



GAHC010170722020

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

Case No. : WP(C)/5034/2020

ON THE DEATH OF ANIL MAHANTA
SMTI RANU MAHANTA W/O- LATE ANIL MAHANTA, C/O. SRI MOHEN
SHARMAH, WARD NO.12, NORTH LAKHIMPUR, NORTH LAKHIMPUR, DIST.
LAKHIMPUR, ASSAM, PIN-787001.

VERSUS

THE STATE OF ASSAM AND 4 ORS.
REP. BY THE COMMISSIONER, PANCHAYAT AND RURAL DEVELOPMENT,
PANJABARI, JURIPAR, GUWAHATI-37.

2:THE DIRECTOR PANCHAYAT AND RURAL DEVELOPMENT

ASSAM
PANJABARI
JURIPAR
GUWAHATI-37.

3:THE CHIEF EXECUTIVE OFFICER

TINSUKIA ZILLA PARISHAD
TINSUKIA
PIN-786125.

4:THE COMMISSIONER AND SECY.
TO THE GOVT. OF ASSAM
FINANCE DEPTT.
DISPUR
GUWAHATI-781006.

5:THE ACCOUNTANT GENERAL (A AND E)



ASSAM
MAIDAMGAON
BELTOLA
GUWAHATI-29

Advocate for the Petitioner : MS D BORGOHAIN

Advocate for the Respondent : SC, PNRD

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : Ms. D. Borgohain. Advocate.

For the Respondents : Mr. K. Konwar, Additional Advocate General, Assam assisted by Mr. P. Handique, Advocate.

Mr. S. K. Medhi, Standing Counsel, Accountant General (A&E), Assam.

Mr. A. Chaliha, Standing Counsel, Finance Department, Assam.

Date of Hearing : 08.06.2023, 10.08.2023

Date of Judgment : 10.10.2023.

JUDGMENT & ORDER (CAV)

1. Heard Ms. D. Borgohain, learned counsel for the petitioner. Also heard Mr. K. Konwar, learned Additional Advocate General, Government of Assam assisted by Mr. P. Handique, learned counsel representing the P&RD Department, Assam, Mr. S. K. Medhi, learned Standing Counsel for the Accountant General (A&E), Assam and Mr. A. Chaliha, learned Standing Counsel for the Finance Department, Assam.

2. The issues:-

- i. The question involved in the present writ petition is whether the term used "conclusion of a proceeding and final order passed" in Rule 22 (1) of the Assam Services (Pension) Rules, 1969 (herein after referred as Rules, 1969), in respect of a criminal proceeding shall mean conclusion of a proceeding when a person is convicted or whether such finality and conclusion of proceeding shall attain finality after determination of the appeal as provided under Section 393 of the Cr.P.C.
- ii. The second question will be whether under Rule 21 of the Rules, 1969, the Governor is empowered to withheld the provisional pension permanently or for a specified period or a regular pension which has already been granted.

3. The facts:

The facts in the present case which is not in dispute can be summarized as follows:-

- I. The husband of the present petitioner, who was a Government servant and serving as UDA and I/C Accountant of Dhemaji Zilla Parishad was arrested in connection with Dhemaji Police Station Case No. 156/2011 under Section 468/471/409 of the Indian Penal Code and under Section 7 of the P.C. Act, 1988 on 26.05.2011.
- II. Subsequently the Commissioner, Panchayat & Rural Development Department by an order dated 30.05.2011 placed the petitioner under

suspension w.e.f. 26.05.2011 (from the date of arrest). The order dated 30.05.2011 reveals that based on the report of the CEO, Dhemandi Zilla Parishad that financial irregularities to the tune of Rs. 1.88 crores of public fund was committed by the petitioner, the petitioner has been placed under Suspension. A departmental proceeding was also initiated.

- III. The respondent authorities without completing disciplinary proceeding, kept him under suspension for more than 13 months and also did not release the arrears of salary, subsistence allowance which compel the petitioner had to file a writ petition being WP(C) No. 3675/2022 before this Court, which was disposed of under its order dated 12.09.2012, directing the respondent authorities to take a considered decision with regard to revocation of suspension, payment of subsistence allowance for the period of suspension and release of arrears of salary as claimed in the writ petition by the petitioner within a period of six weeks.
- IV. Pursuant to such order dated 12.09.2012, the respondent authority under its letter dated 19.10.2012, re-instated the petitioner in service.
- V. Subsequently, on 24.08.2017, a departmental proceeding was initiated by issuing show cause notice. Enquiry Officer was appointed and a day prior to the retirement of the petitioner on 29.11.2017, the petitioner was removed from service as punishment.
- VI. Such decision was again challenged by filing a writ petition being WP(C) No. 470/2018, before this Court which was disposed of under

its order dated 11.02.2019 by setting aside the order of removal and with a liberty to the employer to start de-novo proceeding.

- VII. Alleging to non compliance of the order dated 11.02.2019 passed by this Court in WP(C) No. 470/2018, the petitioner filed a contempt petition being numbered as Cont.Case(C) No. 581/2019, which was disposed of under its order dated 11.08.2020, by issuing a direction to all the respondent contemnors to do the needful to ensure that the provisional pension is paid to the petitioner on or before 01.10.2020. While passing such order, this Court concluded that under Rule 22(1) of the Rules, 1969, the petitioner cannot be deprived of provisional pension.
- VIII. While the contempt proceeding was pending, the petitioner was convicted in the criminal proceeding being Special Case No. 8/2015, by the learned Special Judge, Assam, Guwahati under its order dated 19.10.2019, which was initiated on the basis of FIR dated 26.05.2011 as discussed hereinabove.
- IX. Thereafter, by an order dated 18.09.2020, the petitioner was granted provisional pension with effect from 01.12.2017 till the date of his conviction dated 19.10.2019.
- X. In the meantime, the petitioner challenged his conviction in Criminal Appeal No. 399/2019, before this Court. This Court admitted such appeal on 24.10.2019 and, on an application being filed which was registered as I.A.(CrI)/415/2020, allowed the petitioner to go on bail under its order dated 15.09.2020.

- XI. In the meantime, the petitioner filed the present writ petition assailing the order dated 18.09.2020 with a prayer that the petitioner is entitled for grant of family pension under Rule 22 of the Rules, 1969 till the judicial proceeding which was initiated through lodging of FIR dated 26.05.2011 is finalised.
- XII. While both the appeal and writ petition were pending, the petitioner expired on 13.10.2021. His wife (petitioner herein) got impleaded in both the cases i.e. the Criminal Appeal No. 399/2019 as well as in the present writ petition.

4. Arguments of the learned counsel for the petitioner: -

- I. Ms. Borgohain, learned counsel for the petitioner argues that the deceased husband of the present petitioner was deprived of the provisional family pension inasmuch as there is no power to stop provisional pension on conviction when an appeal is preferred and pending.
- II. Referring to Rule 22 of the Rules, 1969, learned counsel submits that Rule 22(1) is enacted to protect the interest of those pensioner against whom a proceeding is pending during his period of service and no final order has been passed on the date of retirement. According to her, in the case in hand, in terms of Section 393 of Code of Criminal Procedure, 1973, the proceeding initiated against the deceased employee shall continue till it attains finality in an appeal or a Special Leave Petition before the Hon'ble Apex Court.
- III. It is the contention of Ms. Borgohain, learned counsel that the Rule

21 of the Rules, 1969 empowers the Governor to withhold or withdraw permanently or for a specific period of time regular pension when a pensioner is found guilty of misconduct or negligence committed during the period of his service and such Rule shall be applicable when the proceeding attains finality and regular pension has been granted.

- IV. Relying on the definition of the judicial proceeding as defined under Section 2(i) and Section 393 of the Code of Criminal Procedure, 1973, Ms. Borgohain, learned counsel submits that when an appeal is pending, it cannot be said that the proceeding has attained finality. In support of her contention, Ms. Borgohain, learned counsel relies on the judgment of a Coordinate Bench rendered on 12.02.2015 in WP(C) No. 1782/2014 (***Samsul Haque –Vs- State of Assam & 6 ors***). Ms. Borgohain, learned counsel further relies on the decision of the Hon'ble Apex Court in the case of ***U. J. S. Chopra -Vs- State of Bombay*** reported in ***AIR 1955 SC 633***.
- V. Ms. Borgohain, learned counsel for the petitioner also argues that the intention of the legislature is very clear while framing the Rule 20 and Rule 22 of the Rules, 1969 inasmuch as in Rule 20 of the Rules, 1969 the word "conviction" has been used whereas in Rule 22 of the Rules, 1969, is structured in a way giving finality of the proceeding, not specifically conviction. Therefore, from the aforesaid, it is clear that it was the intention of the legislature to provide relief to a pensioner at least the provisional pension till the proceeding initiated against him attains finality.

5. Argument of Mr. K. Konwar, learned Additional Advocate General, Assam for the State respondents/department: -

- I. when a person is convicted, the determination is made and finality is achieved so far the same relates to the conviction of the person. A mere pendency of an appeal, even if, the sentence is stayed, the conviction shall remain. Therefore, so far relating to the conviction, it is a finality of the judicial proceeding. In support of such contention, Mr. Konwar, relies on a decision of Madhya Pradesh High Court in ***Writ Appeal No. 1245/2012 (Raj Karan Singh -Vs- State of Madhya Pradesh)***, whereby dealing with a pari materia provision, it was held that provisional pension was to meet out the contingencies, so that the employee may get provisional pension till the finality of the proceeding but as soon as the proceeding are concluded by the criminal court convicting a retired employee he would not be entitled for further pension until and unless, his conviction is stayed or set aside by the higher authority.
- II. Relying on the constitution Bench decision of the Hon'ble Apex Court in the case of ***The State of Uttar Pradesh -Vs- Mohammad Nooh*** reported in ***1958 AIR SC 86***, Mr. Konwar, argues that there is nothing in Indian Law to warrant the suggestion that decree or order of the Court or Tribunal of the First instance becomes final only on the termination of all proceeding by way of appeal or revision. According to Mr. Konwar, the impugned order dated 18.09.2020 is a valid order as the conviction of the deceased dated 19.10.2019 passed by the court of first instance is still holding

the field as the same was neither stayed or suspended or modified.

- III. Relying on the judgment of the Hon'ble Apex court in the case of ***K. C. Sareen –Vs- CBI, Chandigarh*** reported in ***(2001) 6 SCC 584***, Mr. Konwar, submits that when a public servant was found guilty of corruption after a judicial adjudicatory process conducted by a court of law, judiciousness demands that he should be treated as corrupt until he is exonerated by a superior Court.
- IV. Relying on the judgment of the Hon'ble Apex Court rendered in ***Union of India and Ors –Vs- Shri Ramesh Kumar*** reported in ***1997 Supp.3 SCR***, Mr. Konwar argues that on the suspension of execution of sentence under Section 389 Cr.P.C., an accused avoids undergoing sentence pending criminal appeal however, the conviction continues and is not obliterated and if the conviction is not obliterated, any action taken against a government servant on a misconduct which lead to his conviction by the court of law, does not loose its efficacy merely because appellate Court has suspended the execution of sentence.
- V. Relying on the judgment of Delhi High Court in the case of ***P.C.Misra, Danics/Joint Director (Retd.) –Vs- Union of India and Ors*** passed in ***WP(C)/12470/2018***, Mr, Konwar, argues that while dealing with a pari materia provision of Rule 69 (1) of CCS Pension Rules 1969, the Delhi High Court held that finality shall mean the finality of the judgment and conviction passed by the Court of first instance and therefore, the pensioner shall not be entitled for pension.

6. Determination and Decision of this Court:

This Court has given thoughtful considerations to the arguments advanced by the learned counsel for the parties. Also perused the materials available on record.

- I. Rule 20 of the Rules, 1969 provides that the Governor of Assam reserves a right to withhold or withdraw a pension or any part of it, if the pensioner is convicted of serious crime or is guilty of grave misconduct. The explanation to the said Rule, provides that such power is exercisable in a case when the crime or misconduct is committed after the pensioner has retired from service with a further clarification that such Rule shall not be applicable in respect of crime or misconduct committed before the retirement from service. The explanation further refers that for the purpose of crime or misconduct committed during the period of service, Rule 21 of the Rules, 1969 shall be applicable.
- II. Rule 21, of the Rules, 1969 further provides that the Governor shall have a right to withhold or withdraw a pension or any part of it either permanently or for a specific period and is also having the right to order recovery from the pension to meet any pecuniary loss caused to the government when in a department or a judicial proceeding, the petitioner is found guilty of grave misconduct etc.
- III. The explanation 'B' to the Rules, 1969 provides that a judicial proceeding is deemed to be instituted under Rule 21 of the Rules, 1969, in case of a criminal proceeding, from the date on which

complaint or report of police officer is made or on a date when the Magistrate takes cognizance of such offence.

- IV. From the aforesaid, it is clear that when a pensioner is found guilty of grave misconduct or negligence during the period of his service and in the meantime he has retired and getting pension, the Governor of Assam can withhold or withdraw the pension in whole or in part thereof either permanently or for a specific period. The Governor is further empowered to make recovery from such pension.
- V. Rule 22 (1) of Rules, 1969 provides that when a proceeding either departmental or judicial was instituted under Rule 21 of the Rules, 1969 and such proceeding continued, and in the meantime, the officer has retired on attaining the age of compulsory retirement or otherwise, he is entitled to get the provisional pension, not exceeding the maximum pension which would have been admissible on the basis of his qualifying service from the date of retirement to the date on which upon conclusion of such proceeding (either judicial proceeding initiated under Rule 21 of Rules, 1969 or departmental proceeding is continued) final orders are passed.
- VI. In the case in hand, the criminal proceeding was initiated within the meaning of Rule 21 of the Rules, 1969 while the husband of the petitioner was in service. A departmental proceeding was also initiated within the meaning of Rule 21 of the Rules, 1969 during his service period, though the petitioner was removed from service, such decision was set aside with a liberty to continue with de-novo proceeding which was not started. Therefore, in the present case, this

Court is concerned with the judicial proceeding and not the departmental proceeding within the meaning of Rule 21 and 22 of the Rules, 1969.

- VII. Section 393 of the Code of Criminal Procedure, 1973 provides for finality of judgments and orders of appeal. It provides that judgment and orders passed by an appellate Court upon an appeal shall be final except in the case as provided for under Sections 377, 378 and Sub-Section (4) of Section 384 or Chapter XXX of the Cr.P.C.
- VIII. Section 377 of the Cr.P.C., provides for appeal by State government against sentence, which is having no relevance in the present case. Section 378 of the Cr.P.C. deals with appeal in case of acquittal and Sub-Section (4) of Section 384 of Cr.P.C., relates to summary dismissal of appeal under Section 383 of Cr.P.C.
- IX. Section 2(i) of Cr.P.C., defines judicial proceeding to include any proceeding in course of which evidence is or may be legally taken on oath. Thus, the definition of judicial proceeding is an inclusive definition.
- X. Chapter XXIX of Cr.P.C., deals with provisions and procedure of appeals, containing Sections 372 to 394 of Cr.P.C. Section 391 of Cr.P.C, empowers the appellate Court to take additional evidence, when the appellate Court thinks necessary and the appellate Court can itself take such evidence. Therefore, an appeal under Section 374 of Cr.P.C., as the case herein, shall for all meaning and purports, a judicial proceeding within the meaning of Section 2(i) of the Cr.P.C.

XI. Now coming the argument and judgments relied on by Mr. Konwar, learned Additional Advocate General, Assam, this court is of the view that the context in which the judgments passed by the Hon'ble Apex Court that have been relied upon by Mr. Konwar, learned Additional Advocate General, Assam is not applicable in the given facts of the case inasmuch as the present case relates to a payment of pension and the legislature in its wisdom specifically used the word and emphasised on "conclusion and finality" of judicial proceeding. Therefore, the judgment which relates to the exercise of power under Article 311 and relating to execution of decree is not applicable in the present case inasmuch as a dismissal of government servant cannot be equaled with a person who has retired and who is entitled for pension. In the considered opinion of this Court pension being a very valuable right, the legislature in its wisdom has incorporated the provision of Rule 22 of Rules, 1969 so that the pensioner survives till the allegation made against him attains finality.

7. In terms of the discussions and determination made hereinabove, this Court passes the following orders:-

- I. Criminal Appeal is a judicial proceeding in the context of Rule 22 (1) of the Pension Rules, 1969.
- II. Accordingly, the judicial proceeding initiated against the husband of the petitioner during his service period shall attain finality on the termination/determination of the criminal appeal filed by the pensioner/husband of the petitioner under Section 374 of Cr.P.C., which is now being pursued by the present petitioner.

III. Therefore, till such finality of judicial proceeding is attained, the pensioner/deceased husband of the petitioner shall be entitled for provisional pension till his death i.e. and the present petitioner shall be entitled for provisional family pension till determination of the appeal being Crl. Appeal No.399/2019, and further course of action shall depend upon the determination made in the appeal as discussed hereinabove.

IV. Accordingly, it is directed that the respondents/employers including the respondent No. 5, shall ensure that payment as determined hereinabove shall be released/made within a period of four weeks from receipt of a certified copy of this order by the aforesaid respondents to be submitted by the petitioner.

V. A compliance report be filed thereafter by the respondents before the Registry of this Court.

8. With the aforesaid observations, discussions and decisions, the present writ petition stands allowed. Parties to bear their own cost.

JUDGE

Comparing Assistant