



GAHC010018892022

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

Case No. : WP(C)/877/2022

NAGENDRA NATH BORAH AND 12 ORS
S/O-LATE UPENDRA NATH BORAH,
R/O-VILL.-BHATEMORA,
P.O-R.R.L,
DISTRICT-JORHAT, ASSAM

2: AKANMAN DAS
S/O-LATE KALIRAM DAS

R/O-VILL.-KHUTIAPUTA

P.O-NAHOTIA
DISTRICT-JORHAT
ASSAM

3: PRADIP DUTTA
S/O-LATE KALAI DUTTA

R/O-VILL.-BAHATIA

P.O-JORHAT

DISTRICT-JORHAT
ASSAM

4: JAGAT CHANDRA GOGOI
S/O-LATE KAMAL GOGOI

R/O-VILL.-KOPORA DHARA METALI GAYAON

P.O-LADOIGOR

DISTRICT-JORHAT
ASSAM



5: ATUL DUTTA
S/O-LATE LUKENDRA DUTTA

R/O-VILL.-MOHBANDHA CHAKALATING

P.O-R.R.L

DISTRICT-JORHAT
ASSAM

6: BHULANATH BORAH
S/O-LATE DHANIRAM BORAH

R/O-VILL.-KHANGIA

P.O-NA HOTIA

DISTRICT-JORHAT
ASSAM

7: BIREN KOCH
S/O-LATE SOMEDHAR KOCH

R/O-VILL.-KUHUM JUGANIA

P.O-KAKILAMUKH

DISTRICT-JORHAT
ASSAM

8: BUP KEOT
S/O-LATE GUNARAM KEOT

R/O-VILL.-SENSUA

P.O-R.R.L

DISTRICT-JORHAT
ASSAM

9: PREMADHAR GOGOI
S/O-LATE CHITRADHAR GOGOI

R/O-VILL.-BORAHOM KATHONI

P.O- BORAHOM KATHONI



DISTRICT-JORHAT
ASSAM

10: BANSHIDHAR HAZARIKA
S/O-LATE TITARAM HAZARIKA

R/O-VILL.-KHANGIA GAON

P.O-TEKELA

DISTRICT-JORHAT
ASSAM

11: TOSHESWAR BORA
S/O-LATE SONESWAR BORA

R/O-VILL.-PANISAKUA

P.O-R.R.L

DISTRICT-JORHAT
ASSAM

12: MULAN BORAH
S/O-LATE BAPURAM BORAH

R/O-VILL.-PAKHIMURIA

P.O-SAUKHAT

DISTRICT-JORHAT
ASSAM

13: GANESH HAZARIKA
S/O-LATE SONADHAR HAZARIKA

R/O-VILL.-KHONGIA

P.O-TEKELA

DISTRICT-JORHAT
ASSA

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, REVENUE AND D.M DEPARTMENT, GOVT. OF ASSAM, DISPUR,



GUWAHATI-781006, ASSAM

2:THE DEPUTY COMMISSIONER
JORHAT DISTRICT
ASSA

Advocate for the Petitioner : MR S BORTHAKUR

Advocate for the Respondent : GA, ASSAM

Linked Case : WP(C)/794/2022

NAREN DAS AND 3 ORS
S/O. LT. DANDIRAM DAS
VILL. SULIKATA MOUZA RAMPUR
PALSHBARI KAMRUP ASSAM
PIN-781128.

2: PRABIN BARUAH
R/O. MOUZA CHAYANI
VILL. KOKJHAR
PALASHBARI
KAMRUP
PIN-781128.

3: LAL CHARAN DAS
S/O. LT. BHAKAT CHARAN DAS
VILL. 1 NO. AMTOLA BAMUNPARA MOUZA DAKHIN SARU BANSAR
PALASHBARI
KAMRUP
PIN-781128.

4: BHABESH DAS
S/O. LT. KAMALA DAS
VILL. NALGAN MOUZA KURUA
PIN-781128.
VERSUS

THE STATE OF ASSAM AND 2 ORS
REP. BY THE CHIEF SECRETARY OF THE GOVT. OF ASSAM.

2:COMMISSIONER AND SECY.
GOVT. OF ASSAM



DEPTT. OF REVENUE AND DISASTER MANAGEMENT DISPUR
GUWAHATI-781006.
3:DEPUTY COMMISSIONER
KAMRUP AMINGAON DIST. KAMRUP.

Advocate for : MR. K N CHOUDHURY
Advocate for : GA
ASSAM appearing for THE STATE OF ASSAM AND 2 ORS

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioners :Mr. K. N. Choudhury,
Sr. Advocate..
Mr. S. Borthakur, Advocate.
Mr. S. Goswami, Advocate.

For the Respondents : Mr. D. Saikia,
Advocate General, Assam.
Mr. J.Handique, Advocate.

Date of Hearing : 31.08.2022, 01.09.2022

Date of Judgment & Order :27.09.2022

JUDGMENT & ORDER (CAY)

Heard Mr. K. N. Choudhury, learned Senior Counsel assisted by Mr. S. Goswami, learned counsel for the petitioner in WP(C) No. 794/2022 and Mr. S. Borthakur, learned counsel for the petitioner in WP(C) No. 877/2022. Also heard Mr. D. Saikia, learned Advocate General, Assam assisted by Mr. J. Handique, learned Standing Counsel for the Revenue and Disaster Management Department.

2. This two writ petitions are taken up together for disposal as both the



petitions raises common question of law and fact and arises out of a common notification dated 26.08.2021 issued by the Commissioner & Secretary to the Government of Assam, Revenue & D. M. Department, notifying the upper age limit of Gaon Pradhans.

3. **Brief background fact of the case:-**

- a. The petitioners were appointed as Gaonburahs (Village Heads) in their respective villages by the respondent authority as per the provisions of Executive Instruction No. 162(A) made under Assam Land and Revenue Regulation, 1886 and prior to amendment of the said Executive Instruction.
- b. The said Executive Instruction was amended by way of notification dated 16.01.2016 by the Governor of Assam, whereby Executive Instruction 162 and 162A were deleted and new clause 161(A) was inserted.
- c. The new clause 161 (A)(1)(iii) mandates that Gaonbura can continue to function up to the age of 65 years, if he is physically and mentally fit to carry out the duties and responsibilities assigned to him. Certain other amendments were also made which is not relevant for the determination of the present litigation.
- d. Subsequently, by yet another notification dated 26.08.2021, the Governor of Assam amended the Executive Instruction by substituting the Clause-1 of Executive Instruction 162 by reducing minimum years of entry to be 30 years instead of 35 years. By way of the said notification dated 26.08.2021, three changes were made,



(1) the existing word "Gaonbura" was substituted by the word "Gaon Pradhan", (2) the minimum qualifying age of 35 years was incorporated for selection as Gaon Pradhan and (3) it was incorporated that the Gaon Pradhan shall hold his/her post up to the age of 65 years unless removed from the post, before attaining the age of 65 years by the concerned Deputy Commissioner of the District or Principal Secretaries of the Autonomous Council areas on any of the ground mentioned in Clause (2) of this instruction.

- e. Subsequent to this, the Deputy Commissioner issued different orders releasing the Gaon Pradhans from their services, who in the meantime attained 65 years of age. Being aggrieved, the present writ petitions have been filed.

4. **Argument of the learned counsel for the petitioners.**

Mr. K. N. Choudhury, learned Senior Counsel and Mr. S. Borthakur, learned counsel make the following arguments.

- a. The decision was taken on the basis of a recommendation of Committee, which recommended fixing maximum age of 65 years for superannuation of Gaonbura's. However, while Cabinet took the decision, it was proposed by the Department concerned i.e. Department of Revenue and Disaster Management that Executive Instruction should be amended but the same should be made applicable in case of future appointments and shall not be made applicable to the existing Gaonbura's and such recommendation was approved by the Cabinet and therefore for all meaning and purport, the



notifications are prospective in nature and therefore, the petitioners could not have been released from their positions as Gaonbura's of their respective villages on the basis of the Executive Instruction dated 26.08.2021.

- b. When a notification or rule is brought in, the same is prospective in nature, until and unless the same is declared to be retrospective or by implication, it is shown that the effect of said notification or rule is retrospective in nature. In the case in hand, the Executive Instruction specifically provides that it shall come into effect from the date of publication in the official gazette and therefore, by virtue of such Executive Instruction, the Deputy Commissioners were vested with no such power to release the petitioners from their respective service.
- c. Mr. Choudhury, learned Senior Counsel further contends that by way of the impugned action of the Deputy Commissioner, the State Authorities are seeking to reverse from an anterior date, a benefit which has already been granted to the petitioners and therefore, this Court is required to interfere with such highhanded action of the Deputy Commissioner's and this Court should clarify that the Executive Instruction in question are not applicable in case of the present petitioners in view of the aforesaid settled proposition of law. To buttress his arguments, Mr. Choudhury relies on a judgment of the Hon'ble Apex Court in the case of **Chairman, Railways Board and Others –Vs- C. R. Rangadhamaiah and Others** reported in **(1997) 6 SCC 623**.
- d. Mr. K. N. Choudhury, learned Senior Counsel relying on the decision of



the Hon'ble Apex Court in the case of ***Union of India and Others – Vs- Tushar Ranjan Mohanty and Others*** reported in ***(1994) 5 SCC 450*** contends that the legislatures and the competent authority under the Constitution of India have the power to make laws with retrospective effect. This power, however, cannot be used to justify the arbitrary, illegal or unconstitutional act of the executive. When a person is deprived of an accrued right vested in him under a statute or under the Constitution and he successfully challenges the same in the court of law, the legislature cannot render the said right and the relief obtained nugatory by enacting retrospective legislation. Mr. Choudhury, learned Senior Counsel further submits that the petitioners are having a vested and concluded right to continue as per condition of service prior to the amendment, more particularly when the Executive Instruction in question is having prospective effect. Mr. Choudhury, learned Senior Counsel also submits that by way of the Execution Instruction, which expressly operates in future so as to govern the future right, the right of the petitioners who are already in service cannot be recto actively be taken away and if same is done, the same shall be violative of Article 14 and 16 of the Constitution of India

- e. Mr. Borthakur, learned counsel relying on the judgment of the Hon'ble Apex Court in the case of ***Assistant Excise Commissioner, Kottayam and Others –Vs- Esthappan Cherian and Another*** reported in ***(2021) 10 SCC 210*** contends that a rule or law cannot be construed as retrospective unless it expresses a clear or manifest intention, to the contrary.

5.

Argument of Mr. D. Saikia, learned Advocate General:

- (a) Per contra, Mr. D. Saikia, learned Advocate General, Assam relying on the decision of the Hon'ble Apex Court in the case of ***Kandarpa Sarma –Vs- Rajeswar Das and Ors*** reported in ***(2011) 14 SCC 752*** submits that the Hon'ble Apex Court in ***Kandarpa Sarma*** (supra) in no ambiguous term held that Executive Instruction holding the field do not fix any terms and conditions of service of the Gaonbura's. It was further held that the Gaonbura's should not be allowed to continue to work as Gaonbura's in perpetuity, there has to be some age limit or duration of period for his service on completion of which he should stand relieved, submits Mr. Saikia, learned Advocate General.
- (b) Mr. Saikia, learned Advocate General also contends that the Hon'ble Apex Court requested and left it to the State Government to frame such service conditions for the Gaonburahs as expeditiously as possible preferably within a period of three months from the date of passing of the judgment. The Hon'ble Apex Court in the said judgment in ***Kandarpa Sarma*** (Supra) also expressed the feelings that the contents of the Executive instruction relating to appointment of Gaonburah requires updating and further amendments should be in tune with the present day requirement, which shall be done simultaneously with the aforesaid exercise. Therefore, Mr. Saikia, learned Advocate General, Assam contends that in the spirit of the aforesaid judgment, the Cabinet in its wisdom had taken a decision to lay down the procedure relating to



selection and appointments of the Gaonburah's, fixing minimum qualifications, departmental control over them, the duties and liabilities of Gaonburah's and accordingly the Amendment Notifications were issued.

(c) Regarding the retrospective of the Executive Instruction in question, Mr. Saikia, learned Advocate General, Assam contends that though the department initially given a proposal that the maximum age of 65 years should not be applicable to the existing Gaonburah's however, while approving such decision, the Cabinet has without any ambiguity, fixed the age to be 65 years without giving any rider that same shall not be applicable to the existing Gaonburah's and thereby rejected such proposal of the Department. Therefore, from the intent of the Notification, it is clear that it is retrospective in nature and therefore, the petitioner's cannot claim to continue beyond 65 years of age.

6. I have given anxious consideration to the arguments advanced by the learned counsel for the parties.
7. In the backdrop of the aforesaid arguments, this Court is of the considered opinion that the first issue to be determined in the present case is whether the present petitioners are having a vested and concluded right to continue to serve as Gaonburah's till they are mentally and physically fit as provided under the Executive Instruction that was holding the field when this petitioners were appointed as Gaonburah's.
8. The law is well settled that the legislature or the executive are

competent to make rule or to issue executive instruction following the due procedure laid down under the Constitution of India as provided under the Article 162 and proviso to Article 309 or Article 166 of the Constitution of India. They are equally competent to make such rule or such executive instruction prospective or retrospective in nature.

9. The law is equally well settled that even in a case of retrospective legislation or Executive Instruction vested and concluded right cannot be taken away.
10. Reading of the Executive Instructions in question this Court do not find that the Executive Instructions are retrospective. What the Executive Instructions, in the considered opinion of this Court provides is that from the date of its coming into force, the age of retirement of Gaonburah's in Assam shall be 65 years. Therefore, the same would apply from the said date to all Gaonburah's serving the Government of Assam, even though they were recruited prior to the date of coming effect of such Executive Instructions. This Court is of further considered opinion that the employer is having power to determine the age of superannuation and same is a prerogative of the employer and the same is an incidents of service. No employee is having any vested and concluded right to continue to serve upto the age of superannuation, which was holding the field on the date of their entry into the service and the employer is within its competent either to increase the age of superannuation and decrease the same. The Gaonburah's of Assam being holder of Civil posts under the State of Assam cannot claim to have vested right to not to have altered the age of superannuation. Such view of this Court finds support from the decision of

the Hon'ble Apex Court in ***Roshan Lal Tandon –Vs- Union of India*** reported in ***(1968) 1 SCR 185***.

11. In the case of ***Chairman, Railway Board*** (Supra), and in ***Tushar Ranjan Mohanty*** (Supra) and ***Esthappan Cherian*** (supra) it was held that vested and concluded right of an employee cannot be taken away by retrospective amendment of rule. There is no quarrel on such proposition of law. However, the said judgments do not lay down the ratio that the age of superannuation as fixed by the rule holding the field on the date of entry into the service is a vested and concluded right of an employee. Therefore, the same are not applicable in the present fact of the case.
12. The issue before the Hon'ble Supreme Court in the case of ***Kandarpa Sarma*** (supra) relied on by the learned Advocate General, State of Assam was the definition of family for right of appointment as Gaonburah. While dealing with such issue, the Hon'ble Apex Court came to a conclusion that as the Gaonburah's holds a Civil post, there need to be some service conditions governing their service and made an observation that there should be some age limit and duration of period etc. While making such observation, the Apex Court further held that since the determination is within the domain of State Government, the court expects and left it to the State Government to frame such service condition as expeditiously possible. The State might have in its wisdom acted on such desire of the Hon'ble Apex Court, however, this Court is of the considered opinion that for determination of the present litigation the ratio laid down in ***Kandarpa Sarma*** (Supra) is not at all relevant inasmuch as the applicability of the Executive Instruction to the case of the



petitioners is the issue and not the competence of the State to issue such instruction.

13. In view of the aforesaid discussions and reasons, these two writ petitions are dismissed. Parties to bear their own cost.
14. The records are returned back to Mr. J. Handique, learned counsel.

JUDGE

Comparing Assistant