

GAHC010213282023



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

Case No. : WP(C)/5578/2023

PINUEL BASUMATARY
S/O LATE KRISTODAS BASUMATARY, R/O NO. 1, SAPKHAITI, UDALGURI-
784509, BTR, ASSAM-781003

VERSUS

THE STATE OF ASSAM AND 4 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM, ADMINISTRATIVE REFORMS AND TRAINING
DEPARTMENT, DISPUR, GUWAHATI-781006

2:THE PENSION AND PUBLIC GRIEVANCE DEPARTMENT
REPRESENTED BY THE SECRETARY
DISPUR
ASSAM
GHY-06

3:THE ACCOUNTANT GENERAL (A AND E)
ASSAM
MAIDAMGOAN
BELTOLA
GUWAHATI-29

4:THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF
ASSAM
FINANCE (EC-III) DEPARTMENT
DISPUR
ASSAM
GHY-0

Advocate for the Petitioner : MR B D DAS

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

ORDER

Date : 28.06.2024

Heard Mr. B. D. Das, learned Senior Counsel assisted by Mr. J. Lotha, learned counsel for the petitioner. Also heard Mr. B.J. Talukdar, learned Senior Government Advocate assisted by Mr. P.K. Medhi, learned counsel for the respondent and Mr. R. K. Talukdar, learned Standing Counsel, Accountant General.

2. This writ petition is filed by the writ petitioner aggrieved by denial of the benefit of additional pension and gratuity and the facility of the service of one Telephone and one Security Assistant (TSA). This claim of benefits was rejected by the respondent authorities vide the impugned order dated 12.04.2023.

3. The petitioner was a former State Information Commissioner, who served for the period from his appointment dated 31.07.2015 till 31.12.2019. The petitioner was a Civil servant and a member of the Indian Audit Service. He demitted his office as an OSD in the Office of the Principal Accountant General, A&E, Assam. By order dated 31st of 2015, the petitioner was appointed as the State Information Commissioner in Assam. The period of appointment was for five years. After the completion of his tenure, he demitted his office as the State Information Commissioner. According to the petitioner, his salary, allowances and other entitlements as per the provisions of the Right to Information Act, 2005 was not given to him by the respondent department. In terms of Section 16 (5) under the Right to Information Act, 2005, salary and allowances payable

and other terms and conditions of service of the State Information Commissioner shall be the same as that of a Chief Secretary of the State. In view of such statutory provision, the petitioner claimed his salary and allowances and other benefits payable to him equivalent to that of a State Chief Secretary pursuant to his appointment as State Information Commissioner, which however was denied to him.

4. The learned counsel for the petitioner submits that where the statute according to the Right to Information Act under the pre-amended provision of Section 16(5) under terms and conditions prescribed under the Right to Information Act, 2005, the terms and conditions for the state chief information commissioner the tenure and the terms and conditions under which the state chief information commissioner is the state information commissioner and the state chief information commissioner hold offices are prescribed.

5. Under Section 16 (5) Right to Information Act, 2005 prior to its amendment in 2019, it was provided that the salaries and allowances payable to and the other terms and conditions and services of the State Information Commissioner shall be the same as that of the Chief Secretary of the State Government. And it was provided also, that at the time of appointment, if they were in the receipt of a pension in respect of any previous service of the Government of India or under the Government of a State, the salary in respect of the service of the State Information Commissioner shall be reduced by the amount of that pension, including any portion of the pension which was commuted and pension equivalent of other forms of the retirement benefits. The learned counsel for the petitioner submits that since the benefits were not granted, he had earlier approached this Court by filing WP(C) No.4497/2021 and by order dated 16.11.2022, the respondents were directed to redress the grievances of the writ

petitioner and pass an appropriate order.. In deference to the order passed earlier by this Court, the respondent authorities have passed the impugned order. However, while doing so, they have referred to a judgment of a Division Bench rendered by this Gauhati High Court (Itanagar Bench) which was rendered different facts and circumstances and context and consequently rejected the claim of the writ petitioner. It is submitted that the respondent authority by the impugned order dated 12.04.2023 placed reliance on the judgment rendered by a Division Bench of this Court in *Eken Riba and Ors. Vs State of Arunachal Pradesh and Ors.* reported in 2022 (2) GLT 474. In the said matter, the claims of the petitioners therein, who were also State Information Commissioners, were that they should also be granted the salary equivalent to that of the State Chief Information Commissioner. On the facts and circumstances of the case, the said judgment of the Division Bench rejected the contentions of the petitioner.

6. The learned counsel for the petitioner submits that relying on the Judgment of the Division Bench, the respondent authorities held that in order to be entitled for pension under the CCS Pension Rules, 1972, more particularly, Rule 49, there is also a corresponding requirement for a minimum qualifying service of the person concerned, who have served and the minimum qualifying service was 10 (ten) years. But since under the provisions of Right to Information Act, 2005 relating to appointment of State Information Commissioner, term of appointment for the period was found to be 5 (five) years and the minimum qualifying period of 10 (ten) years of service having not been satisfied, the case of the petitioner was rejected.

7. The learned counsel for the petitioner has strongly urged that the facts and circumstances involved in the judgment rendered by the Division Bench of this

Court in *Eken Riba and Ors. (supra)* is entirely different from the facts and circumstances of the present case. He further submits that a similar issue came up before the Kerala High Court and by Judgment and Order dated 11.04.2023, the Kerala High Court allowed a similar claim of the petitioner therein. He has pressed into service the judgment of the Kerala High Court in this context to submit that where the provisions of the RTI Act specifically grants the benefits sought for by the petitioner, the same cannot be taken away by the respondent authorities without there being an amendment of the relevant sections. It is also submitted that the State Chief Information Commissioner has already been released the benefits as payable under Section 16(5) including additional pension.

8. The respondents have contested the matter by filing their affidavits and have held that since a Division Bench of this Court has already rendered the view that to avail the claim of the benefit as claimed by the writ petitioner, the requirement of 10 (ten) years of minimum service is necessary and since the petitioner does not possess the same, it was rightly rejected by the department and therefore, there is no infirmity in the impugned order issued by the competent authority.

9. The learned counsels for the parties have been heard. Pleadings on record have been carefully perused. Before proceeding further to decide the controversy before this Court, it is necessary to refer to the relevant provisions of the Act. Section 16 of the Right to Information Act is relevant, more particularly, Section 16 (5) of the Right to Information Act.

10. The Section 16 (5) of the Right to Information Act, 2005 prior to its amendment in 2019 is extracted below:-

“16. Term of office and conditions of service.

(1).....

(2).....

(3).....

(4).....

(5) The salaries and allowances payable to and other terms and conditions of service of the State Chief Information Commissioner and the State Information Commissioners shall be such as may be prescribed by the Central Government:

Provided that the salaries, allowances and other conditions of service of the State Chief Information Commissioner and the State Information Commissioner shall not be varied to their disadvantage after their appointment:

Provided further that the State Chief Information Commissioner and the State Information Commissioner appointed before the commencement of the Right to Information (Amendment) Act, 2019 shall continue to be governed by the provisions of this Act and the rules made thereunder as if the Right to Information (Amendment) Act, 2019 had not come into force.”

11. The petitioner was appointed as the State Information Commissioner by order dated 31.07.2015 and in the said appointment order it was specified clearly that his term of office and conditions of service will be regulated as per the provisions of Section 16 RTI Act, 2005. Under such circumstances, it is relevant to referred to the provisions of Section 16(5) of the Right to Information Act, 2005 prior to its amendment in 2019 as the same is relevant for the purposes of this particular case.

12. Section 16(5) of the Right to Information Act, 2005 prior to its amendment in 2019 clearly provided that the salaries and allowances payable to the State Information Commissioner shall be the same as that of the Chief Secretary to

the State Government.

13. In this context, it is necessary to refer to the judgment passed by the Co-Ordinate Bench in a petition filed by the writ petitioner in the earlier round of litigation. The writ petitioner and another similarly situated person had approached this Court by filing WP(C) No. 4497/2021, which came to be disposed of by the Co-Ordinate Bench on 16.11.2022. This writ petition was preferred by writ petitioner and another was on the exact question of whether the State Information Commissioner will be entitled to the retirement benefits, including pensionary benefits and other service benefits, in terms of the condition of the service equivalent to that of the Chief Secretary of the State. The order dated 16.11.2022 passed in WP(C) No. 4497/2021 is extracted below:-

“16.11.2022

Heard Mr. BD Das, learned senior counsel for the petitioner in WP(C)No.4569/2021 and Mr. S Chamaria, learned counsel for the petitioner in WP(C)No.4497/2021. Also heard Mr. H Sarma, learned Additional Senior Government Advocate for the State respondents as well as Mr. B Chakraborty and Mr. RK Talukdar, learned counsel respectively for the authorities under the Accountant General (A & E), Assam in the two writ petitions.

2. Nilufer Alom Hazarika, the petitioner in WP(C)No.4497/2021 was appointed as a State Information Commissioner, Assam as per the order dated 03.03.2016 and continued up to 05.04.2020, whereas Pinuel Basumatary, the petitioner in WP(C)No.4569/2021 was also appointed as a State Information Commissioner, Assam by the order dated 31.07.2015 and continued upto 31.12.2019. Upon the retirement of the two writ petitioners, by their respective writ petitions, claim for their retirement benefits including pension and other entitlements under the service conditions.

3. Mr. BD Das, learned senior counsel refers to Section 16(5) of the Right to Information Act, 2005 (for short, the RTI Act of 2005) as it stood prior to the amendment in the year 2019 which provides that the salaries and allowances payable and other terms and conditions of the State Information Commissioner shall be same as that of the Chief Secretaries of that State. Accordingly, Mr. BD Das, learned senior counsel for the petitioner in WP(C)No.4569/2021 supported by Mr. S Chamaria, learned counsel for the other writ petitioner in WP(C)No.4497/2021 make a claim that the two writ petitioners are entitled to the retirement benefits and other service benefits including pension in the same terms as that of the Chief Secretary to the Government of Assam.

4. The respondents by their affidavit-in-opposition in page 15 paragraph 9 has taken a stand that as the petitioners have not retired as Chief Secretaries or served in the equivalent rank of an officer of the State of Assam. Therefore, the claim of the writ petitioners for their retirement benefit and other service benefits in the same terms as that of the Chief Secretaries was rejected.

5. In the conspectus of the aforesaid facts, the question for determination in these writ petitions is as to whether the two writ petitioners having served as State Information Commissioner are entitled to their retirement benefits including pensionary benefits and other service benefits as per the terms and conditions of service equivalent to that of the Chief Secretary of the State.

6. The stand of the respondents in their affidavit is that the petitioners would not be entitled as because they had not served as Chief Secretary nor have served in any equivalent rank as that of the Chief Secretary. Fundamentally, the said stand would be acceptable inasmuch as admittedly the petitioners have not served as the Chief Secretary nor had served as an officer in the rank equivalent to the Chief Secretary, but Section 16(5) of the RTI Act of 2005 creates a legal fiction in favour of the State Information Commissioner that by virtue of having been appointed and served as State Information Commissioner they would be entitled to salaries and allowances payable and other terms and conditions of service, same as

that of the Chief Secretary of the State.

7. In view of the legal fiction under Section 16(5) of the RTI Act of 2005, wherein it is a statutory provision that the salaries and allowances payable and the other terms and conditions of service of the State Information Commissioner shall be same as that of the Chief Secretaries of the State, the stand of the respondents that as the two writ petitioners have neither served as Chief Secretaries nor in the rank equivalent to Chief Secretaries, they would be disentitled to the benefits of salaries and allowances and other benefits of that of the Chief Secretaries of the State would be unacceptable in law, inasmuch as by virtue of the legal fiction under Section 16(5) they would be so entitled as statutorily provided. Accordingly, the respondents are directed to pass a reasoned order on the claim of the two writ petitioners for their service benefits including retirement benefit and pension, if applicable, in the same terms and conditions as that of the Chief Secretary to the Government of Assam.

8. The reasoned order be passed within a period of two months from the date of receipt of the certified copy of this order.

9. If any further grievance of the petitioners remain on any such order that may be passed, liberty remains to approach again.

10. Writ petitions stand allowed in the above terms.”

14. A careful perusal of the said order reflects that at paragraph 7 of the said order, the Co-Ordinate Bench had returned a finding that the stand of the respondents therein that the two writ petitioners having either served as Chief Secretaries nor in the rank equivalent to Chief Secretaries would not be entitled to the benefits of salaries or allowances or other benefits of that of the Chief Secretaries, was turned down and held to be unacceptable. It was held that in view of the legal fiction under Section 16 (5) of the RTI Act they would be statutorily entitled as provided for to the terms and conditions and salaries and

allowances of that of the Chief Secretary of the State.

15. In the opinion of this Court, there is a clear finding by the Co-Ordinate Bench in the earlier round of litigation that in view of the legal fiction created under section 16 (5) of the RTI Act, the petitioners will be entitled to the benefits as prescribed under the statute. Nevertheless, the Co-Ordinate Bench disposed of a writ petition directing the authorities to pass a reasoned order within a period of 2 (two) months and in deference thereof, the impugned order dated 12.04.2023 was issued by the respondent authority rejecting the claims by placing reliance on the judgment of *Eken Riba and Ors. (supra)*.

16. The judgment rendered by *Eken Riba and Ors. (supra)* does not reveal clearly as to whether the petitioners therein were similarly situated like that of the present petitioner. The present petitioner is a member of a Union civil service and he superannuated as the OSD in Office of the Principal Accountant General. Under such circumstances, the petitioner being a member of the Union Civil Service is entitled to be governed by the CCS Pension Rules, 1972. Under Rule 49 of the CCS Pension Rules, it is clearly provided that in case of a government servant retiring in accordance with the provisions of the Rules, the government servant would be entitled to pension as provided for under the said Rules. Under Rule 3(1)(i) Government is defined as Central Government. Rule 13 provides for qualifying service of the government servants. From a perusal of the various provisions of the CCS Pension Rules, 1972, it is clear that a member of a service, who superannuated from the services in terms of the Rules will be entitled to pension as provided in the under Rule 49 of the CCS Pension Rules, 1972. There is no dispute that the present petitioner is drawing his pension after superannuating from his services under the Union. Under such circumstances, the requirement of qualifying service of 10 (ten) years as has

been held to be necessary to be eligible for the benefits of salary and allowances equivalent to that of the Chief Secretary, by the respondent authorities, is completely misplaced.

17. In the context of the judgment rendered in *Eken Riba and Ors. (supra)*, there is no finding that the appellants/the petitioners therein were also a Government Servants or Central Government Servants. It was under such circumstances that the Division Bench in *Eken Riba* was of the view that in order to avail the benefits, qualifying service of 10 (ten) years was mandated. In the facts of the present case, there is no dispute that the petitioner is a member of the Central Civil Services and as he is already drawing pension under the CCS Pension Rules, he satisfies the parameters necessary for qualifying service. However, save and except placing reliance upon the judgment rendered in *Eken Riba and Ors.(Supra)*, the respondents have not been able to show any materials as to why the benefits conferred under Section 16 (5) of the Right to Information Act, 2005, as it then stood under the Right to Information Act 2005, should not be conferred on persons found to be otherwise eligible. The judgment referred to by the learned counsel for the petitioner rendered by the Kerala High Court also returns a clear finding that since there is a mandate of the section under RTI Act that a State Information Commissioner would be entitled to the salary and allowances and other benefits of the Chief Secretary of the State, the same cannot be denied as it is the mandate of the statute.

18. In the opinion of this Court, the view adopted by the Kerala High Court, correctly reflects the position under the statute. In addition thereto, in view of the finding of the Co-Ordinate Bench rendered in WP(C)/4497/2021 that by virtue of the legal fiction created in Section 16 (5) of the Right to Information Act, 2005, the petitioner would be entitled to the benefits as mandated under

this provisions of Section, this Court is of the considered view that the impugned order issued by the respondents denying the benefits as conferred under Section 16 (5) to the writ petitioner cannot be accepted to be correct. This Court is of the further opinion that the co-ordinate Bench by the judgment and order dated 16.11.2022 rendered in WP(C)/4497/2021 had return a definite finding that the petitioner would be entitled to the benefits conferred under the provisions of Section 16(5) of the Right to Information Act, 2005. However, instead of interfering with the order or passing an order directing the benefits to be conferred on the writ petitioner, the matter was remanded to the authorities to be examined and for passing a speaking order. However, the findings arrived at by the Co-Ordinate Bench in WP(C)/4497/2021 has since attained finality, as the state has not preferred any appeal against these findings arrived at by the Court.

19. Under such circumstances, it is held that the petitioner will be entitled to the benefits of salary and allowances as conferred under Section 16 (5) as it stood prior to its amendment in 2019. The respondents are directed to forthwith release and confer the benefits receivable by the petitioner in terms of this order, read with Section 16 (5) of the Right to Information Act, 2005 prior to its amendment in 2019.

20. The entire exercise shall be completed within a period of 30 (thirty) days from the date of receipt of certified copy of this order.

21. Since it is submitted that the petitioner retired as State Information Commissioner with effect from 31.12.2019 and therefore, he would be entitled to the benefits and allowances under Section 16(5) of the Right to Information Act, 2005 with effect from 01.01.2020. It is also submitted that the State Chief Information Commissioner has already been released the benefits as payable

under Section 16(5) including additional pension. Accordingly, the benefits that will be accrued to the writ petitioner in view of this order namely, additional pension, additional DCRG and Telephone and Security Assistant should be conferred on the petitioner within a period of 30 (thirty) days as directed above.

22. Writ petition, is accordingly, stands allowed and disposed of in terms of the above. No order as to cost.

JUDGE

Comparing Assistant