

GAHC010183942023



2025:GAU-AS:8390

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

Case No. : WP(C)/4821/2023

AZIZUR RAHMAN
S/O- LATE ABDUR REZZAQUE,
R/O- CONCORD APARTMENT, ISLAMPUR,
HAJI MUSAFIRKHANA ROAD,
P.O.- ULUBARI, DIST.- KAMRUP(METRO),
(ASSAM), PIN- 781007.

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM,
DEPARTMENT OF HOUSING AND URBAN AFFAIRS,
ASSAM SECRETARIAT, DISPUR,
GUWAHATI-6.

2:THE ASSAM URBAN WATER SUPPLY AND SEWERAGE BOARD
REPRESENTED BY ITS MANAGING DIRECTOR

AMRITPUR PATH
GANESHGURI

GUWAHATI-06.

3:THE MANAGING DIRECTOR
ASSAM URBAN WATER SUPPLY AND SEWERAGE BOARD
AMRITPUR PATH
GANESHGURI

GUWAHATI-06.

4:THE PRINCIPAL ACCOUNTANT GENERAL

MAIDAMGAON
BELTOLA

GUWAHATI-27

For the Petitioner : Mr. K.N. Choudhury, Sr. Adv.
Ms. R. Choudhury, Adv.

For the Respondents : Ms. M. Bhattacharjee, Addl. Sr. GA, Assam (R/1).
Mr. S.P. Choudhury, SC, AUWS&SB (R/2 & 3).
Mr. D. Bhattacharjya, SC, O/o. AG(A&E) (R/4).

BEFORE

THE HON'BLE MR. JUSTICE SUMAN SHYAM

Date of hearing : 23/05/2025.

Date of Judgement : 23/06/2025.

JUDGEMENT AND ORDER (CAV)

1. Heard Mr. K.N. Choudhury, learned senior counsel assisted by Ms. R. Choudhury, learned counsel for the writ petitioner. Also heard Ms. M. Bhattacharjee, learned Additional Senior Government Advocate, Assam, appearing for the respondent no.1; Mr. S. P. Choudhury, learned Standing Counsel, Assam Urban Water Supply and Sewerage Board, appearing for the respondent nos. 2 & 3 and Mr. D. Bhattacharjya, learned Standing Counsel, Office of the AG (A&E) Assam, appearing for the respondent no. 4.

2. The core question arising for decision of this Court in the present writ petition is as to whether, the writ petitioner would be entitled to the benefits of pension payable under Assam Services (Pension) Rules, 1969 despite his permanent absorption under section 22 (2)(ii) of the Assam Urban Water Supply and Sewerage Board Act, 1985 in the service of the Board with effect from 25/07/1996 ?

3. As per the projections made in the writ petition, it appears that pursuant to a selection process held by the Assam Public Service Commission (APSC) and the recommendation made thereto by the communication dated 07/07/1987, the petitioner was temporarily appointed as Assistant Engineer (Civil) under the Directorate of Municipal Administration, Assam, in the pay scale of Rs. 875-

40-1075-EB-40-1275-EB-45-1500-50-1850/- per month and other allowances as admissible under the Rules. The appointment so made by the order dated 05/07/1988 was to take effect from the date of joining in service. Accordingly, the petitioner had joined service as Assistant Engineer (Civil) in the Directorate of Municipal Administration, Assam. While he was serving as Assistant Engineer (Civil) under the Municipal Administration Department (MAD), by invoking the powers under section 8 of the Assam Urban Water Supply and Sewerage Act, 1985 (*here in after referred to as the Act of 1985*), the service of the petitioner, as Assistant Engineer (Civil), was also placed at the disposal of the Assam Urban Water Supply and Sewerage Board (*herein after referred to as the 'Board'*), Guwahati, on part time basis, by issuing the notification dated 10/07/1989. In the said notification, it was, clearly mentioned that the part time assignment of duties of the petitioner at the disposal of the Board would be in addition to his own duties as Assistant Engineer (Civil) of MAD.

4. In terms of the notification dated 10/07/1989, the petitioner went on to discharge his duties as Assistant Engineer under the Board on part time basis with effect from 03/07/1989 till 09/04/1990. However, during this period, he continued to draw his salary from the Directorate of Municipal Administration. On 10/04/1990, the petitioner was sent on deputation to serve under the Board and he remained on deputation till 14/12/1995. As such, with effect from 10/04/1990, the petitioner was allowed to draw deputation allowance up to 14/12/1995. While the writ petitioner was on deputation, a decision was taken in the 18th meeting of the Board of Directors of the Board, held on 17/11/1995, to permanently absorb the petitioner in the services of the Board. Accordingly, by the communication dated 12/07/1996 issued by the Managing Director of the board i.e the respondent no. 3 herein, opinion of the Government of Assam in the MAD was sought in the matter.

5. On 25/07/1996, the Joint Secretary to the Government of Assam, MAD, addressed a communication to the respondent no. 3, advising that the writ petitioner should be absorbed substantively in the service of the Board, whereafter, the Board should appoint him under section 22(2)(ii) of the Act of 1985. In the communication dated 25/07/1996, it has also been mentioned that the service rendered by the petitioner under the State Government should be treated as service under the Board and the petitioner would enjoy all rights and privileges i.e. leave, pension etc. in the changed situation as he was enjoying in the State Government employment. Such approval of the Government for permanent absorption of the writ petitioner in the service of the Board was to take effect from 05/07/1988 i.e his initial date of joining in Government service.

6. Pursuant to the communication dated 25/07/1996, the respondent no.3 had issued Office Order dated 20/08/1996 under section 22 (2)(ii) of the Act of 1985 permanently and substantively

absorbing the petitioner in the service of the Board with retrospective effect from 05/07/1988 i.e from the date of his initial appointment under the Government of Assam.

7. While rendering his service under the Board, the petitioner was promoted from time to time. By virtue of the promotions given to the petitioner, he had reached the rank of Chief Engineer. On attaining the age of superannuation, the petitioner had retired from the service of the Board as Chief Engineer, on 31/01/2023. After his retirement from service, he has received all his retirement benefits including the Contributory Provident Fund (CPF) dues along with the matching contribution made by the Board. By filing this writ petition, the petitioner, has claimed that he was entitled to the benefit of pension, as payable to a Government servant, under the Assam Services (Pension) Rules, 1969. The proposal for payment of pension to the petitioner, as forwarded by the respondent no. 3, was rejected by the Government vide notification dated 11/12/2023, issued by the Additional Secretary to the Government of Assam, Department of Housing and Urban Affairs. Hence, this writ petition.

8. It is the case of the writ petitioner that since his original appointment as Assistant Engineer (Civil) was under the Government of Assam which was a pensionable service and considering the fact that it is a case of deputation transfer by way of permanent absorption in a substantive post under the Board, hence, by virtue of section 22(2)(ii) of the Act of 1985, notwithstanding his permanent absorption in the service of the Board, the petitioner would be entitled to draw pension as a regular Government servant.

9. The respondent nos. 2 & 3 have contested the claim of the writ petitioner by filing counter affidavit, *inter-alia*, contending that the petitioner was temporarily appointed to officiate as Assistant Engineer (Civil) under the MAD, Assam and when the petitioner was absorbed in the service of the Board, his service was not regularized as Assistant Engineer (Civil) under the MAD. As such, the writ petitioner would not be entitled to draw pension under the Assam Services (Pension) Rules, 1969 since pension is payable only to those Government servants whose services have been regularised. It is also the stand of the respondents that pursuant to his absorption in the service of the Board, the petitioner was entitled only to Contributory Provident Fund (CPF), which benefit he has already availed. As such, the petitioner is not entitled to any further relief in this proceeding.

10. Mr. K.N. Choudhury, learned senior counsel appearing for the writ petitioner has strenuously argued that although the initial appointment of the petitioner as Assistant Engineer (Civil) under the MAD, Assam, was temporary in nature, yet, since the same was made pursuant to a regular selection process conducted by the APSC and against a sanctioned vacant post, hence, it would have to be

deemed to be a regular appointment. The said position, according to Mr. Choudhury, has further been established from the fact that the writ petitioner has retired from the post of Chief Engineer on attaining his age of superannuation which would not have been possible had the writ petitioner not been treated as a confirmed employee. Mr. Choudhury, therefore, submits that unless the petitioner was treated as a regular Government servant, and his services were deemed to have been regularized, the authorities could not have and would not have promoted the petitioner up to the rank of Chief Engineer.

11. By inviting the attention of this Court to section 22(2)(ii) of the Act of 1985, Mr. Choudhury has further argued that it is a clear case where the petitioner's rights and interest, as a Government servant, stood protected under a statute and, therefore, the respondents cannot now refuse to pay pension to the petitioner. Mr. Choudhury has also submitted in his usual fairness that owing to a mistake of fact, the writ petitioner had not only made CPF contribution while serving under the Board but had also received the maturity amount due under the CPF scheme after his retirement although, in reality, he was entitled to receive pension as per the provisions of the Rules of 1969. However, submits Mr. Choudhury, if the prayer of the petitioner is granted by this Court, then in that event, he would be ready and willing to refund the CPF amount already drawn by him. In support of his above arguments, Mr. Choudhury has placed reliance on two decisions of this Court rendered in the case of ***Dolly Borpujari Vs. State of Assam and others*** reported in **2010(2) GLT 147** and in the case of ***Bedanidhi Upadjiyaya Vs. Union of India and others*** reported in **2014 (6) GLR 252** to submit that in more or less similar fact situation, the Division Bench of this Court had accepted the claim of the writ petitioners therein for granting regular pension.

12. Opposing the submissions made by the petitioner's counsel, Mr. S.P Choudhury, learned Standing Counsel, Assam Urban Water Supply and Sewerage Board, has argued that the service of the petitioner under the Government of Assam was never regularized and, therefore, being a temporary employee, the petitioner did not have any right to receive pension under the Assam Services (Pension) Rules, 1969. According to Mr. S.P. Choudhury, having failed to exercise his option for repatriation during the period of his deputation transfer to the Board within the prescribed period of time, the petitioner had accepted that his service conditions would be governed by section 22(3) of the Act of 1985. If that be so, submits Mr. S.P. Choudhury, the petitioner cannot now maintain his claim for sanction of regular pension.

13. I have considered the submissions made at the Bar and have also gone through the materials available on record.

14. At the very outset, it would be pertinent to mention herein that the basic facts of the case, which lie in a narrow campus, are more or less admitted. It is not in dispute that the writ petitioner was originally appointed as Assistant Engineer (Civil) under the MAD, Assam, pursuant to a selection process conducted by the APSC. In the appointment letter dated 05/07/1988, it was mentioned that the petitioner has been appointed temporarily so as to officiate as Assistant Engineer (Civil). Thereafter, by issuing the notification dated 10/07/1989, the service of the petitioner was placed at the disposal of the Board on part time basis. Notwithstanding the same, the petitioner continued to serve as Assistant Engineer (Civil) under the MAD. Thereafter, the petitioner was sent on deputation transfer to the Board. Accordingly, the writ petitioner was on deputation with effect from 10/04/1990 to 14/11/1995. It was only after the approval of the Government of Assam was granted vide communication dated 25/07/1996, that steps were taken for permanent absorption of the petitioner in the service of the Board. Accordingly, by issuing Office Order dated 20/08/1996, the petitioner was permanently absorbed in the service of the Board with effect from 05/07/1988. Therefore, this is evidently a case of deputation transfer followed by substantive absorption under the Board which process was carried out by the departmental authorities by issuing the aforementioned notifications. However, from the materials brought on record, it appears that till his substantive absorption under the Board, the service of the petitioner was not regularized in accordance with the procedure prescribed by law.

15. In the conspectus of the above facts, the question that would arise for consideration of this Court in this case is as to which are the rights and interest of the petitioner, as a Government servant, that would remain protected under the Act of 1985 pursuant to his substantive absorption in the service of the Board. The answer to the said question, in the opinion of this court, would lie in the correct interpretation of section 22(2)(ii) of the Act of 1985, which is reproduced herein below, for ready reference :-

“Rule 22(2)(ii) – that he should be absorbed substantively in the service of the Board and then the Board will absorb him substantively in service and thereupon the services rendered by him under the State Government shall be treated as services rendered under the Board and he shall be entitled to have such rights or to such similar rights in the changed situation with regard to remuneration, leave and pension as will not be less favourable to the service conditions, agreements and rights as he would have entitled to before he was employed in the Board.”

16. The Act of 1985 had received the assent of the President on 25/12/1986 whereafter, it came

into force from the notified date. The Board was created under the aforesaid statute. There is no wrangle at the Bar that the terms and conditions of service of the employees of the Board would be governed by the provisions of the Act of 1985.

17. Section 22(2) of the Act deals with transfer of State Government employee to the Board. As per section 22(ii), every Officer or employee of the State Government, whose services have been transferred to the Board, shall intimate the State Government in writing within two years from the date of transfer of his service to the Board – (i) that he may be permitted to retire from service and there upon he shall be permitted to retire from Government service and he will be entitled to compensation pension and gratuity and any other benefit permissible to him at the maximum possible limit under the Rules. Alternately, the right of the transferred employee pursuant to his permanent absorption in the service of the Board would be governed by section 22(2)(ii) of the Act of 1985.

18. As per section 22(2)(ii) of the Act of 1985, a transferred employee, upon being absorbed substantively in the service of the Board, cannot be denied of the benefit of the service rendered by him under the State Government and the said period of service ought to be treated as service rendered under the Board. Accordingly, the absorbed employee would have similar rights in all other aspect including pension as he would have been entitled to before he was absorbed in the service of the Board, meaning thereby, that while in Government service, if the absorbed employee was entitled to the benefits such as leave and pension, such benefits cannot be changed or denied to him by the Board, in a manner which was less favourable to the employee. From the above, it is thus clear that notwithstanding his substantive absorption in the service of the Board, all rights accruing in favour of the writ petitioner, while in the service under the Government, would remain protected under section 22(2)(ii) of the Act of 1985. The question is, did the petitioner have a right to receive pension as on 20/08/1996 i.e. the date of his permanent absorption in the service of the Board? The answer to the said question, in the opinion of this Court, has to be in the negative for the reasons stated herein below.

19. In the present case, the writ petitioner was appointed as Assistant Engineer (Civil) under the MAD, temporarily and on an officiating basis vide notification dated 05/07/1988. As noted above, there is nothing on record to show that the service of the petitioner was ever made permanent on any date prior to his substantive absorption in the service of the Board. As such, it is apparent that although the initial appointment of the petitioner as Assistant Engineer (Civil) was pursuant to a regular selection and against a substantive post, yet, his appointment was not made permanent. In other words, the writ petitioner was not a permanent employee of the State Government on the date

of his substantive absorption in the service of the Board. If that be so, the writ petitioner evidently did not fulfill the eligibility criteria, as laid down in Rule 31 of the Rules of 1969 for receiving pension. Under such circumstances, this Court is of the opinion that in the absence of an order from the Governor of Assam declaring that the petitioner would be entitled to receive pension under the Rules of 1969, no pension would be due and payable to the petitioner under the Pension Rules of 1969 on the date of his substantive absorption in the service of the Board.

20. Mr. S.P. Choudhury has relied upon section 22(2) of the Act of 1985 to submit that due to failure on the part of the petitioner to intimate the State Government in writing within two years from the date of his transfer stating that he may be permitted to retire from Government service and be entitled to compensation pension, thus coming in the way of his claim, no pension was payable to the petitioner. However, I am of the view that section 22(2)(i) which deals with transfer of State Government employees to the service of the Board, would not have any bearing in the matter since the present is not a case of deputation transfer but substantive absorption of the petitioner in the service of the Board. As such, it would be section 22(2)(ii) of the Act of 1985, which will be applicable in the case of the petitioner, subject, however, to the condition that the said provision would protect only those rights and interest of the petitioner, which had accrued to him as a Government servant, as on the date of his permanent absorption in the service of the Board, meaning thereby that the right of the petitioner for payment of regular pension would stand protected under section 22(2)(ii) of the Act of 1985 only if it is found that the petitioner was entitled to receive pension under the Assam Service (Pension) Rules, 1969, on the date of his substantive absorption under the Board.

21. The right of a Government servant serving under the State Government of Assam to receive pension is governed by the provisions of Assam Service (Pension) Rules, 1969 (*for short the Rules of 1969*) framed under the proviso to Article 309 of the Constitution of India. Rule 31 of the Rules of 1969 lays down the condition of qualifying service for receipt of pension. Rule 31 is reproduced herein below for ready reference :-

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

22. Rule 36 of the Rules of 1969 further provides that service does not qualify for pension unless the Officer holds a substantive post on a permanent establishment. Rule 36 is reproduced herein below for ready reference :-

"36. Service does not qualify unless the officer holds a substantive office on a permanent establishment:

Provided that continuous temporary or officiating service under the Government of Assam, followed without interruption by confirmation in the same or any other post, shall count in full as qualifying service except in respect of –

- (a) Periods of temporary or officiating service in non-pensionable establishment, and*
- (b) Periods of service paid from contingencies."*

23. Since the employment of the petitioner under State Government was not made permanent prior to his absorption in the service of the Board, hence, he was not qualified under Rule 31 to receive pension. Since the Board is a non-pensionable establishment, hence, in view of the first proviso to Rule 36, permanent absorption of the petitioner in the service under the Board, will also not count so as to bring his case within the ambit of the Pension Rules of 1969.

24. By relying upon the provisions of Rules 31 & 36 of the Rules of 1969, a Division Bench of this Court has held in the case of ***Ujala Narzary Vs. State of Assam and others*** reported in ***(2023) 4 GLR 688*** that unless the employee fulfills the requirement of the Rules, he would not be entitled to receive pension.

25. From a careful reading of Rules 31 & 36 of the Rules of 1969, it is thus apparent that in order to be eligible to receive pension, the person must be employed under the Government. His employment must not only be substantive but also permanent in nature. In case of an employee in temporary or officiating service, the conditions of Rule 36 must be fulfilled for receiving pension under the Rules of 1969.

26. There is no doubt or dispute about the fact that the petitioner's service under the Board was not pensionable. In other words, the Board is a non-pensionable establishment within the meaning of Rule 36 of the Rules of 1969. Therefore, the writ petitioner was not entitled to receive pension for the service rendered under the Board. Since the writ petitioner was not holding a permanent post under the Government nor did he fulfill the requisite length of qualifying service for receipt of pension under the Rules of 1969, as on the date of his permanent absorption under the Board, hence, he had also not acquired any right to receive pension even under Rule 31. As such, this Court is of the opinion that section 22(2)(ii) of the Act of 1985 would be of no avail to the writ petitioner in so far as his claim to receive pension as a Government servant is concerned.

27. There is another aspect of the matter which deserves special consideration by this Court. It is the admitted position of fact that ever since his substantive absorption in the service of the Board, the petitioner has been making CPF contribution. CPF contribution becomes applicable in those cases where no pension is payable to the employee. Upon his retirement, the writ petitioner has also received/withdrawn the CPF dues without raising any protest. Therefore, it is evident that since his date of absorption in the service of the Board i.e. 20/08/1996, till his retirement from service on attaining the age of superannuation on 31/01/2023, the writ petitioner has continued to subject himself to the CPF scheme being fully conscious and having clear understanding of the fact that he was in a non-pensionable service. It was only after his retirement from service and after the lapse of nearly 27 years since the date of his permanent absorption in the service of the Board, that the petitioner has approached this Court by filing the present writ petition, asserting his right to receive pension. Such a right of the petitioner, in the opinion of this Court, cannot be recognized at this point of time, in the facts and circumstances of the present case.

28. The Legal Maxim "*Vigilantibus non dormientibus jura subveniunt*" means law assists those who are vigilant but not those who sleep over their rights. In the present case, as has been noted herein above, even assuming that the petitioner had any right to receive pension under the Rules of 1969, even then, he was not at all vigilant about such right. Therefore, this Court is of the opinion that in the facts and circumstances of the case, no relief can be granted to the writ petitioner at this distant point of time.

29. It is also to be noted herein that any claim to receive pension is in the nature of a money claim. Therefore, such claim is required to be made without any undue delay and laches as otherwise, the same will be hit by the Law of Limitation. In the case of ***Union of India Vs. Surjit Kaur and another*** reported in ***(2007) 15 SCC 627***, the Hon'ble Supreme Court, while dealing with

the issue as to whether, question of limitation would come into play in the matter of assertion of right to receive pension, has held that right to pension should be asserted within the period of limitation. The observations made in para 3 are reproduced herein below for ready reference :-

“3. The High Court erred in holding that the cause of action was a recurring one. A right to the pension should be asserted within the period of limitation. The right having been established, the right to receive the pension would then be a continuing one. The right not having been established within the period of limitation the suit of the respondent was clearly barred by limitation. We are fortified in our view by the recent decision of this Court in Union of India Vs. Punjab Singh reported in (2003) 10 SCC 36”.

30. In ***Union of India and others Vs. Tarsem Singh*** reported in ***(2008) 8 SCC 648***, the Apex Court has observed that normally a belated service related claim will be rejected on the ground of delay and laches or limitation. The exception to the said rule would be in cases of continuing wrong where relief can be granted even if there is a long delay in seeking remedy. In such a case, the right to receive pension, however, must be established within the period of limitation. In the present case, as noted above, the writ petitioner had never asserted his right to receive pension within the period of limitation or prior to his retirement from service. Therefore, this cannot be treated to be case of continuing wrong.

31. Coming to the arguments advanced by Mr. K.N. Choudhury that the service of his client was treated as permanent for all practical purposes as otherwise, no substantive promotion could have been given to the writ petitioner during the course of his employment, I am unable to agree with such submission of Mr. Choudhury. The writ petitioner was substantively absorbed under the service of the Board vide order dated 20/08/1996. Pursuant to his absorption as above, the petitioner had become a permanent employee of the Board. Therefore, he was entitled to all service benefits including promotion, as may be due, under the law as a permanent employee of the Board. However, that by itself cannot lead to the conclusion that the service of the petitioner was regularized as Assistant Engineer (Civil) under the MAD, by necessary implication. The above argument, therefore, stands rejected.

32. There can be no quarrel with the proposition of law laid down in the case of ***Dolly Borpujari (Supra)*** and ***Bedanidhi Upadjiyaya (Supra)*** relied upon by Mr. Choudhury. However, what is to be borne in mind is that the contentious issues involved in the present proceeding are not pertaining to the validity of the absorption process but pertaining to the issue of protection of the right of the employee under section 22(2)(ii), pursuant to his substantive absorption in the service of

the Board. Since this Court is of the opinion that the right of the writ petitioner to receive pension under the Pension Rules of 1969 had never accrued, the question of protecting such right under section 22(2)(ii) of the Act of 1985 also does not arise in the eyes of law. Under the circumstances, this Court is of the opinion that no relief can be granted to the petitioner either under the law or under equity.

33. For the reasons stated herein above, this writ petition is held to be devoid of any merit. The same is accordingly, dismissed.

There shall be no order as to costs.

JUDGE

Comparing Assistant