well as the learned Senior Govt. Advocate have both referred to the provision of Rule 21 of the Assam Services (Pension) Rules, 1969 to project that as the criminal trial is pending for adjudication, the respondent authorities have a right to withhold the disbursement of the final pension. It is submitted that the petitioner is getting the interim pension subject to finalization of the

final pension. It is also submitted that the financial implication of the scam to the State Exchequer, in which the petitioner was charged was to the extent of about 7.00 crores against supply of a particular item, which was sub-standard or inferior quality and the same was procured at an exorbitant rate.

11. It was also submitted that the Pension and Public Grievances Department, by a notification dated 21.06.2012, had issued a direction to the effect that during the pendency of the departmental or judicial proceeding no DCRG shall be paid until the conclusion of such proceeding and till the issue of final orders thereon. Accordingly, it is submitted that the respondent authorities have rightly withheld the pension of the petitioner.

12. On a perusal of the said provision, it appears that the pre-condition to withhold the pension is that the authorized officer acting in the name of the Governor of Assam reserves the right of withholding the pension or any part thereof. It is also observed that such right can be reserved if in a departmental or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence during the period of his service. In the present case in hand, there is no record of departmental proceedings where the petitioner has been found guilty of great misconduct or existence of any record of the petitioner being held guilty in any judicial proceeding.

13. By an order dated 25.06.2013, passed by the Supreme Court of India, in SLP (Crl) no.5080/2013, the proceedings of Vigilance P.S. case no.2/2004 corresponding to Special case no.19/2012 was stayed. This Court in the case of *Sri Satya Narayan Prasad Gupta v. The State of Assam and ors.*, 2015 (4) GLT 905: (2015) 5 GLR 307, by referring to Rule 21 of the Assam Services (Pension) Rules, 1969, had held that under the Assam Services (Pension) Rules, 1969, the State had no power to withhold the pension amount.

Arriving at the said finding, this Court had placed reliance on the provisions of Rule 43(b) of the Bihar Pension Rules as applicable to the State of Jharkhand as well as to the judgment of the Supreme Court of India in the case of *State of Jharkhand v. Jitendra Kumar Srivastava (2013) 12 SCC 210*, to hold that under Rule 43(b), pension can be withheld only where a finding is recorded either in the departmental inquiry or judicial proceeding that the employee had committed grave misconduct in the discharge of his duty while in office.

14. In this regard, this Court has perused the relevant provision of the Rule 21 of the Assam Services (Pension) Rules, 1969.

15. In this case, there is no finding recorded by Judicial Court that the petitioner has been found guilty of grave misconduct or negligence during the period of his service rendered. Although the proceeding against the criminal case has commenced while taking cognizance of the offence by order dated 31.03.2012, but accordingly to the learned counsel for the petitioner, the period within which the stay was operating cannot be said to be a period where the criminal proceeding can be said to be pending.

16. The provisions of sections 21 and 22 of the Assam Services (Pension) Rules, 1969 are quoted below:-

21. "The Governor of Assam reserves to himself the right of withholding or withdrawing a pension or any part of it whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if in a departmental or judicial proceeding the pensioner is found guilty of grave misconduct or negligence during the period of his service, including, service rendered upon re-employment after retirement; provided that—

(a) such departmental proceeding, if instituted while the officer was in service, whether before his retirement or during his re-employment, shall, after the final retirement of the officer, be deemed to be a

proceeding under this rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the officer had continued in service;

Explanation. The continuation of the proceeding after the final retirement of the officer shall be automatic under sub-R. (a) of R. 21 and no fresh decision of the Governor and/or the Appointing Authority nor any show cause notice to the person concerned shall be necessary.

The powers under R. 21 shall be exercisable not only in case of causing pecuniary loss to Government but also in all other cases ;

(b) such departmental proceeding, if not instituted while the officer was in service, whether before his retirement or during his employment—

(i) shall not be instituted save with the sanction of the Governor of Assam;

(ii) shall not be in respect of any event which took place more than 4 years before such institution ; and

(iii) shall be conducted by such authority and in such place as the Governor of Assam may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the officer during his service;

(c) no such judicial proceeding, if not instituted while the officer was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or an event which took place more than 4 years before such institution ; and

(d) the Assam Service Commission shall be consulted before final orders as passed.

Explanation. For the purpose of this rule—

(a) a departmental proceeding shall be deemed to be instituted on the date on which the statement of charges is issued to the officer or pensioner, or if the officer has been placed under suspension from an earlier date, on such date ; and

*(b) a judicial proceeding shall be deemed to be instituted—
(i) in the case of a criminal proceeding, on the date on which the complaint or report of police officer, on which the Magistrate takes cognizance, is made, and*

(ii) in the case of a civil proceeding, on the date of presentation of

the plaint in the Court.

22.(1) Where any departmental or judicial proceeding is instituted under R. 21 or where a departmental proceeding is continued under Cl. (a) of the proviso thereto against an officer who has retired on attaining the age of compulsory retirement or otherwise, he shall be paid during the period commencing from the date of his retirement to the date on which upon conclusion of such proceeding, final orders are passed, a provisional pension not exceeding the maximum pension which would have been admissible on the basis of his qualifying service up to the date of retirement, or if he was under suspension on the date of retirement, up to the date immediately preceding the date on which he was placed under suspension ; but no gratuity or death-cum-retirement gratuity shall be paid to him until the conclusion of such proceeding and the issue of final orders thereon.

(2) Payment of provisional pension made under Cl. (1) shall be adjusted against the final retirement benefits sanctioned to such officer upon conclusion of the aforesaid proceeding but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period."

23. On a conjoint reading of the provision of section 21 as well as Explanation (b) thereto would show that for the purpose of Rule 21, a judicial proceeding shall be deemed to be instituted (i) in the case of a criminal proceeding, on the date on which the complaint or report of the police officer, on which the Magistrate takes cognizance, is made.

24. In the present case in hand, the I.O. of Vigilance P.S. Case No. 2/2004, had submitted charge-sheet against 41 accused persons including the petitioner on 30.03.2012. The learned Special Judge, Assam vide order dated 31.03.2012, took cognizance of the offence under sections 109, 468, 471, 420, 120-B IPC committed by all the 41 accused persons including the petitioner. It may be stated that in this regard, the learned counsel for the petitioner had

submitted that the taking of cognizance of offence committed by the petitioner without any sanction of prosecution as required under section 197 CrPC and section 19 of the Prevention of Corruption Act, 1988 is being examined by the Supreme Court of India in SLP (Crl.) No. 5047/2013 and 17 (seventeen) other connected SLPs. In this regard, having noted that in the meanwhile, the petitioner has superannuated on 28.02.2018, we are not inclined to make any comment on a matter which is *sub judice* before the Supreme Court of India.

25. The allegation against the petitioner and other co-accused is that they had caused pecuniary loss to the State exchequer to the extent of about Rs.7.00 Crore.

26. Be that as it may, the petitioner has admitted that he is being paid provisional pension. In this regard, it is seen that by applying the provisions of Rule 22(1) of the Assam Services (Pension) Rules, 1969, as a judicial proceeding has been instituted against the petitioner, the respondents have granted provisional pension to the petitioner.

27. The learned counsel for the Agriculture Department has submitted that as per the provision of section 21 of the Assam Services (Pension) Rules, 1969, the Governor must pass an order to withhold the salary. In this regard, we are inclined to hold that as charge- sheet had been submitted by the I.O. of Vigilance P.S. Case No. 2/2004 corresponding to Special Case No. 19/2012, before the competent Court i.e. Court of Special Judge, Assam, Guwahati on 30.03.2012, and cognizance of commission of offence committed by the petitioner and other co-accused was taken by order dated 31.03.2012 and thereafter, the petitioner had superannuated on 28.02.2018, as per Rule 21, there was no necessity for the Governor of Assam to pass any order. The criminal proceeding is deemed to be continuing since 31.03.2012, till its

disposal.

28. The learned counsel for the petitioner had placed reliance on the decision of the Supreme Court of India in the case of *B.P.L. Ltd. (supra)* to project that as the trial of Special Case No. 19/2012, arising out of Vigilance P.S. Case No. 2/2004 was stayed by the Supreme Court of India by order dated 25.06.2013, passed in SLP (Crl.) No. 5080/2013 and therefore, although for the purpose of statistics, the said case exists, but no trial is pending against the petitioner.

29. In the said regard, the Court cannot accept the said contention of the learned counsel for the petitioner because on facts the case of *B.P.L. Ltd. (supra)* is distinguishable from the facts of this case. As per the facts of the said cited case, it can briefly be stated that a reference regarding industrial dispute was made by the Government. In the said context, it was held by the Supreme Court of India to the effect that the Tribunal gets jurisdiction only on reference made by the Government and that when the operation of the very order of reference was stayed, the question of dispute pending before the Tribunal did not arise inasmuch as the reference order itself stood suspended. It was further held to the effect that so long as stay order was operating it could not be said that the dispute was pending before the Tribunal. It was further observed that once the operation of order of reference is stayed there is no question of dispute pending before the Tribunal so long as the said order remains in operation because reference precedes dispute. It was further explained to the effect that to put it differently, dispute could come up for adjudication by the Tribunal pursuant to the order of reference only and that if in a pending proceeding operation of order is stayed pending disposal of the main matter such as an appeal or revision, obviously the impugned order does not get

quashed or wiped out, it only remains suspended, but it was not a case where the dispute was pending and only further proceedings were stayed. In the said context, it was held that when the order of reference itself was stayed the Tribunal did not have the jurisdiction to pass any further order.

30. The interpretation of stay of reference in connection with an industrial dispute as decided in the case of *B.P.L. Ltd. (supra)* cannot be applied in the case where the criminal trial had been stayed. In the present case in hand, the Supreme Court of India, by order dated 25.06.2013, passed in SLP (Crl.) No. 5080/2013, had merely stayed the trial. This is not a case where the charge-sheet submitted against the petitioner was stayed and therefore, in this case in hand, a criminal trial against the petitioner shall be deemed to have commenced on 31.03.2012, when the learned Trial Court had taken cognizance of the offence committed by the petitioner and other co-accused. Hence, in the present case, the mere stay of trial cannot be interpreted to mean as if no trial pending against the petitioner.

31. Therefore, the Court is of the considered opinion that the petitioner has not been able to make out a case for issuance of a direction upon the respondent authorities to release full pension to the petitioner.

32. Hence, the petitioner is not found entitled to any relief in this writ petition and accordingly, this writ petition fails and is thus, dismissed, without any order as to cost.

33. None of the observations made in this order shall prejudice the petitioner during his trial in the criminal proceeding referred above.

JUDGE

Comparing Assistant