

GAHC020003192021



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

Case No. : WP(C)/132/2021

SHRI MANGI CHANG
S/O AKHO CHANG,
32726 RANK (N/K),
3RD BATTALION, N.A.P
TUENSANG, NAGALAND

VERSUS

THE STATE OF NAGALAND AND 3 ORS
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVERNMENT
OF NAGALAND, KOHIMA

2:THE HOME COMMISSIONER TO THE GOVERNMENT OF
NAGALAND

DEPARTMENT OF HOME

NAGALAND
KOHIMA

3:THE DIRECTOR GENERAL OF POLICE

NAGALAND
KOHIMA

4:THE SUPERINTENDENT OF POLICE

TUENSANG
NAGALAN

Advocate for the Petitioner : S. TEMJEN

Advocate for the Respondent : GOVT ADV NL

Date of hearing and judgment : 20.02.2024

**BEFORE
HON'BLE MR. JUSTICE DEVASHIS BARUAH**

JUDGMENT & ORDER (ORAL)

The petitioner herein had approached this Court seeking a direction upon the respondents to consider the petitioner's invalid pension and any other service benefits and other consequential interest w.e.f. the date of Administrative Approval and Release Order of the petitioner's invalid pension without further delay.

I have heard Mr. S. Temjen, learned counsel appearing on behalf of the petitioner and Ms. A. Ayemi, learned Government Advocate appearing on behalf of the State respondents.

2. The facts involved in the instant case as it appears from a perusal of the pleadings is that the petitioner was initially appointed as Recruit GB Constable against an existing vacancy vide an Order dated 23.08.1993, issued by the Commandant, 3rd Battalion NAP, Teunsang, Nagaland. After the petitioner was appointed as a GB Constable the petitioner was attached to the then Commandant, 3rd NAP Battalion, Tuensang, Nagaland, and was deputed to work under the then Commandant's supervision to help and support in the domestic household works. Unfortunately, some time in the year 1987, the petitioner's finger was chopped out at the time of cutting the firewood. It is claimed by the petitioner that the same happened during the course of performing his official duties. The record reveals that the petitioner thereupon applied for invalid pension and on 28.03.1991, the Commandant, 3rd NAP Battalion, Tuensang, had

issued the Approval and Release Order to that effect. Thereupon the petitioner approached the said respondents on various occasions for grant of his pension and other pensionary benefits on the basis of his Release Order. Some time in the year 1995, the petitioner was informed by the respondent authorities that on account of the petitioner not having 10 (ten) years of service he would not be entitled to any pension or pensionary benefits. Thereupon the petitioner did not take any further steps and some time in the year 2021, and to be precise, on 29.04.2021, the petitioner submitted a representation requesting the State respondents to consider the petitioner's application for invalid pension and/or other service benefits. However, the same not being granted the petitioner has approached this Court by filing the instant writ petition seeking the reliefs as above stated.

3. The record reveals that this Court, vide an Order dated 06.08.2021 issued notice. The respondent Nos. 1, 2 & 3 had filed an affidavit-in-opposition on 09.03.2022 stating *inter alia* that the petitioner was duly informed as far back as on 1991 itself that he would not be entitled to any pensionary benefits except the General Provident Fund and and in that regard an amount of Rs. 25,000/- (rupees twenty five thousand) and Rs. 7,000/- (rupees seven thousand) were duly paid to the petitioner. A perusal of the said affidavit-in-opposition clearly reveals that the reason why the petitioner has not been granted any pension or pensionary benefits is that the petitioner did not have the length of service of 10 (ten) years. The record reveals that there is an additional affidavit-in-opposition filed by the respondent Nos. 1 to 3 pursuant to an Order passed by this Court on 01.05.2023, whereby an Office Memorandum (OM) dated 22.12.2015 was brought on record.

4. This Court has duly taken note of the said OM dated 22.12.2015, which categorically states that for being entitled to an invalid pension under Rule 38 an employee has to have a qualifying service of not less than 10 (ten) years. In the backdrop of the above pleadings, let this Court take note of the submissions

so advanced by the learned counsels appearing on behalf of the parties.

5. Mr. S. Temjen, learned counsel appearing on behalf of the petitioner submits that on account of the petitioner being discouraged and sometimes teased, the petitioner was compelled to apply for the invalid pension. He further submitted that the petitioner applied for the invalid pension only on the assurance given by the then Commandant of the 3rd NAP Battalion that the petitioner would be duly paid his pension and other service benefits. It is under such circumstances that the petitioner had submitted his papers and was granted a Release Order on 28.03.1991. He submitted further that though the petitioner did not agitate before this Court for almost 30 (thirty) years but not granting the pension and other pensionary benefits is a continuing cause of action and as such, it cannot be said that the writ petition suffers from delay or laches. In that regard the learned counsel drew the attention of this Court to the judgment of the Supreme Court in the case of ***Union of India and Others vs. Tarsem Singh***, reported in ***(2008) 8 SCC 648***. The learned counsel further submitted that in a similar case, the Co-ordinate Bench of this Court, in the case of ***Shri Shilupi Ao vs. the State of Nagaland and Others [WP(C)/228(K)/2014]*** in the judgment dated 14.05.2015 had granted the benefit of pension and other service benefits inspite of the petitioner therein not having the qualifying service of 10 (ten) years. The learned counsel further drew the attention of this Court to the OM dated 12.02.2019, whereby the Government of India, Ministry of Personnel, Public Grievances and Pension (Department of Pension and Pensioners Welfare) have categorically clarified that the period of 10 (ten) years of qualifying service is not required in a case of invalid pension.

6. On the other hand, Ms. A. Ayemi, learned State counsel appearing on behalf of the respondents submitted that the OM dated 12.02.2019 cannot be applied to the facts of the instant case, in as much as a perusal of the said OM would show that the said OM dated 12.02.2019 had issued certain clarifications

on the basis of the Amendment made to Rule 38 & 49 of the Central Civil Service (Pension) Rules, 1972 (for short the Rules of 1972) by the Notification bearing No. 21/1/2016-P&PW(F) dated 04.01.2019. Therefore, it is the submission of the learned counsel for the respondents that the said OM having been based on the amended Rules 38 & 49 of the Rules of 1972 which came into effect from 04.01.2019, the same cannot be applied to the instant case in as much as the petitioner had retired from service on 28.03.1991. The learned counsel for the respondents further submitted that this is not the case of disability pension but is a case of invalid pension, whereby the petitioner himself had applied for being released from the service and as such, the petitioner has to qualify in terms with Rule of 1972, as it existed then, to be entitled to any pension or service benefits. The learned counsel for the respondents further submitted that the judgment in the case of **Shilupi Ao** (supra) cannot be made applicable to the present facts taking into account that the said judgment was rendered in the facts of that case and more particularly when the respondent No. 4, i.e. the Accountant General, Nagaland, had made certain concessions in the said affidavit-in-opposition filed therein. She, therefore, submitted that in the instant case there is no such concession so given. The learned counsel further submitted that in the instant case, the petitioner, admittedly, was informed in the year 1995 that he would not be granted any pension or service benefits and for which the petitioner was paid an amount of Rs. 25,000/- (rupees twenty five thousand) as well as Rs. 7,000/- (rupees seven thousand), which the petitioner duly accepted and thereupon, almost after 30 (thirty) years from the date on which the petitioner was released from service the petitioner has approached this Court. She, therefore, submitted that it is a pure and simple case of delay and laches, for which the writ petition should be dismissed on this Court alone.

7. This Court has given its anxious consideration to the submissions so made by the learned counsels appearing on behalf of the parties.

8. Invalid pension under Rule 38 of the Rules of 1972 can be granted to a Government servant when the Government servant retires from service on account of any bodily or mental infirmity which had permanently incapacitated him for his service. A Government servant applying for such invalid pension is required to submit a Medical Certificate of incapacity issued by a Medical Board, in case of Gazetted and Non-Gazetted servant, who is getting a pay not exceeding a certain amount *per mense* and in case of other employees such certificate is to be issued by a Civil Servant or a District Medical Officer or Medical Officer of equivalent status. A further perusal of Rule 38 of the Rules of 1972 also shows that the said Rule would apply when the Government servant seeks invalidation for any bodily or mental infirmity. Therefore, in a case of an invalid pension it is the employee who seeks discharge. This Court, at this stage, also finds it relevant to take note of that Rule 3(q) of the Rule of 1972 which defines 'qualifying service' to mean service rendered while on duty or otherwise which shall be taken into account for the purpose of pension or gratuities admissible under the Rules of 1972. Rule 13 of the Rules of 1972 provides that the qualifying service of a Government servant commences from the date on which he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity. Though Rule 49 of the Rules of 1972 nowhere provides that the qualifying service for getting pension is 10 (ten) years but a perusal of Rules 49(1) of the Rules of 1972 stipulates that if a Government servant retires before completing qualifying service of 10 (ten) years, he would only be entitled to the amount of service gratuity calculated at the rate of half months emoluments for every completed 6 (six) monthly period of qualifying service.

9. This Court has also taken note that by the Notification dated 04.01.2019, Rule 38 as well as Rule 49 have been amended. A perusal of the said Notification would show that sub-rule (1) and sub-rule (2) of Rule 38 were substituted. In terms with the said substituted sub-rule (2) of Rule 38, and

more particularly the proviso to sub-rule (2) of Rule 38, the requirement of having 10 (ten) years of qualifying service have been dispensed with but have been made subject to the conditions stipulated in Clause (A) & (B) of sub-rule (2) of Rule 38. On the basis of the said amendment made to Rule 38 & Rule 49, the OM dated 12.02.2019 was issued.

10. This Court has also duly taken note of that in the Notification dated 04.01.2019, it was specifically stipulated that the said amendment would come into force on the date of publication in the Official Gazette, meaning thereby that the said amendment to Rule 38 & Rule 49 of the Rules of 1972 have to be applied prospectively. The consequential effect, therefore, is that the OM dated 12.02.2019 or even the amended Rule 38 & Rule 49 cannot be applied to the present case.

11. This Court further finds it relevant to take note of a judgment of the Supreme Court in the case of ***Union of India and Others vs. Rakesh Kumar***, reported in ***(2001) 4 SCC 309***, wherein at paragraph 21, it was categorically observed that if the Rules are not providing for grant of pensionary benefits it is for the authority to decide and frame appropriate Rules but the Court cannot direct payment of pension on the ground of the so-called hardship likely to be caused to a person who have resigned without completing the qualifying service for getting pensionary benefits. It was also observed that pensionary benefits are granted to Government servant who is required to retire on his attaining the age of compulsory retirement except in those cases where there are special provisions. The said paragraph No. 21 is quoted herein under:-

"21. Learned counsel for the respondents submitted that on the basis of G.O., number of persons are granted pensionary benefits even though they have not completed 20 years of service, and, therefore, at this stage, Court should not interfere and see that the pensionary benefits granted to the respondents are not disturbed and are released as early as possible. In our view, for grant of pension the members of BSF are governed by CCS (Pension) Rules. CCS (Pension) Rules nowhere provide

that a person who has resigned before completing 20 years of service as provided in Rule 48-A is entitled to pensionary benefits. Rule 19 of the BSF Rules also does not make any provision for grant of pensionary benefits. It only provides that if a member of the force who resigns and to whom permission in writing is granted to resign then the authority granting such permission may reduce the pensionary benefits if he is eligible to get the pension. Therefore, by erroneous interpretation of the rules if pensionary benefits are granted to someone it would not mean that the said mistake should be perpetuated by direction of the Court. It would be unjustifiable to submit that by appropriate writ, the Court should direct something which is contrary to the statutory rules. In such cases, there is no question of application of Article 14 of the Constitution. No person can claim any right on the basis of decision which is de hors the statutory rules nor there can be any estoppel. Further, in such cases there cannot be any consideration on the ground of hardship. If rules are not providing for grant of pensionary benefits it is for the authority to decide and frame appropriate rules but Court cannot direct payment of pension on the ground of so-called hardship likely to be caused to a person who has resigned without completing qualifying service for getting pensionary benefits. As a normal rule, pensionary benefits are granted to a government servant who is required to retire on his attaining the age of compulsory retirement except in those cases where there are special provisions."

12. In the backdrop of the above analysis, if this Court recapitulates the facts, it would be seen that the petitioner herein, on his own accord applied for the invalid pension, and thereupon he was discharged from his service on 25.03.1991. The petitioner did not have the qualifying service to be entitled to the pension or the service benefits. The petitioner was duly informed at that relevant point of time that he would not be entitled to pension or service benefits as he did not have the qualifying service, the petitioner, in terms with Rule 49(1) of the Rules of 1972 was paid Rs. 25,000/- (rupees twenty five thousand) and Rs. 7,000/- (rupees seven thousand). The petitioner received the said amount without any qualm. After almost 30 (thirty) years from the date of release, the petitioner submitted a representation on 29.04.2021 and thereupon filed the instant writ petition. It seems that the petitioner was encouraged by the amendments made to Rule 38 and Rule 49 of the Rules of 1972 and the

Notification issued on 12.02.2019 to reagitate a cause which was dead almost 30 (thirty) years back. This Court had in the previous segments of the instant judgment have held that the amendment to Rule 38 and Rule 49 of the Rules of 1972 was prospective and as such, the amendment of Rule 38 and Rule 49 of the Rules of 1972 cannot be put to use to reagitate the cause of the petitioner.

13. This Court had also taken note of the judgment passed by the Co-ordinate Bench in the case of ***Shilupi Ao*** (supra). The said judgment with due respect was rendered in a case where the respondents therein had granted concession and as such the interpretation given in the said judgment cannot be applied to the present case.

14. For the above reasons, this Court is of the unhesitant opinion that the instant writ petition has to fail for which the instant writ petition stands dismissed. In the peculiar facts of the case, this Court is not inclined to impose costs.

Sd/-
JUDGE

Comparing Assistant