

GAHC010029882023



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

Case No. : Review.Pet./28/2023

NILADHAR DEKA
S/O LATE LAHBAR DEKA,
RESIDENT OF HOUSE NO. 191 A, ROOPNAHGAR, DIST KAMRUP M ASSAM,
781032

VERSUS

THE STATE OF ASSAM 4 ORS .
REP. BY THE CHIEF SECRETARY TO THE GOVT OF ASSAM, DISPUR,
GUWAHATI- 781006, DIST- KAMRUP(M), ASSAM

2:THE COMMISSIONER AND SECRETARY
TO THE GOVT OF ASSAM
FINANCE(TAXATION) DEPTT
DISPUR
GUWAHATI- 781006
P.O- ASSAM SACHIVALAYA
DISPUR
GUWAHATI- 781006
DIST- KAMRUP(M)
ASSAM

3:THE COMMISSIONER OF TAXES
GUWAHATI
UNIT D
KAR BHAWAN
DISPUR
GUWAHATI- 781006
DIST- KAMRUP(M)
ASSAM

4:THE ASSISTANT COMMISSIONER OF TAXES

GUWAHATI
UNIT -D
KAR BHAWAN
DISPUR
GUWAHATI- 781006
DIST- KAMRUP(M)
ASSAM

5:DILIP CHANDRA KALITA
S/O- LATE KAMALA KANTA KALITA SR/O- NOONMATI
GOPAL NAGAR
RAM NAGAR
BYE LANE 1
GUWAHATI- 20
DIST- KAMRUP(M)
ASSA

Advocate for the Petitioner : MR. M P SARMA, MR A CHETIA,MS S SARMA HAZARIKA,MS
D MAHANTA,MR. U K NAIR

Advocate for the Respondent : GA, ASSAM, SC, FINANCE

Linked Case : WP(C)/2121/2018

DILIP CHANDRA KALITA
S/O- LATE KAMALA KANTA KALITA SERVING AS CHOWKIDAR/PEON
(GRADE IV) IN THE OFFICE OF THE ASSTT COMMISSIONER OF TAXES
GUWAHATI
UNIT D SINCE 01.07.1994
P.O- ASSAM SACHIVALAYA
DISPUR
GUWAHATI- 781006
DIST- KAMRUP(M)
ASSAM
PERMANENT R/O- NOONMATI
GOPAL NAGAR
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GUWAHATI- 781006
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ASSAM

5:NILADHAR DEKA
PRESENTLY PROMOTED TO THE POST OF JUNIOR ASSTT. ON 01.02.2018
FROM THE POST OF GRADE- IV
CHOWKIDER/PEON OF THE OFFICE OF THE ASSTT COMMISSIONER OF
TAXES UNIT D
GUWAHATI- 781006
DIST- KAMRUP(M)
ASSAM

Advocate for : MR. C DEKA
Advocate for : GA
ASSAM appearing for THE STATE OF ASSAM AND 4 ORS

Linked Case : Review.Pet./128/2023

DILIP CHANDRA KALITA
S/O- LT. KAMALA KANTA KALITA
SERVING AS CHOWKIDAR/ PEON (GRADE IV) IN THE OFFICE OF THE
ASSTT. COMMISSIONER OF TAXES
GUWAHATI
UNIT D
SINCE 01.07.1994
P.O- ASSAM SACHIVALAYA
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GUWAHATI- 781006
DIST- KAMRUP(M)
ASSAM

Advocates for the review petitioners : Mr. MP Sarma
In Review Pet No.28/2023

Advocates for the review petitioners : Mr. S Sahu
In Review Pet No.128/2023

Advocates for the respondents : Mr. B Gogoi
Standing counsel
Finance and Taxation,
Department

Government of Assam
Ms. S Sharma
Government Advocate

B E F O R E
HON'BLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT & ORDER(ORAL)

08.08.2024

Heard Mr. S Sahu, the learned counsel appearing on behalf of the review petitioner in Review Pet No.128/2023 and Mr. MP Sarma, the learned counsel appearing on behalf of the review petitioner in Review Pet. No.28/2023. I have also heard Mr. B Gogoi, the learned standing counsel, Finance and Taxation Department, Government of Assam.

2. Both these review petitions have been filed seeking review of the judgment and order dated 04.01.2023 passed in WP(C)No.2121/2018. For the sake of convenience, this Court would refer to the parties herein in the same status as they stood in the writ proceedings.

3. The review petitioner in Review Pet.No.128/2023 is the petitioner in WP(C)2121/2018 and the review petitioner in the Review Pet. No.28/2023 is the respondent No.5 in the said writ petition. The ground on which, the review petition has been filed is that an error apparent on the face of the record has been committed by this Court by partly dismissing the writ petition and partly by passing appropriate directions directing reversion of the respondent No.5 to his

original post. The error which has been submitted to have been committed by this Court, which is apparent on the face of the record is that this Court had applied the amended Rule 6(6) of the *Assam Ministerial District Establishment Service Rules 1967* (for short, the Rules of 1967) which as per both the counsels for the review petitioners could not have been applied so, in view of the Office Memorandum dated 06.04.1999, whereby only the un-amended Assam Ministerial District Establishment Service Rules 1967 was incorporated to the service conditions of the review petitioners.

4. The counsels appearing on behalf of both the review petitioners duly submitted that taking into account that only the un-amended Rule 6(6) of the Rules of 1967 was incorporated, the principles of Legislation by Incorporation shall apply and irrespective of an amendment being made to Rule 6(6) in the Rules of 1967, unless and until the same is again re-incorporated vide any office memorandum or circular, the service conditions has to be adjudged on the basis of the Office Memorandum dated 06.04.1999. In that regard, the learned counsels appearing on behalf of the review petitioners have relied upon the judgments of the Supreme Court in the case of ***Mohan Chowdhury Vs. the Chief Commissioner, Union Territory of Tripura***, reported in ***AIR 1964 SC 173***, as well as the judgment in the case of ***the State of MP Vs. M V Narasimhan*** reported in ***AIR 1975 SC 1835***. In that regard the learned counsels referred to paragraph 11 of the judgment rendered in ***Mohan Chowdhury (supra)*** as well as paragraph 16 in the case of ***MV Narasimhan (supra)***. The learned counsels appearing on behalf of the review petitioners have further submitted that the basis on which both the judgments have been delivered is in terms with Section 8 of the General Clauses Act, 1897 (for short,

the Act of 1897). In addition to that, the learned counsels appearing on behalf of the review petitioners submitted that a perusal of the stands which have been taken by the respondent authorities in the affidavits also clearly show that they have not adopted the Rules of 1967 and have only stated that the principle of the Rules of 1967 is to be followed. It is therefore the submission of the learned counsels appearing on behalf of the review petitioners that if only the principle is to be followed and the Rules of 1967 have not been adopted, an error apparent on the face of the record, had crept in the judgment sought to be reviewed on the basis that this Court applied the amended Rule 6(6) of the Rules of 1967.

5. *Per contra*, Mr. B Gogoi, the learned counsel appearing on behalf of the Finance and Taxation Department of the Government of Assam submitted that a perusal of the Office Memorandum dated 06.04.1999 would show that in view of various requests being made seeking clarification to the Commissioner of Taxes, the Office Memorandum dated 06.04.1999 was issued in view of there being no Service Rules for the establishment of the subordinate offices under the Commissionerate. It was also mentioned in the said office memorandum that as the Rules of 1967 is generally followed by the subordinate offices, the said Rules of 1967 be followed wherever felt necessary. The learned counsel further submitted that at that relevant point of time, in terms with the un-amended Rule 6(6) of the Rules of 1967 for the purpose of promotion to the post of LD Assistant, the required qualifications was HSLC or equivalent examination and had rendered at least seven years of continuous service on the first day of the year in which the selection is made. Adding to his submissions, the learned counsel appearing on behalf of the respondent State submitted that in view of

the amendment being made to Rule 6(6) in the year 2015, now the qualification required would be in terms with the amended Rule 6(6) of the Rules of 1967. In addition to that, the learned counsel appearing on behalf of the Finance and Taxation Department further submitted that the respondent No.5 in the writ petition is admittedly junior to the writ petitioner and as such, even assuming the educational qualification is HSLC passed, then also the review petition so filed by the respondent No.5 has no legs to stand, *inasmuch as*, the respondent No.5 cannot supersede the petitioner, taking into account that the criteria for the selection is seniority-cum-merit. Under such circumstances, the learned counsel, therefore, submitted that the Review Pet.No.28/2023 ought to be dismissed on that count alone. It was also submitted that there was a confusion amongst the respondent authorities as to whether the un-amended Rule 6(6) or the amended Rule 6(6) would apply in view of various communications being issued by certain officials. But in view of the judgment passed by this Court, which is sought to be reviewed, the respondent authorities have taken a decision to apply the amended Rule 6(6) of the Rules of 1967.

6. I have heard the learned counsels appearing on behalf of the parties and have given anxious consideration to their respective submissions.

7. Let this Court first take up the submission urged by the learned counsels appearing on behalf of the review petitioners as regards the applicability of the principles of legislation by Incorporation. For doing so, this Court finds it relevant to take note of Section 8 of the Act of 1897. The said provision is reproduced hereinunder:

“8. Construction of references to repealed enactments-(1)*Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.*

(2) Where before the fifteenth day of August, 1947, any Act of Parliament of the United Kingdom repealed and re-enacted] with or without modification, any provision of a former enactment, then references in any Central Act or in any Regulation or instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.”

8. A perusal of Sub-Section (1) of Section 8 of the Act of 1897 shows that where the Act of 1897, or any Central Act or Regulation made after the commencement of the Act of 1897, repeals and re-enacts, with or without modification, any provision of a former enactment, then the references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provisions so re-enacted. Sub-Section (2) of Section 8 of the said Act for the purpose of the instant dispute has no relevance for which the same is not dealt with herein.

9. The Supreme Court in the case of ***MV Narasimhan (supra)***, observed that when a subsequent Act incorporates provisions of a previous Act, then the borrowed provisions becomes an integral and independent part of the subsequent Act, and are totally unaffected by any repeal or amendment in the previous Act. It was also observed at paragraph 16 of the said opinion that the aforestated principle, however, shall not apply in the following cases:

(a). Where the subsequent Act and the previous Act are supplemental to each other;

(b). Where the two Acts are in *pari materia*;

(c). Where the amendment in the previous Act, if not imported into the subsequent Act also would render the subsequent Act wholly unworkable and ineffectual; and

(d). Where the amendment of the previous Act, either expressly or by necessary intendment, applies the said provisions to the subsequent Act.

10. In a subsequent judgment of the Supreme Court in the case of ***State of Uttarakhand Vs. Mohan Singh and others***, reported in **(2012) 13 SCC 281**, the Supreme Court had very carefully drawn the distinction between a Referential Legislation and a Legislation by Incorporation. This aspect of the matter is very relevant, taking into account the submission so made by the learned counsel appearing on behalf of the review petitioners. As per the Supreme Court, in the case of ***Mohan Singh (supra)***, a subsequent legislation often makes a reference to an earlier legislation so as to make the provisions of the earlier legislation applicable to matters covered by the later legislation. Such a subsequent legislation may either be a referential legislation, which merely contains a reference to or the citation of the provision of the earlier statutes, or a Legislation by Incorporation, whereunder the provisions of the earlier legislation to which reference is made are incorporated into the later legislation by reference.

11. The Supreme Court in ***Mohan Singh (supra)*** duly relied upon the judgment of the Supreme Court in the case of ***MV Narasimhan (supra)***, and

thereupon observed that a clear distinction has to be drawn between a mere reference to or a citation of one statute in another and an incorporation which in effect means bodily lifting a provision of one enactment and making it a part of another. In case of a mere reference to or a citation to an enactment into another without incorporation, Section 8(1) of the Act of 1897 applies and the reference to the provision repealed is required to be construed as reference to the provision re-enacted. It was also observed that where a provision of one statute is incorporated in another, the repeal or amendment of the former does not affect the later. The effect of incorporation is as if the provision incorporated were written out in the incorporating statute and were part of it. Explaining the term 'Legislation by Incorporation', the Supreme Court further observed that this principle is a common legislative device employed by the legislature, where the legislature for convenience of drafting, incorporates provisions from any existing statute by reference to that statute, instead of setting up for itself at length the provision which it desires to adopt. Once the incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed, and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made to the statute for which the provision(s) is/are incorporated has/have no effect on the incorporating statutes. In *Wood's Estate*, In re reported in (1886) 31 Ch. D. 607, Lord Esher, M.R. pointed out the following:

‘... If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at

all.'

The above passage finds approval of the Supreme Court in ***Mohan Singh*** (Supra).

12. In the backdrop of the above, let this Court take note of as to whether principles of Legislation by Incorporation would at all apply in so far as the Office Memorandum dated 06.04.1999. No doubt the Office Memorandum by no stretch of imagination can be said to be an Act or even a Statutory Rule. However, the learned counsels appearing on behalf of the review petitioners submit that the Office Memorandum is an instrument which would also come within the ambit of Legislation by Incorporation, in view of the fact that in absence of a Statutory Rule, an executive order, can be made to fill up the lacunae in the Statutory Rules. The learned counsel appearing on behalf of the review petitioners to buttress their submission relied upon the Constitution Bench Judgment in the case of ***Mohan Chowdhury*** (supra) as well as another judgment of the Supreme Court in the case of ***Union of India Vs. HR Patankar and Others***, reported in ***AIR 1984 SC 1587***.

13. This Court had duly perused the judgment of the Constitution Bench in the case of ***Mohan Chowdhury*** (supra), wherein it was held that the presidential order would come within the meaning of the term '*Instrument*' as employed in Section 8 of the Act of 1897. This Court has also perused the judgment of the Supreme Court in the case of ***HR Patankar*** (supra), wherein the Supreme Court had duly observed that in absence of the Statutory Rules, or where the Statutory Rules are silent, it is competent to the Government by an

executive order to make appropriate Seniority Rules or to fill in the lacuna in the Statutory Rules by making an appropriate seniority Rule in regard to the subject on which the Statutory Rules are silent.

14. But the question arises as to whether the Office Memorandum dated 06.04.1999 can at all be said to be an executive order. An executive order in terms with the Constitution would be an order coming within the ambit of Article 77(2) of the Constitution in so far as the Government of India is concerned and, in so far as the State, it would be Article 166(2) of the Constitution. Such executive orders in the case of the Government of India has to be in the name of the President and in the case of the State has to be in the name of the Governor.

15. In the background of the above, this Court would like to take the Office Memorandum dated 06.04.1999. The said office memorandum under no circumstances can be said to come within the ambit of a legislation or even an instrument for the purpose of applying the principles of Legislation by Incorporation.

16. The said office memorandum has been issued by the Commissioner of Taxes, making certain clarifications, in view of the fact that there are no statutory Rules. Taking into account that the said Office Memorandum which is dated 06.04.1999, the power of the Commissioner of Taxes has to be, therefore, taken in the context of Section 3 of the *Assam General Sales Tax Act 1993* as an officer appointed to carry out the purposes of the *Assam General Sales Tax Act*

1993. There is nothing brought before this Court to show that the said Office Memorandum dated 06.04.1999 was issued, upon being duly authorized in terms with Article 166(2) of the Constitution. Therefore, in the opinion of this Court, the principle of Legislation by Incorporation cannot be imported to the Office Memorandum dated 06.04.1999.

17. Let this Court now take note of the second submission so made by the learned counsels appearing on behalf of the review petitioners to the effect that it is the stand of the respondent State itself that they had not adopted the Rules of 1967 and as such, the amended Rule 6(6) of the Rules of 1967 could not have been made the basis on which the judgment sought to be reviewed have been passed.

18. This Court had duly perused the various affidavits which have been filed by the Finance and Taxation Department in the instant proceedings. The stand so taken by the said department is not clear as to whether they have adopted the Rules of 1967. In fact, their affidavit categorically stated that the department was under a state of confusion as to whether the amended Rule 6(6) or the un-amended Rule 6(6) should be applied after the amendment being made to the Rules of 1967 in the year 2015. It is also the stand of the respondent department that it is on the basis of the judgment which have been sought to be reviewed, wherein the amended Rule 6(6) was applied, the cloud on the applicability of the un-amended or amended Rule 6(6) of the Rules of 1967 was removed.

19. Taking into account the stand which has been taken by the respondent department, it is the opinion of this Court that amended Rule 6(6) of the Rules of 1967 could not have been made the basis for disposing of the writ petition, *inasmuch as*, the stand of the respondent department lacks clarity as to even whether the Rules of 1967 has been adopted or not. It is the further opinion of this Court that applying the amended Rule 6(6) of the Rules of 1967, in passing the judgment sought to be reviewed, this Court in exercise of the jurisdiction under Article 226 of the Constitution stepped into the shoes of the Executive, which could not have been done, and as such, an error apparent on the face of the record had crept in, in passing the judgment and order sought to be reviewed. Accordingly, this Court reviews the judgment and order dated 04.01.2023 passed in WP(C)No.2121/2018. Consequently, the writ petition being WP(C)No.2121/2018 is restored back to file.

20. With the above observation(s), both the review petitions stand disposed of.

JUDGE

Comparing Assistant