



GAHC010002852011

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

Case No. : WP(C)/6/2011

SRI DILIP KUMAR SINHA and ANR.
JUNIOR ENGINEER CIVIL SILCHAR RURAL ROAD DIVISION PWD,
SILCHAR-1.

2: SHRI SATYAJIT SINHA
JUNIOR ENGINEER CIVIL KARIMGANJ STATE ROAD DIVISION
PWD
KARIMGANJ-1

VERSUS

THE STATE OF ASSAM AND ORS
REP. BY THE SECRETARY, PUBLIC WORKS DEPARTMENTS, GOVT. OF
ASSAM, DISPUR, GUWAHATI-6.

2:PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM

FINANCE DEPARTMENT
DISPUR
GUWAHATI - 6.

3:THE COMMISSIONER AND SPECIAL SECRETARY TO THE GOVT. OF
ASSAM

PWD DEPARTMENT
DISPUR
GUWAHATI-6.

4:UNDER SECRETARY TO THE GOVT. OF ASSAM

PWD ESTT.B BRANCH
DISPUR
GUAHATI-6.



5:THE CHIEF ENGINEER

PWD ROADS/BUILDINGS
ASSAM
GUWAHATI-3.

6:ASSAM PUBLIC SERVICE COMMISSION

REP. BY THE SECRETARY
JAWAHARNAGAR
KHANAPARA-22

Advocates for the Petitioners : Mr. B. C. Das, Sr. Advocate
: Mr. S. Nath

Advocates for the Respondents : Mr. P. Nayak
: Mr. P. P. Dutta
: Ms. M. D. Borah

Linked Case : WP(C)/6700/2010

JOYDEEP NATH and 9 ORS
S/O LT. J.C NATH LASKAR
JUNIOR ENGINEER
PWD
SILCHAR RURAL ROAD DIVN
SILCHAR-1

2: SANJIB KANOO

JR. ENGINEER
PWD SILCHAR RURAL ROAD DIVN
SILCHAR-1

3: MD. FAKRUL ALAM BARBHUIYA

JR ENGINEER
PWD RURAL ROAD DIVN
SILCHAR-1

4: MD. ZAHIRUL ISLAM CHOUDHURY

JR.ENGINEER
PWD RURAL ROAD DIVN



SILCHAR-1

5: RAJU PAUL

JR.ENGINEER
PWD RURAL ROAD DIVN
SILCHAR-1

6: AVIJIT PAUL

JR. ENGINEER
PWD RURAL ROAD DIVN
SILCHAR-1

7: BANIBRATA CHAKRABORTY

JR. ENGINEER
KARIMGANJ STATE ROAD DIVN
PWD
KARIMGANJ-1

8: MD. AMIR HUSSAIN CHOUDHURY

JR. ENGINEER
PWD RURAL ROAD DIVN
HAILAKANDI

9: HRISHIKESH DAS

JR.ENGINEER CIVIL KARIMGANJ STATE ROAD DIVN
PWD
KARIMGANJ-1

10: ABDUL HASSAN CHOUDHURY

JR.ENGINEER MECHANICAL OFFICE OF THE ASSTT. EXECUTIVE
ENGINEER
PWD MECHANICAL SUB DIVN
SILCHAR.
VERSUS

THE STATE OF ASSAM AND ORS
REP. BY THE SECY.
PUBLIC WORKS DEPTT
GOVT OF ASSAM
DISPUR
GHY-6



2:PRINCIPAL SECY
TO THE GOVT. OF ASSAM

FINANCE DEPTT
DISPUR
GHY-6

3:THE COMMISSIONER AND SPECIAL SECY
TO THE GOVT. OF ASSAM

PWD DEPTT
DISPUR
GHY-6

4:UNDER SECY. TO THE GOVT. OF ASSAM

PWD ESTT.B BRANCH
DISPUR
GHY-6
5:THE CHIEF ENGINEER

PWD ROADS/BUILDINGS ASSAM
GHY-3
6:ASSAM PUBLIC SERVICE COMMISSION
REP.BY THE SECY. JAWAHAR NAGAR
KHANAPARA-22

Advocates for the Petitioners : Mr. B. C. Das, Sr. Advocate
: Mr. S. Nath

Advocates for the Respondents : Mr. P. Nayak
: Mr. P. P. Dutta
: Ms. M. D. Borah

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER (ORAL)

Date : 02-05-2023

Heard Mr. B. C. Das, the learned Senior counsel assisted by Mr. S. Nath, the learned counsel appearing on behalf of the petitioners and Mr. P. Nayak, the learned Standing counsel appearing on behalf of the Public Works Department (for short "the PWD"). I have also heard Mr. P. P. Dutta, the learned Standing



counsel appearing on behalf of the Assam Public Service Commission (for short "the APSC") and Ms. M. D. Borah, the learned Standing counsel appearing on behalf of the Pension and Public Grievances Department, Government of Assam.

2. Both the writ petitions are taken up together as the facts are similar and the questions of law involved are paramateria. The issue involved in both the writ petitions is as to whether the petitioners herein would be entitled to the Old Pension Scheme i.e. the pension in terms with the Assam Services (Pension) Rules, 1969 (for short "the Rules of 1969") or the New Pension Scheme i.e. the New Defined Contributory Pension Scheme, 2009 which was brought into effect from 01.02.2005 by way of an Office Memorandum dated 06.10.2009.

3. The facts involved in the instant case are that the Public Works Department of the Government of Assam vide a letter bearing No.RBEB120/2002/1 dated 21.05.2002 requested the A.P.S.C. to initiate a selection process for filling up of 100 Nos. of vacancies of Junior Engineer (Civil) under PWD. The 100 vacancies consisted of 80 vacancies in the PWD Roadwing and 20 vacancies in the PWD Building wing. On the basis of the said requisition so made on 21.05.2002, the APSC issued an advertisement vide letter No.83/PSC/DR/5/1/2000-2001 dated 29.05.2002 for 100 Nos. of Junior Engineer (Civil) posts. The said advertisement was published on 05.06.2002.

4. It is also pertinent herein to note that pursuant to the advertisement, the PWD further requested the APSC vide a communication No.RBEB120/2002/15 dated 09.09.2003 for initiating a selection process of another 8 (eight) Nos. of J.E.(C) post under Roadwing along with 80 Nos. of J.E.(C) post under Roadwing.

5. The APSC conducted the selection and submitted select list of candidates



for appointment in order of preference. The said select list/lists is/are not a part of the record but from the appointment order dated 30.10.2014, it reveals that the recommendation was made vide three separate communications i.e. letters dated 13.01.2004, 19.01.2004 and 21.01.2004. This aspect of the matter would be dealt with in detail at the later stage of the judgment. Thereupon, on the basis of the recommendations, the PWD appointed 103 Nos. of Junior Engineer (Civil) and 5 Junior Engineer (Mechanical) on the basis of an appointment order bearing No.RBEB.120/2002/65 dated 30.10.2004.

6. Before further proceeding in respect to the entitlement of the petitioners, this Court finds it relevant to take note of certain developments as regards the pension schemes which took place immediately after the order dated 30.10.2004. In the year 2004, the Central Government launched the New Pension Contributory Scheme. At that relevant point of time, on account of huge pension liability of the State of Assam which was rising exponentially, the Government of Assam took a policy decision to formulate a similar contributory pension scheme applicable to the future State Government employees who joined the services and posts in connection with the affairs of the State Government on or after 01.02.2005. In view of the said policy decision, the Commissioner and Secretary to the Government of Assam, Finance Department had issued a circular on 25.01.2005 wherein it was mentioned that in view of the decision of the Government of Assam to have a Contributory Pension Scheme applicable in future to the State Government employees who joined the services of the State Government on or after 01.02.2005, it was mandatory to mention in all advertisements for filling up of vacant posts under the State Government as well as in the appointment letters of the selected candidates that they would be governed by a new set of Pension Rules which would be



formulated in line with the Contributory Pension Scheme announced by the Government of India. Further to that, it was also mentioned that those fresh recruits joining the services of the State Government on or after 01.02.2005 had also to furnish an undertaking along with their respective joining report to the effect that they would be governed by the New Pension Rules and not be governed by the existing Rules of 1969.

7. Now coming back again to the facts involved in the instant case, it would be seen that the petitioners herein were appointed to the services and posts in connection with the affairs of the Government of Assam vide notifications dated 09.02.2005 and 29.09.2005. It would also appear from a perusal of the notifications dated 09.02.2005 as well as on 29.09.2005 that in terms with the directions issued in the communication dated 25.01.2005, it was mentioned that the appointees in terms with the said notifications shall not be governed by the existing Rules of 1969 and the orders issued thereunder from time to time but they would be governed by a new set of Pension Rules which are being formulated in line with the Contributory Pension Scheme announced by the Government of India.

8. The petitioners in both the writ petitions were appointed on the basis of the notifications dated 09.02.2005 and 29.09.2005. The petitioners upon issuance of the appointment orders accepted those appointment orders and joined their services. In the meantime, while the petitioners continued to render their services, on 06.10.2009, an Office Memorandum was issued by the Government of Assam, Finance (Budget) Department whereby the New Defined Contributory Pension Scheme was notified. For the sake of convenience, the said New Defined Contributory Pension Scheme is hereinafter referred to as the NDCPS,



2009. A perusal of the said Office Memorandum dated 06.10.2009 shows that there is a reference to the communication dated 25.01.2005 whereby the Government had taken a policy decision to introduce a Contributory Pension Scheme for employees joining the State Government services on or after 01.02.2005 in tandem with the Government of India. It is on the basis thereof that the Governor of Assam was pleased to introduce the NDCPS, 2009. It was made clear that the Scheme would be applicable to all new entrants joining the State Government services on regular basis against vacant sanctioned post(s) on or after 01.02.2005. The details and workability of the Scheme have been mentioned in the various clauses of the said Office Memorandum dated 06.10.2009. It is also pertinent to mention that the Office Memorandum dated 06.10.2009 had the backing of the Cabinet decision which was approved on 04.09.2009. A further perusal of the said Office Memorandum dated 06.10.2009 would show that Clause 12 of the said Office Memorandum stipulated about the guidelines which was appended to the said Office Memorandum. It was mentioned that the Scheme shall be deemed to have come into effect from 01.02.2005 as circulated by the communication dated 25.01.2005.

9. At this stage, it is relevant to mention that both the writ petitions were filed challenging the Office Memorandum dated 06.10.2009 as well as the insertion of the clause in the appointment notifications dated 09.02.2005 and 29.09.2009 whereby it was mentioned that the appointees therein shall not be governed by the existing Assam Service (Pension) Rules, 1969. A further perusal of the contents of the writ petitions as it stood at the time of filing of the writ petitions would reveal that the pivotal issue raised was as to how the Rules made under the proviso to Article 309 of the Constitution of India could be amended by way of an executive instructions. It was also the case of the petitioners in the writ



petitions as to how the NDCPS, 2009 could be given a retrospective effect from 01.02.2005 that too when the vested rights to get pension accrued upon the petitioners on the basis of the Rules of 1969 as at the time of appointments of the petitioners, Rules of 1969 was only holding the field and even the NDCPS, 2009 did not come into existence.

10. It further appears that the Government of Assam realized that sans any amendment being carried out to the Rules of 1969, by way of executive instruction, it would not be possible to overshadow the statutory effect of the Rules of 1969. Therefore, pursuant to the approval of the Cabinet held on 05.07.2011, the Pension and Public Grievances Department, Government of Assam, in exercise of the powers conferred under the proviso to Article 309 of the Constitution issued a notification vide No.PPG(P)88/2009/37 dated 14.07.2011 thereby amending the Rules of 1969. The said notification dated 14.07.2011 being relevant for the purpose of the instant case is extracted hereinbelow:

*“GOVERNMENT OF ASSAM
PENSION AND PUBLIC GRIEVANCES DEPARTMENT
DISPUR:::::GUWAHATI::: 6*

Order by the Governor
NOTIFICATION

Dated Dispur, the 14th July, 2011

*NO.PPG(P)88/2009/37 : In pursuance of the approval of Cabinet held on 5/7/2011 and in exercise of the powers conferred by **the proviso to Article 309 of the Constitution of India**, the Governor of Assam is pleased to make the following rules further to amend the Assam Services (Pension) Rules, 1969, hereinafter referred to as the principal Rules namely:*

Short title and commencement 1. **(1) These rules may be called the Assam Services (Pension) (Amendment) Rules, 2011.**



(2) They shall be deemed to have come into force with effect from 01.02.2005.

Insertion of new rule 2A 2.

In the principal rules, after rule 2, the following new rule 2A shall be inserted, namely :-

*“2A. Provisions of these rules shall not apply to **Government servants appointed on or after 01.02.05 to the services and posts in connection with the affairs of the State Government of Assam which are borne on pensionable establishment**, whether temporary or permanent. Such employees shall be governed by the “New Defined Contribution Pension Scheme, 2009” newly introduced by the Government of Assam”.*

*(Smti G. Baruah, IAS),
Commissioner & Secy. to the Govt. of Assam,
Pension & Public Grievances Department.
Dated Dispur, the 14th July, 2011”*

11. Further to that, vide another notification No.PPG(P)88/2009/38, the General Provident Fund (Assam Services) Rules, 1937 was further amended. The said notification being relevant is extracted hereinbelow:

*“GOVERNMENT OF ASSAM
PENSION AND PUBLIC GRIEVANCES DEPARTMENT
DISPUR::::: GUWAHATI::: 6*

Order by the Governor
NOTIFICATION

Dated Dispur, the 14th July, 2011

NO.PPG(P)88/2009/38 : In pursuance of the approval of Cabinet held on



5/7/2011 and in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of Assam is pleased to make the following rules further to amend the General Provident Fund (Assam Services) Rules, 1937, hereinafter referred to as the principal Rules namely:

Short title and commencement 1. (1) **These rules may be called the General Provident Fund (Assam Services) (Amendment) Rules, 2011.**

(2) **They shall be deemed to have come into force with effect from 01.02.2005.**

2. **In the principal Rules, in rule 4, after proviso 2, the following new proviso shall be inserted, namely :-**

“Provided further more that the Government Servant appointed on or after 01.02.2005 to the services and posts in connection with the affairs of the State Government of Assam which are borne on pensionable establishment, whether temporary or permanent, shall not be eligible to join the Fund.”

*(Smti G. Baruah, IAS),
Commissioner & Secy. to the Govt. of Assam,
Pension & Public Grievances Department.
Dated Dispur, the 14th July, 2011”*

12. It further appears that the Secretary to the Government of Assam, Pension and Public Grievances Department had issued a Corrigendum bearing No.PPG(P)/140/2009/41 dated 17.09.2011 thereby requesting all concerned to read the Government notifications which have been quoted hereinabove as dated 14.07.2011 instead of 13.07.2011. Pursuant to these amendments being made by the Assam Services (Pension) (Amendment) Rules, 2011 (hereinafter

referred to as "the Amending Rules") both the writ petitions were amended thereby challenging the Amending Rules of 2011. At this stage, it is relevant to mention that by the Amending Rules, retrospectively w.e.f. 01.02.2005, the rights under the Rules of 1969 were taken away in respect to those appointees who entered the services of the State of Assam on or after 01.02.2005.

13. It appears from records that the instant writ petitions in view of the challenge to the Statutory Rules were placed before the Division Bench of this Court. However, during the course of the hearing before the Division Bench on 10.11.2021, the petitioners gave up their challenge to the Amending Rules of 2011 which was duly recorded in the order dated 10.11.2021 by the Division Bench of this Court. It is under such circumstances, both the writ petitions are before this Court.

14. Now, after giving up the challenge to the Amending Rules of 2011, the issue therefore arises for consideration before this Court is only as to whether the petitioners having been selected pursuant to an advertisement dated 29.05.2002 and they being included in the said select list prior to 01.02.2005, would they be entitled to the pension in terms with Rules of 1969 or the pension in terms with the NDCPS, 2009. The grievances of the petitioners herein is that as the advertisement was issued prior to 01.02.2005 which was the cut off date for the New Pension Scheme, their case is covered by the judgment of the Division Bench of this Court in the case of ***Sanjay Kumar and Another Vs. Union of India and Others*** reported in (2022) SCC Online Gau 214 as well as the judgment of the Delhi High Court in the case of ***Shyam Kumar Choudhary and Others Vs. Union of India and Others*** reported in (2019) SCC Online Del 11891.

15. To appreciate the said contention so made by the learned Senior counsel



for the petitioners, it is relevant to take note of the advertisement dated 05.06.2002. It clearly transpires that the said advertisement was limited to only 100 posts i.e. 80 posts of Junior Engineer (Civil) under the PWD, Roadwing and 20 posts of Junior Engineer (Civil) under the PWD, Building Wing. It further appears from the affidavit-in-opposition filed by the respondent Nos. 1, 3, 4 and 5 that the further requisition was made on 09.09.2003 for selection of another 8 Nos. of Junior Engineer (Civil) under the PWD, Roadwing along with another 80 Nos. of Junior Engineer (Civil) posts under the Roadwing. The select list or the recommendations so made by the APSC is however not before this Court as already stated supra but be that as it may, it appears from the notifications dated 30.10.2004, 09.02.2005 and 29.09.2005 that the APSC submitted 3 (three) recommendations vide letter No.24PSC/CON/Exam-2/J.E.(C)/2002-2003 dated 19.01.2004, letter No.27PSC/CON/Exam-02/J.E.(C)/2002-2003 dated 21.01.2004 and letter No.15PSC/CON/E-3/J.E.(M)/2002-2003 dated 13.01.2004 on the basis of which the three notifications dated 30.10.2004, 09.02.2005 and 29.09.2005 were issued.

16. It is also relevant to take note of that in the notification dated 30.10.2004, 108 persons were given appointments thereby exhausting the posts which were advertised in pursuance to the advertisement dated 05.06.2002. The notification dated 09.02.2005 as well as 29.09.2005 by which 84 and 46 persons were appointed were not a part of the advertisement dated 05.06.2002. But the State Government appointed these persons on the basis of the recommendations so made by the APSC vide letters dated 19.01.2004 and 21.01.2004 referred to hereinabove. Therefore, it would be seen that the appointments so made vide notifications dated 09.02.2005 and 29.09.2005 were not on the basis of the advertisement dated 05.06.2002.

17. Now, the question therefore arises as to what are the rights of the petitioners on the basis of which their names being included in the select list or for that matter, the recommendations so made by the APSC on 19.01.2004 and 21.01.2004. It is no longer res-integra that being included in the select list does not confer any vested right for appointment. Inclusion in a select list only gives a right to be considered for appointment. Therefore, it was only upon the issuance of the notifications dated 09.02.2005 and 29.09.2005 that the rights of the petitioners crystallized as vested rights in respect to the post where they were appointed. In this regard, this Court finds it relevant to draw reference to the judgment of the Supreme Court in the case of ***State of A.P. & Others Vs. D. Dastagiri & Others*** reported in (2003) 5 SCC 373 and more particularly to paragraph No.4 which is reproduced below:

“4. In the counter-affidavit filed on behalf of the respondents in Civil Appeal No. 915 of 2000, in para 16 it is stated that the process of selection was cancelled at the last stage i.e. before publishing the list of selected candidates on the sole ground that the State Government wanted to introduce prohibition and obviously the Government felt that there was no need of Excise Constables during imposition of prohibition in the State. There is serious dispute as to the completion of selection process. According to the appellants, the selection process was not complete. No record has been placed before us to show that the selection process was complete, but, it is not disputed that the select list was not published. In para 16 of the counter-affidavit, referred above, the respondents themselves had admitted that the selection process was cancelled at the last stage. In the absence of publication of select list, we are inclined to think that the selection process was not complete. Be that as it may, even if the selection process was complete and assuming that only select list remained to be published, that does not advance the case of the respondents for the simple reason that even the candidates who are selected and whose names find place in the select list, do not get vested right to claim

appointment based on the select list. It was open to the State Government to take a policy decision either to have prohibition or not to have prohibition in the State. Certainly, the Government had right to take a policy decision. If pursuant to a policy decision taken to impose prohibition in the State there was no requirement for the recruitment of Constables in the Excise Department, nobody can insist that they must appoint the candidates as Excise Constables. It is not the case of the respondents that there was any mala fides on the part of the appellants in refusing the appointment to the respondents after the selection process was complete. The only claim was that the action of the appellants, in not appointing the respondents as Excise Constables, was arbitrary. In the light of the facts that we have stated above, when it was open to the Government to take a policy decision, we fail to understand as to how the respondents can dub the action of the respondents as arbitrary, particularly, when they did not have any right as such to claim appointments. In the absence of selection and publication of select list, mere concession or submission made by the learned Government Pleader on behalf of the appellant State cannot improve the case of the respondents. Similarly, such a submission cannot confer right on the respondents, which they otherwise did not have.”

18. In the above backdrop, a further question arises as to whether the petitioners could be considered that they have entered into service in the affairs of the State of Assam on the basis of they being included in the select list so as to be entitled to in terms with the Old Pension Scheme regulated under the Rules of 1969. For that purpose, it would be relevant to take note of the Rule 31 of the Rules of 1969 which stipulates as to when the services of an employee would qualify for pension. Rule 31 of the Rules of 1969 being relevant is extracted hereinbelow:

“**31.** *The service of an officer does not qualify for pension unless in*

conforms to the following three conditions:-

Firstly, the service must be under Government;

Secondly, the employment must be substantive and permanent;

Thirdly, the service must be paid by Government:

Provided that the Governor may, even though either or both of conditions (1) and (2) above are not fulfilled,-

(i) *declare that any specified kind of service rendered in a non-gazetted capacity shall qualify for pension, and*

(ii) *in individual cases and subject to such conditions as he may think fit to impose in each case allow service rendered by an officer to count for pension."*

A perusal of Rule 31 would show that three conditions have to be satisfied for the purpose of the service of an Officer to be qualified for pension. Firstly, the services of the officer must be under the Government. Secondly, the employment must be substantive and permanent and thirdly, the service must be paid by the Government. There is a proviso to Rule 31 of the Rules of 1969 which stipulates that the Governor may make declarations that any specified kind of service rendered in the non-gazetted capacity shall qualify for pension and in individual cases and subject to such conditions as he may think fit to impose in each case allow service rendered by an officer to count for pension by doing away with the conditions that the service must be under the Government and that the employment must be substantive and permanent. However, the third condition that the services must be paid by the Government cannot be done away with by way of any declaration.



19. In the instant case, it would be seen that the petitioners herein were not in the service of the Government; their employment were neither substantive nor permanent and their services were not paid by the Government prior to their appointments so made vide notifications dated 09.02.2005 and 29.09.2005 and as such, the question of the petitioners' being entitled to pension under the Rules of 1969 on the basis that they were included in the select list would be contrary to Rule 31 of the Rules of 1969.

20. At this stage, it may be relevant to take note of the submissions of the petitioners as regards the applicability of the law declared by the Division Bench of this Court in the case of **Sanjay Kumar (supra)** as well as the Delhi High Court judgment in the case of **Shyam Kumar Choudhary (supra)** wherein it was held that the selection proceedings having been initiated when the Old Pension Scheme was holding the field but on account of delay in issuance of the appointment letters for a period which resulted in the appointment orders being issued, pursuant to the coming into effect of the New Pension Scheme; the petitioners therein before the Delhi High Court as well as the Division Bench of this Court were held to be entitled to the benefits of the Old Pension Scheme.

21. The facts of the instant case however as have been narrated hereinabove is different from the case in the case of **Sanjay Kumar (supra)** as well as **Shyam Kumar Choudhary (supra)** inasmuch as in the instant writ petitions before this Court, the posts in respect to which the advertisement was issued were already filled up vide the notification dated 30.10.2004 and therefore the advertisement lost its force pursuant to the said notification dated 30.10.2004. The Government in its wisdom instead of going ahead with the fresh selection proceedings appointed the petitioners herein in respect to other vacancies which

admittedly arose prior to 01.02.2005. At this stage, this Court finds it relevant to refer to the judgment of the Supreme Court in the case of **Regional Manager Vs. Pawan Kumar Dubey & Another reported in (1976) 3 SCC 334** wherein it was observed at paragraph No.7 that one additional or different fact can make a world of a difference between conclusions in two cases even when the same principles are applied in each case to similar facts. Paragraph No. 7 of the said judgment is quoted hereinbelow:

“7. We think that the principles involved in applying Article 311(2) having been sufficiently explained in Shamsher Singh case it should no longer be possible to urge that Sughar Singh case could give rise to some misapprehension of the law. Indeed, we do not think that the principles of law declared and applied so often have really changed. But, the application of the same law to the differing circumstances and facts of various cases which have come up to this Court could create the impression sometimes that there is some conflict between different decisions of this Court. Even where there appears to be some conflict, it would, we think, vanish when the ratio decidendi of each case is correctly understood. It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts.”

In the instant case, the fact that the petitioners were appointed to the posts which were outside the scope of the advertisement dated 05.06.2002 completely changes the complexion so far as the applicability of the ratio laid down in the case of **Sanjay Kumar (supra)** and **Shyam Kumar Choudhary (supra)** for which it is the opinion of this Court that the ratio in the said judgments cannot be made applicable to the instant case.

22. It is also relevant to take note of another aspect of the matter which pertains to the submissions that as the vacancies arose at the time when the Old Pension Scheme was holding the field so the petitioners would be entitled to the Old Pension Scheme. In a recent judgment of the Supreme Court in the case of ***State of Uttar Pradesh and Others Vs. Rachna Hills and Others reported in (2023) SCC Online SC 506***, the Supreme Court while dealing with an issue as to whether the Rules and Regulations that existed when the vacancies arose would be applicable or the amended regulations would be applicable; by relying upon the judgment in the case of ***State of Himachal Pradesh Vs. Raj Kumar and Others reported in (2022) SCC Online SC 680*** held that the vacancies are to be filled up on the basis of the Rules existing as on the date in force and not on the basis of the Rules at the time when the vacancies arose. Paragraph Nos. 32 and 33 of the judgment in ***Rachna Hills (supra)*** are quoted hereinbelow.

“32. In a recent decision, in State of Himachal Pradesh v. Raj Kumar, after reviewing a number of decisions on the same subject, this Court formulated the following principles:

“70. A review of the fifteen cases that have distinguished Rangaiah would demonstrate that this Court has been consistently carving out exceptions to the broad proposition formulated in Rangaiah. The findings in these judgments, that have a direct bearing on the proposition formulated by Rangaiah are as under:

1. There is no rule of universal application that vacancies must be necessarily filled on the basis of the law which existed on the date when they arose, Rangaiah's case must be understood in the context of the rules involved therein.

2. It is now a settled proposition of law that a candidate has a

right to be considered in the light of the existed rules, which implies the "rule in force" as on the date consideration takes place. The right to be considered for promotion occurs on the date of consideration of the eligible candidates.

3. The Government is entitled to take a conscious policy decision not to fill up the vacancies arising prior to the amendment of the rules. The employee does not acquire any vested right to being considered for promotion in accordance with the repealed rules in view of the policy decision taken by the Government. There is no obligation for the Government to make appointments as per the old rules in the event of restructuring of the cadre is intended for efficient working of the unit. The only requirement is that the policy decisions of the Government must be fair and reasonable and must be justified on the touchstone of Article 14.

4. The principle in Rangaiah need not be applied merely because posts were created, as it is not obligatory for the appointing authority to fill up the posts immediately.

5. When there is no statutory duty cast upon the State to consider appointments to vacancies that existed prior to the amendment, the State cannot be directed to consider the cases."

(emphasis supplied)

33. *In view of the clear enunciation of the law, we have no hesitation in rejecting the submission made by the learned counsels for the Respondents, that the vacancies that existed prior to the amendment of Regulation 17 of Chapter II, must be governed by unamended rules."*

23. In that view of the matter, the fact that the vacancies arose prior to the coming into effect of the NDCPS, 2009 would have no bearing and the



petitioners having been appointed after the NDCPS, 2009 had come into force in view of the Amending Rules of 2011, would be regulated by the NDCPS, 2009 and not by the Old Pension Scheme.

24. In that view of the matter, this Court does not find any merits in the writ petitions for which both the writ petitions stands dismissed.

JUDGE

Comparing Assistant