

GAHC020004442023

2024:GAU-NL:550



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

Case No. : WP(C)/175/2023

SHRI LAXMAN SONAR
EX. ABI (MT),
15TH NAP (IR) BN, CHUMUKEDIMA,
NAGALAND, PIN CODE 797103

VERSUS

THE STATE OF NAGALAND AND 2 ORS
THROUGH THE CHIEF SECRETARY TO THE GOVERNMENT OF
NAGALAND, NAGALAND, KOHIMA

2:THE SPECIAL SECRETARY TO THE GOVERNMENT OF NAGALAND

HOME DEPARTMENT
POLICE ESTABLISHMENT BRANCH
NAGALAND
KOHIMA

3:HTE DIRECTOR GENERAL OF POLICE
NAGALAND
KOHIMA

Advocate for the Petitioner : I. APOK PONGENER, ANUNGLA LKR, RENBONI, ATU
IMCHEN

Advocate for the Respondent : Mr. V. Zhimomi, Govt. Adv.

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BEFORE

HON'BLE MR. JUSTICE KAKHETO SEMA

JUDGMENT & ORDER (CAV)

Date : 22-10-2024

Heard Mr. I. Apok Pongener, learned counsel for the petitioner and Mr. V. Zhimomi, learned Government Advocate for the State respondents.

2. The writ petition has been filed, seeking for a direction, to quash and set aside the Notification No. POL/ESTT-2/7/2019, dated 21/11/2022, issued by the Government of Nagaland, Home Department, Police Estt. Branch, releasing the petitioner from service, on completion of 35(thirty five) years of service, under the Nagaland Retirement from Public Employment (Second Amendment) Act, 2009.

3. The facts of the case, in brief, as projected in the writ petition are as follows;

i) The petitioner was appointed as a constable driver under the establishment of DEF Kohima, on contract basis, for a period of 1(one) year w.e.f. 01/04/1988. The service of the petitioner was extended from time to time and thereafter, by the order dated 30/03/1990, the service of the petitioner was last extended for a period of 3(three) months w.e.f. 01/04/1990 to 30/06/1990 with a rider that "He may not apply for further extension".

ii) The petitioner thereafter remained unemployed and was also not paid the salary for the month of July 1990 to September 1990. It was only sometime in the month of October 1990 that the petitioner was verbally instructed by the department to report for duty. No formal order was issued, but the petitioner was assigned duties as a constable driver to drive the bullet proof car at the Raj Bhavan.

iii) That by a W.T Message, dated 06/05/1998, issued by the IGP (Hqr), the petitioner was detailed to undergo 6(six) months condensed basic training course at Police Training School, Chumukedima. On completion of the basic training course, the Principal, Police Training School Chumukedima, Nagaland, issued the order dated 20/08/1998 releasing and directing the petitioner to report back to his unit.

iv) That the Dy. Inspector General of Police (Hqr), Nagaland, Kohima,

wrote the letter dated 02/11/1999 to the Home Commissioner, Police General Branch, Nagaland, Kohima, requesting the latter to regularize the contract service of the petitioner w.e.f. 09/12/1998 i.e. the date on which the petitioner had passed out the parade of recruits basic training.

v) Subsequently, the Government of Nagaland, Home Department, Police Estt. Branch wrote the letter No. POL-1/ESTT/72/96, dated 26/05/2001, to the Director General of Police, Nagaland, Kohima, conveying the approval of the Government for regularization of the service of the petitioner with immediate effect from 09/12/1998. Consequent thereto, the Registrar, Police Headquarter, Nagaland, Kohima, issued the order dated 10/06/2002 regularizing the service of the petitioner w.e.f from the date of joining.

vi) That by the order dated 02/12/2003, issued by the Director General of Police, Nagaland, Kohima, the petitioner was promoted to the rank of Hav(MT) in the establishment of the IG(INT). Thereafter, by the order dated 08/10/2012, the petitioner was promoted to the rank of MTSI and posted at DEF Kohima and again by the order dated 13/11/2017, issued by the Home Commissioner, Nagaland, Kohima, the petitioner and 9(nine) others were promoted to the upgraded post of ABI(MT) and the petitioner was posted at 15th NAP(IR) Bn. Chumukedima.

vii) That when the petitioner was continuing in service, the Government of Nagaland, Home Department Police Estt. Branch, issued the impugned notification dated 21/11/2022 releasing the petitioner from service with effect from 31/03/2023 on completion of 35 years of service in terms of section-3(1) and 3(2) of the Nagaland Retirement from Public Employment (Second Amendment) Act, 2009 and in terms of the Government of Nagaland, P&AR Notification No. AR-3/Gen-174/2007(Pt) dated 07/08/2009.

4. The main thrust of the case of the petitioner is that he has been prematurely released from service even before the completion of 35 years of service by wrongly taking the date 01/04/1988 as the date of the petitioner's entry into service.

5. Mr. I. Apok Pongener, the learned counsel for the petitioner submits that the

petitioner was appointed as a constable driver by the Superintendent of Police, Kohima on 01/04/1988 and thereafter regularize in service, in that post, by the Government w.e.f. 09/12/1998. The learned counsel accordingly submits that the service of the petitioner has to be counted from 09/12/1998 and not from 01/04/1988 for computing 35 years of service for releasing the petitioner from public employment. It is also submitted that if the service of the petitioner for computing 35 years of service is counted from 09/12/1998, the petitioner will complete 35 years length of service on 31/12/2033 while the petitioner will attain the age of superannuation on 30/03/2028 as the petitioner's date of birth in the service book is recorded as 01/04/1968. However, since the Nagaland Retirement from Public Employment (Second Amendment) Act, 2009 clearly provides that 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, the petitioner will retire from service on 30/03/2028 on attaining the age of superannuation. The State respondents however by issuing the impugned notification dated 21/11/2022 has prematurely retired/released the petitioner from service w.e.f. 31/03/2023 by wrongly taking 01/04/1988 as the date of the petitioner's entry into service to compute 35 years of service.

6. Mr. I. Apok Pongener has also submitted that after the contractual service of the petitioner was last extended by the order dated 30/03/1990 for 3(three) months w.e.f. 01/04/1990 to 03/06/1990, the petitioner was not granted any extension of service and it was only in the month of October 1990 that the petitioner was instructed to report for duty. No salary was paid to the petitioner during the intervening period i.e. for the month of July 1990 to September 1990 when the petitioner remained unemployed. Mr. I. Apok Pongener accordingly submits that the State respondents cannot count the continuous service of the petitioner w.e.f. 01/04/1988 as there was break/gap in the service of the petitioner for the month of July 1990 to September 1990. In other words, it is also the case of the petitioner, that the service of the petitioner for computing 35 years of continuous service for the purpose of retirement can be counted only with effect from the month of November 1990 and not otherwise.

7. In support of his submission, the learned counsel for the petitioner has relied in

the case of **Director General, Doordarshan Prasar Bharti Co-operation of India & Another -versus- Smti Magi H Desai**, reported in **2023 Live Law (SC) 248**, where the Hon'ble Supreme Court has held that service rendered as casual/contractual cannot be said to be service rendered on a substantive appointment and such service cannot be counted towards qualifying services for pensionary benefits.

8. Mr. V. Zhimomi, the learned Government Advocate on the other hand submits that the petitioner was appointed as a constable driver on contract basis on 01/04/1988 and continued to serve in that capacity till regularization of his service on 09/12/1998 and therefore, the service of the petitioner for computing 35 years of service for the purpose of retirement from public employment was correctly taken w.e.f. 01./04/1988. The learned Government Advocate has also vehemently denied that the petitioner remained unemployed for 3(three) months w.e.f. July 1990 to September 1990 and there is nothing on record to show that the petitioner was terminated from contractual service by the State respondents.

9. Mr. V. Zhimomi has also referred to the 'Revised final seniority list of ASI(MT) and Hav(MT) as on 13/12/2016' which has been issued under the signature of the Deputy Inspector General of Police (Hq) Kohima, Nagaland. In the said seniority list, the date of appointment of the petitioner is shown as 04/01/1988 (to be correctly read as 01/04/1988) and the date of promotion of the petitioner to the post of Hav(MT) is shown as 12/02/2003. The learned Government Advocate submits that the petitioner has without any demur accepted 01/04/1988 as the date of appointment in service and had accordingly accepted the seniority in service and the consequential promotional benefits and therefore, the petitioner now cannot turn around and rebuff that 01/04/1988 is not the date of his appointment in service when it comes to determination of 35 years length of service for releasing the petitioner from public employment. Mr. V. Zhimomi has accordingly submitted that the State respondents has rightly issued the notification dated 21/11/2022 releasing the petitioner from public service w.e.f 31/03/2023 by computing 35 years of service w.e.f 01/04/1988.

10. The learned Government Advocate further submits that the Government of Nagaland in order to clarify the doubt regarding counting of contract/adhoc period of

service for retirement from public service has issued series of Office Memorandum, the last being the O.M dated 31/08/2017, which has been issued in supersession of all the earlier Office Memorandums on the subject and provides 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 employment under the Nagaland Retirement from Public Employment (Second Amendment) Act, 2009. In the instant case, the learned Government Advocate submits that, since the petitioner has availed all the service benefits such as seniority, consequential promotions etc. by counting 01/04/1988 as the date of the petitioner's appointment in service, the State respondents has rightly taken the continuous service of the petitioner w.e.f 01/04/1988 to release the petitioner from service on 31/03/2023, on completion of 35 years of service, by issuing the notification dated 21/11/2022.

11. In the affidavit-in-reply, the petitioner while reiterating the averments made in the writ petition has stated that the 'Revised final seniority list of ASI(MT) & Hav(MT) as on 31/12/2016' was not circulated and therefore, the petitioner was not aware of the same nor had the opportunity to protest against the list.

12. Heard the learned counsel for the parties and also perused the pleadings exchanged between the parties.

13. Section-2 of the Nagaland Retirement from Public Employment Act, 1991 defines public employment and provides as follows;

“2. In this Act, unless there is anything repugnant in the subject or context;-

(1) “Public Employment” mean appointment to any pensionable State Public Service or posts connected 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 undertaking 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.”

14. Secondly by the Nagaland Retirement from Public Employment (Second

Amendment) Act, 2009, section-3 as amended by the Amendment Act 2007 was substituted by the following provisions;

“Section-3(1): Notwithstanding anything contained in any rule or order for 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.”

15. This Court in the case of **Shri. R.T Asang Jamir @ Shri. R. Tsudensangba Jamir -versus- The State of Nagaland & Others**, in W.P.(C) No. 270(K)/2011 and a batch of writ petitions while interpreting the definition of public employment as defined under the Act, has in the judgment & order dated 14/06/2012 held that;

“28. A perusal of the aforesaid definition would go to show that any appointment to any pensionable State Public Service or posts connected with the affairs of the State of Nagaland and the Nagaland Legislative Assembly is included in the definition of public employment. It does not refer to any regular appointment or adhoc appointment.

34.....An adhoc appointee may not be entitled to all the benefits to which a regular employee may be entitled to, but such a distinction will not detract his position as a government servant inasmuch as he continues to be in government service. This Court is of the opinion that in view of the express provision defining public employment, which does not differentiate between regular appointment and adhoc/contract/work-charged appointment for the purpose of retirement, period rendered on such basis has to be computed for the purpose of computation of thirty five years of public employment.”

16. The Hon'ble Division Bench of this Court in W.A No. 5(K)/2017, while examining the order dated 18/05/2016 passed by the learned Single Judge on the notification issued by the State respondents releasing the petitioner therein from service on completion of 35 years of service has also referred to the case of R.T Asang Jamir @ Shri. R. Tsudensangba Jamir (supra) and has by the judgment & order dated 14/03/2017 held as follows;

“9.....A consideration of the judgment & order dated 14/06/2012

would clearly indicate that after considering the definition of public employment as defined under section-2(1) of the Act 2009 (sic Act 1991), the learned Single Judge had come to the finding that any appointment to pensionable State Public Service or posts connected with the affairs of the State of Nagaland and the Nagaland Legislative Assembly is included in the definition of public employment and it does not referred to any regular appointment or adhoc appointment. It was also held that an adhoc appointee may not be entitled to all benefits to which a regular employee may be entitled to, but such a distinction will not detract his position as a government servant inasmuch as, he continues to be in government service. It was therefore opined that in view of the express provision defining public employment which does not distinguish between regular appointment/contract/work-charged appointment for the purpose of retirement, period rendered on such basis has to be computed for the purpose of computation of 35 years of public employment. It was also held that even if the government had taken the date of regular appointment as the date of joining, the same has to be construed to be for governing service conditions of the petitioner other than for the purpose of retirement. In terms of the finding, those batches of writ petitions were dismissed. When the petitioners in those batches of writ petitions appealed before the Division Bench of this Court, the judgment & order of the learned Single Judge was upheld by the order dated 20/07/2012....”

10. After considering the judgment & order dated 14/06/2012 and the order dated 20/07/2012 passed by the learned Single Judge as well as the Division Bench of this Court respectively, we are of the considered opinion that there has been no mention or consideration that computing of 35 years length of service in terms of the Act 2009 should be only with effect from the date of regularization or regular appointment in the same post without break or gap in service.”

17. The State respondents has also issued various memorandums explaining/clarifying as to how the contract/adhoc period of service will be counted for computing 35 years of public employment for the purpose of retirement and the Office Memorandum dated 31/08/2017 which has been issued in supersession of all the earlier office memorandum on the subject, reads as follows;

**“Government of Nagaland
Personnel and Administrative Reforms Department
(Administrative Reforms Branch)**

No. AR-3/GEN-231/2011

Dated : Kohima, the 31st August 2017

OFFICE MEMORANDUM

Sub:- Counting of Contract/Adhoc/Work-charged/Substitute period for retirement purpose

1. The Nagaland Retirement from Public Employment Act. 1991, defines public employment as “appointment to any pensionable state public service or posts connected with the affairs of the State of Nagaland and the Nagaland Legislative Assembly, and includes any appointment under the Government of India, and other State government. Central or State Public Sector Undertaking 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”.
2. And whereas, clarifications have been sought by Departments from time to time whether the services rendered in adhoc/contract/work-charged/substitute capacity prior to regular appointment made through NPSC or Departmental Selection Board or any other prescribed procedure shall count as public employment for the purpose of calculation of length or service under the above Act.
3. And whereas, in the judgment and order dated 24/07/2012, the Gauhati High Court in Case No. WA-168/2012, WA-175/2012, WA-178/2012, WA-179/2012, WA-180/2012, WA-181/2012, WA-183/2012, had ruled that the period of service rendered on adhoc/contract/work-charged has to be counted for computation of public employment under the Nagaland Retirement from Public Retirement from Public Employment (2nd Amendment) Act. 2009.
4. And whereas, this Department had issued office memorandum of even number dated 01.08.2012 regulating counting of past service as public employment for the purpose of pension under the Nagaland Retirement from Public Employment (2nd Amendment) Act, 2009.
5. And whereas, in a landmark judgment and order 14.03.2017 in W.A. No. 5(K) of 2017, the Kohima Bench of Gauhati High Court, referring to the judgment and order dated 14.06.2012 passed in WP(C) No. 270 (K) of 2011 and batch of other writ petitions as well as the Order dated 20.07.2012 passed by the Division Bench in Writ Appeal No. 177-2012 along with a batch of other writ appeals, observed that “in view of the expressed provision defining public employment which does not distinguish between regular appointment and adhoc/contract/work-charged appointment for the purpose of retirement, period rendered on such basis has to be computed for the purpose of computation of 35 years of public employment”. The High Court also held that “having come to the finding that the

Memorandum dated 01.08.2012 is not in consonance with the judicial pronouncement of this Court. The Office memorandum dated 01.08.2012 is of no consequence and we declare the same to be nullity in law”.

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 under the Nagaland Retirement from Public Employment (2nd Amendment) Act. 2009.

7. This supersedes all office memoranda on the subject including the office memorandum dated 29th March, 2017.

*Sd/- PANKAJ KUMAR
Chief Secretary to the Govt. of Nagaland”*

18. In the present case, the submission of the learned counsel for the petitioner is two folds, firstly that, the petitioner service for computing 35 years of service for the purpose of retirement from public employment should be counted with effect from 09/12/1998, that is the date, on which the petitioner was regularized in service and not from date the petitioner was first appointed on contract basis i.e. 01/04/1988 and alternately since there is a break/gap in the service of the petitioner for a period of 3 months commencing from the month of July 1990 to September 1990, the continuous service of the petitioner has to be counted with effect from the month of October 1990. Secondly, since the date of birth of the petitioner in the service book is recorded as 01/04/1968, the petitioner will attain the age of superannuation only on the last date of the month of March 2028. This Court is however unable to accept the contention of the petitioner to be released/retired from service, as propounded, either by the length of service or age, in view of the reasons hereinafter discussed.

19. This Court in R.T Asang Jamir @ Shri. R. Tsudensangba Jamir (supra) while interpreting the definition of ‘public employment’ has held that any appointment to any pensionable state public service or posts connected with the affairs of the State of Nagaland and the Nagaland Legislative Assembly is included in the definition of the public employment. It does not refer to any regular appointment or adhoc appointment. It has further held that an adhoc appointee may not be entitled to all the benefits to which a regular employee may be entitled to, but such a distinction will not

detract his position as a government servant inasmuch as he continues to be in government service. This Court, therein, was of the opinion that in view of the express provision defining public employment, which does not differentiate between regular appointment and adhoc/contract/work-charged appointment for the purpose of retirement, period rendered on such basis has to be computed for the purpose of computing 35 years of public employment. The Hon'ble Division Bench in Sashikala (supra) after considering the judgment & order dated 14/06/2012 passed in R.T Asang Jamir @ Shri. R. Tsudensangba Jamir (supra) has also held that there has been no mention or consideration that the computation of 35 years length of service in terms of the Act 2009 should be only with effect from the date of regularization or regular appointment in the same post without break or gap in service.

20. On a careful perusal of the judgment & order referred to above, this Court is unable to accept the submission of the learned counsel for the petitioner that the service of the petitioner has to be counted only with effect from 09/12/1998, i.e. the date on which the petitioner was regularized in service, for the purpose of computing 35 years of service for releasing the petitioner from public employment. On the other hand, in view of the judicial pronouncement on the definition of public employment as defined in section-2 of the Act 1991, the service rendered by the petitioner on contract basis commencing from 01/04/1988 is to be computed for the purpose of computing 35 years of public service as provided for in section-3(1) and 3(2) of the Nagaland Retirement from Public Employment (Second Amendment) Act, 2009, provided that the service rendered by the petitioner on contract basis is followed by regularization or regular appointment without any break or gap in service.

21. The Government of Nagaland, Personnel and Administrative Reforms Department (Administrative Reforms Branch) has issued the Office Memorandum dated 31/08/2007 clarifying as to how the period of 35 years in service under section-3(1) and 3(2) of the Act 2009 is to be computed for the purpose of releasing a person from public employment. Therefore, the petitioner's service for computation of 35 years of public service has also to be examined in the light of the said O.M dated 31/08/2017.

22. One important fact which cannot escape the attention of this Court, is the

'Revised final seniority list of ASI(MT) and Hav(MT) as on 31/12/2016' in which the petitioner's date of appointment in service is shown as 04/01/1988 (to be correctly read as 01/04/1988) and the petitioner's date of promotion to the post Hav(MT) is shown as 12/02/2003. This date of the initial appointment of the petitioner in service i.e 01/04/1988, the learned Government Advocate submits, has been accepted by the petitioner and the petitioner has accordingly availed the benefits of seniority in service and the consequential promotions on the basis of the said revised final seniority list in which the date of appointment of the petitioner in service is recorded as 01/04/1988. The petitioner therefore now cannot turn around and feign ignorance of the said seniority list. The petitioner in the affidavit-in-reply has only averred that the said revised final seniority list was not widely circulated and therefore, the petitioner did not have the opportunity to protest against the said seniority list. What is however interesting to note is that, the petitioner, in his pleadings, has nowhere rebutted or refuted that his seniority in service and consequential promotions from the rank of Constable Driver upto the rank of ABI(MT) was effected by counting the petitioner's date of appointment in service as 01/04/1988. The petitioner, therefore, now cannot take a contrary stand that his service cannot be counted w.e.f 01/04/1988 but should be counted only with effect from 09/12/1998 or in the alternative from the first date of October 1990 for computing 35 years of service for releasing the petitioner from public employment. The petitioner cannot be allowed to accept the revised final seniority list for availing the benefit of seniority and consequential promotions and reject the same when the petitioner's 35 years length of service is counted from 01/04/1988 for releasing the petitioner from service under the Second Amendment Act, 2009. The petitioner cannot be allowed to approbate and reprobate on the revised seniority list where the petitioner's date of entry into service is recorded as 01/04/1988. This Court is, therefore, of the view that there is continuity in the service of the petitioner w.e.f. 01/04/1988 and the State respondents has committed no infirmity in issuing the notification dated 21/11/2022 releasing the petitioner from service on 31/03/2023 on completion of 35 years of service by taking 01/04/1988 as the date of the petitioner's entry into government service.

23. In the case of **Shyam Telelink Ltd. -versus- Union of India**, reported in

(2010) 10 SCC 165, the Hon'ble Supreme has held as follows;

“23. The maxim qui approbat non reprobat (one who approbates cannot reprobate) is firmly embodied in English Common Law and often applied by Courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument.”

24. The case of Smti. Magi H. Desai (supra) relied by the learned counsel for the petitioner is in the considered opinion of this Court not relevant to the case in hand. In the said case, the Hon'ble Supreme Court while deliberating on Rule-13 of the Central Civil Services (Pension) Rules, 1972 has held that the service rendered as casual/contractual cannot be said to be service rendered on substantive appointment and can be counted towards qualifying services for pensionary benefits. In the present case, the pertinent issue however is, whether under the Nagaland Retirement from Public Employment (Second Amendment) Act, 2009, the service rendered on adhoc/contract/work-charged basis shall be treated as public employment for computing 35 years of public service for the purpose of retirement from public employment which has been held in the affirmative by judicial pronouncements. This being so, the subject matter in the present case and Smti. Magi H. Desai (supra) is all together different and therefore, the decision in Smti. Magi H. Desai (supra) will have no application to the present case.

25. In the light of the discussion made herein above, the writ petition is devoid of merit and dismissed. No cost.

JUDGE

Comparing Assistant