

GAHC010089822020



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

**Case No. : WP(C)/2707/2020**

NAMAR ALI BARBHUIYA  
S/O- LATE TOWAHIR ALI BARBHUIYA, R/O- VILL- SRIKONA PART- II, P.O-  
SRIKONA, DIST- CACHAR, ASSAM, PIN- 788026

VERSUS

THE STATE OF ASSAM AND 5 ORS  
THROUGH THE COMMISSIONER AND SECRETARY TO THE GOVT OF  
ASSAM, ELEMENTARY EDUCATION DEPTT, DISPUR, GUWAHATI- 7810006

2:THE SECRETARY  
TO THE GOVT OF ASSAM  
FINANCE DEPTT  
DISPUR  
GUWAHATI- 781006

3:THE DIRECTOR OF ELEMENTARY EDUCATION  
ASSAM  
KAHILIPARA  
GUWAHATI- 781019

4:THE DISTRICT ELEMENTARY EDUCATION OFFICER  
CACHAR  
SILCHAR  
DIST- CACHAR  
ASSAM

5:THE DIRECTOR OF PENSION  
ASSAM  
HOUSEFED COMPLEX  
DISPUR  
GUWAHATI- 781006

6:THE ACCOUNTANT GENERAL(A AND E)  
ASSAM  
MAIDAMGAON  
BELTOLA  
GUWAHATI - 78102

**Advocate for the Petitioner** : MR. JUNM LASKAR

**Advocate for the Respondent** : SC, ELEM. EDU

**BEFORE**  
**HONOURABLE MR. JUSTICE DEVASHIS BARUAH**

**JUDGMENT AND ORDER(ORAL)**

**Date : 19-04-2023**

Heard Mr. JUNM Laskar, the learned counsel appearing for the petitioner. Mr. P.K. Borah, the learned counsel appears on behalf of the Elementary Education Department, Mr. S.R. Baruah, the learned Standing Counsel appears on behalf of the Director of Pension, Mr. R. Borpujari, the learned Standing Counsel appears on behalf of the Finance Department and Mr. R. Dhar, the learned Standing Counsel appears on behalf of the Accountant General (A & E) Assam.

2. The case of the petitioner herein is that the petitioner was initially appointed on 1/1/1974 as an Assistant Teacher and posted at R.C. M.E. Madrassa Hatirhar, District -Cachar, Assam. Thereupon the service of the petitioner was confirmed vide an order dated 17/10/1977 as recorded in the order dated 30/7/2000. Thereupon the petitioner retired from service on 29/2/2016. The pension papers of the petitioner were sent to the Office of the Director of Pension wherein on account of a deficiency as pointed out by the

Office of the Director of Pension on 10/7/2019 there was excess drawal on account of a wrong fixation of pay. The deficiency as stated in the communication dated 10/7/2019 being relevant is quoted herein under :

*“1) Pay determined on 1/1/1981 is not admissible. Pay on 1/1/1981 should be fixed at Rs. 537/- instead of Rs.573/-. Subsequent fixation be done accordingly and entered in the SB. Due and drawn statement be prepared and excess payment may be assessed including leave encashment benefit. If the excess payment made was not due to misrepresentation or fraud etc. on the part of the pensioner, HOO/Department may waive the recovery upto Rs. 1.00 Lacs with approval of the PPG Deptt. and above Rs.1.00 Lacs with Finance Department as per Govt OM No. Fin(EC-III)1808/2018/2 dtd. 14.06.2019. (2) Date of receiving ad hoc grant of & Provincialisation wanting.”*

3. It appears from the above quoted portion of the communication dated 10/7/2019 that the pay of the petitioner on 1/1/1981 ought to have been fixed at Rs. 537/-, instead it was fixed at Rs. 573/- . Subsequently the pay of the petitioner was worked out on the basis of Rs. 573/- which resulted in an excess amount which the petitioner received during his service. It is further apparent from a communication produced during the course of hearing mentioned that the total excess amount to which the petitioner has received on account of the wrong fixation of pay was Rs. 4,09,993/- and in that view of the matter unless the Finance Department waives the said amount, the entitlement of petitioner towards pension and pensionary benefits have been withheld. It was duly noted in the order dated 3/4/2023 by this Court that there is no allegation of misrepresentation or fraud on the part of the petitioner which had resulted in wrong fixation of his pay. This observation made by this Court on 3/4/2023 is based upon a reading of the affidavit-in-opposition filed by the respondent No. 3 i.e. the Director of Elementary Education.

4. Today Mr. P.K. Borah, the learned counsel appearing on behalf of the Elementary Education Department has produced an instruction issued by the Secretary to the Government of Assam, Department of School Education dated 18/4/2023 wherein it has been mentioned that the pension case of the petitioner was returned by the Director of Pension vide a communication dated 10/7/2019. Thereafter the Director of Elementary Education had instructed the District Elementary Education Officer, Cachar vide a communication dated 8/8/2020 to furnish some information and accordingly the District Elementary Education Officer had submitted the information vide a communication dated 16/9/2022. Subsequently the Director of Elementary Education resubmitted the pension case in respect to the petitioner and requested to accord approval from the Finance Department for waiving the excess drawal amount of Rs.4,09,993/- inasmuch as, as per the Office Memorandum dated 27/01/2022 excess drawal beyond Rs. 3 lakhs in each individual cases, approval of the Finance Department is to be obtained. It was further submitted that after receiving the concurrence from the Finance Department the necessary action would be taken up in accordance with law.

5. The instruction so produced by the learned counsel appearing for the Secondary Education Department is kept on record and marked with the letter "X".

6. The learned counsel for the petitioner submitted that the wrong fixation of pay was not on account of the petitioner. It was done by the authorities concerned and the petitioner had no role in the same. He further submitted that this is not a case which would come within the ambit of fraud or misrepresentation on the part of the petitioner which had resulted in the wrong fixation of pay. The learned counsel for the petitioner further has drawn the

attention of this Court to the judgment of the Supreme Court in the case of ***State of Punjab Vs. Rafiq Masih(White Washer)*** reported in **(2015) 4 SCC 334** and more particularly to paragraph No. 18 wherein the Supreme Court had categorically observed the circumstances under which it would be impermissible and iniquitous to make recovery.

7. This Court have also heard the learned counsel appearing on behalf of the respondents. As would also appear from the affidavit in opposition filed by the respondent No. 3, there is no allegation whatsoever as regards fraud or misrepresentation on the part of the petitioner which had resulted in wrong fixation of pay. This Court further finds it relevant to refer to Paragraph No. 18 of the judgment of the Supreme Court in the case of **Rafiq Masih(White Washer)** (supra) which is extracted herein below.

*“18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:*

- (i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).*
- (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.*
- (iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*
- (iv) Recovery in cases where an employee has wrongfully been required to*

*discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.*

(v) *In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."*

8. A perusal of the paragraph 18(ii) clearly stipulates that it would be impermissible on the part of the respondent authorities to make recovery when the employee had already retired or would retire within one year from the date of the order of recovery. The instant case squarely falls within the ambit of paragraph 18 (ii) of the judgment of the Supreme Court in the case of **Rafiq Masih(White Washer)** (supra). Under such circumstances, the question of making any recovery of the amount of Rs. 4,09,993/- from the petitioner does not arise.

9. It is also relevant to take note the fact that the petitioner had retired as on 29/2/2016 and till date the petitioner has not been paid even the provisional pension or the DCRG on account of the wrong fixation of pay by the respondent authorities. This Court in the interest of justice therefore disposes off the writ petition by declaring that the amount of Rs. 4,09,993/- cannot be recovered from the pension or pensionery dues of the petitioner.

10. This Court further directs the respondent authorities more particularly the Director of Pension as well as the Director of Elementary Education to take appropriate steps on the basis of the declaration made herein so that the petitioner receives his arrear pension, regular pension as well as his pensionery benefits as expeditiously as possible preferably within a period of three months

from the date a certified copy of this order is submitted to the Director of Elementary Education as well as the Director of Pension.

11. This Court further observes that in view of the above declaration that the amount of Rs.4,09,993/- cannot be recovered from the petitioner, the formalities for waiving of the said amount by the Finance Department should not act as an impediment towards the release of the arrear pension, regular pension and other pensionary benefits to the petitioner within the time stipulated herein above.

12. It is made clear that if the arrear pension, regular pension and the pensionary benefits are not paid, to which the petitioner is entitled to, within a period as directed hereinabove, the respondent authorities would be liable to pay interest @ 12% per annum from the date of such default.

13. With the above observations and directions, the petition stands disposed off.

**JUDGE**

**Comparing Assistant**