

GAHC010133762019



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

Case No. : WP(C)/4092/2019

PUNYA SAIKIA
W/O- SRI DHARMESWAR DAS, R/O OF VILL- DAKUA, P.O- DHALPUR, PS-
BIHPURIA, DIST- LAKHIMPUR, ASSAM, PIN- 784165.

VERSUS

THE STATE OF ASSAM AND 7 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT.
OF ASSAM, EDUCATION (ELEMENTARY) DEPARTMENT, DISPUR,
GUWAHATI- 6.

2:THE PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM
PENSION AND PUBLIC GRIEVANCES DEPARTMENT
DISPUR
GUWAHATI-6.

3:THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
FINANCE DEPARTMENT
ASSAM
DISPUR
GUWAHATI-6.

4:THE DIRECTOR OF ELEMENTARY EDUCATION
ASSAM
KAHILIPARA
GUWAHATI-19.

5:THE DIRECTOR OF PENSION AND PUBLIC GRIEVANCE DEPARTMENT
ASSAM
HOUSEFED COMPLEX
GUWAHATI-6.

6:THE DISTRICT ELEMENTARY EDUCATION OFFICER

LAKHIMPUR DISTRICT
NORTH LAKHIMPUR
PIN- 787001.

7:THE TREASURY OFFICER
BIHPURIA TREASURY
DIST.- LAKHIMPUR
ASSAM. PIN- 784161.

8:THE BLOCK ELEMENTARY EDUCATION OFFICER
NARAYANPYUR
DIST- LAKHIMPUR
ASSAM. PIN- 784164

Advocate for the Petitioner : MR. K R PATGIRI

Advocate for the Respondent : SC, ELEM. EDU

BEFORE

HON'BLE MR. JUSTICE MANASH RANJAN PATHAK

10/01/2023

Heard Mr. K. R. Patgiri, learned counsel for the petitioner. Also heard Mr. P N Sarma, learned Standing counsel, Department of School (Elementary) Education for the respondent Nos. 1, 4, 6 & 8, Mr. S R Baruah, learned Government advocate for the respondent No. 2 & 5 and Mr. A. Chaliha, learned Standing counsel, Finance Department for the respondent No. 3 & 7.

2) The petitioner was appointed as an Assistant Teacher in Harmotigarh Lower Primary School under Narayanpur Education Block of Lakhimpur district, while it was in venture stage and with effect from 01.04.1988 said Harmotigarh L.P. School along with its teaching and non-teaching staff were brought under provincialisation, including the service of the petitioner. In terms of the Government Notification No. PMA 955/2017/565 dated 30.12.2017, vide order No. BEEO/NRP/Amalgamation/2018/1406 dated 09.02.2018 said provincialised Harmotigarh L.P. School was amalgamated with Harmotigarh M.E. School.

3) On attaining the age of superannuation at sixty years, the petitioner retired from service on

31.05.2018, after rendering service for more than 30 years. The Block Elementary Education Officer (BEEEO) of Narayanpur Education Block of Lakhimpur district submitted her pension papers with necessary proposal before the District Elementary Education Officer (DEEO), Lakhimpur district, North Lakhimpur, who in turn, by letter No. 9389 dated 03.11.2018 forwarded the same to the Directorate of Pension, Assam for finalization of pension of the petitioner.

4) On 03.04.2019 vide No. DP.ADP/2018-19/2018/11/0619, the Finance & Accounts Officer of the Directorate of Pension, Assam wrote back to the DEEO, Lakhimpur district, North Lakhimpur informing that on 01.01.1989 petitioner's pay was wrongly fixed at Rs. 1285/- instead of Rs. 1185/- stating that subsequent fixation should be done accordingly and the same should be entered in her Service Book and further informed the said authority that due and drawn statement of the petitioner may be prepared and excess payment of pay including leave encashment benefit may be assessed and further, if the said excess drawal by the petitioner was not due to her misrepresentation or fraud, the Head of the Office/Department may waive the same with the approval of the Finance Department.

5) By the said communication dated 03.04.2019, respondents in the Pension Department returned the service book of the petitioner in original along with her pension papers to the DEEO, Lakhimpur, North Lakhimpur for needful action with the observation that the DEEO, Lakhimpur shall return those documents after meeting the deficiency/clarification noted above with the further observation that while submitting new pension proposal, steps should be taken to see that aforesaid deficiency does not recur again leading to return of the pension proposal (Annexure-4 to the writ petition).

6) On the basis of said communication of the Pension Department dated 03.04.2019, it is stated that the respondents in the Elementary Education Department determined excess drawal towards wrong fixation of her pay from 01.01.1988 to 31.05.2018 at Rs. 1185/- instead of Rs. 1285/- amounting to Rs. 3,23,734/- which the respondents are now contemplating to deduct the same from her final pension.

7) Being aggrieved with such action of the respondent, petitioner has approached this Court for redressal of her grievance that respondent shall not recover any amount from her pensionary amount including the retirement gratuity payable to her on the basis of her pay.

8) In the case of *Col. B.J. Akkara (Retd.) -Vs- Govt. of India*, reported in (2006) 11 SCC 709,

the Hon'ble Supreme Court have held that –

Relief against recovery of excess wrong payments of emoluments/ allowances from an employee can be granted on fulfillment of conditions that – (a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee and (b) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery.

The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery. On the same principle, pensioners can also seek a direction that wrong payments should not be recovered, as pensioners are in a more disadvantageous position when compared to in-service employees. Any attempt to recover excess wrong payment would cause undue hardship to them (pensioners).

9) The Hon'ble Supreme Court in the case of *Shyam Babu Verma -Vs- Union of India*, reported in (1994) 2 SCC 521 have held that –

It shall only be just and proper not to recover any excess amount which has already been paid to the petitioners due to the fault of the respondents, where the petitioners being in no way responsible for the same.

10) Referring its various decisions, including *Col. B.J. Akkara* (supra) and *Shyam Babu Verma* (supra), the Hon'ble Supreme Court in the case of *State of Punjab and others -Vs- Rafiq Masih (White Washer)*, reported in (2015) 4 SCC 334 have laid down that –

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, summaries 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.

11) In the case of Rafiq Masih (supra), the Hon'ble Apex Court have also held that –

Premised on the legal proposition considered above, namely, whether on the touchstone of equity and arbitrariness, the extract of the judgment reproduced above, culls out yet another consideration, which would make the process of recovery iniquitous and arbitrary. It is apparent from the conclusions drawn in Syed Abdul Qadir case [(2009) 3 SCC 475] that recovery of excess payments, made from the employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer. It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or soon before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery ,on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement, or within one year from the date of his retirement on superannuation.

12) It is contended by the petitioner that her monthly salary was determined by the respondents in the Elementary Education Department and accordingly, granted and allowed her to draw the revised scale of pay as on 01.01.1988. Accordingly, she was paid the said amount and on the basis of her said pay scale, the respondents enhanced her pay from time to time on revision of pay made by the Government to its employees, till her retirement from service on 31.05.2018.

13) It is also submitted by the petitioner that all along her service book was signed and countersigned by the respondent authorities in the Elementary Education Department during the relevant time and that she did not draw any amount in excess towards her pay fraudulently during her said service life.

14) In the present case, it is not on account of any misrepresentation or fraud made by the petitioner during her service tenure that the benefit of the higher pay scale of Rs.1285/- on 01.01.1988 was given to her, but it was paid to her due to wrong fixation of her salary by the

authorities in the Elementary Education Department for which the petitioner cannot be held to be at fault. From 01.01.1988, till her retirement on 31.05.2018, for a long period of more than 30 years, she might have genuinely believed that said scale of pay and amount is entitled by her and therefore, any such subsequent action to recover the excess payment from her pension amount payable to the petitioner now will cause undue hardship to her.

15) As such, in the said circumstances, the amount already paid to her during her tenure in service cannot be recovered now from the pension amount payable to the petitioner. Moreover, after retirement from service, the respondents in the Directorate of Pension and the Elementary Education Department unilaterally cannot decide to deduct the overpay allowance paid to the petitioner from her pensionary benefit.

16) From the above, it is seen that the balance of convenience and the prima facie case is also in favour of the petitioner. If the petitioner's benefit is cut or deducted out of the total amount of pension payable to her, she will suffer an irreparable loss and injury since, after retirement, the pensionary benefit is the only amount available towards the livelihood for a retired Government employee.

17) For the reasons above, the respondents are directed not to make any recovery of overpay allowance from the pensionary benefit payable to the petitioner in terms of the communication No. DP.ADP/2018-19/2018/11/0619 dated 03.04.2019 of the Finance & Accounts Officer of the Directorate of Pension, Assam to the District Elementary Education Officer (DEEO), Lakhimpur district, North Lakhimpur which is bad in law as well as in violation of the law as laid down by the Hon'ble Apex Court, noted above.

18) As such, said order of the Finance & Accounts Officer, Directorate of Pension, Assam under No. communication No. DP.ADP/2018-19/2018/11/0619 dated 03.04.2019 of the Finance & Accounts Officer of the Directorate of Pension, Assam is hereby set aside and quashed.

19) It is accordingly directed that the alleged overpay allowance already paid to the petitioner herein, the retired Assistant Teacher of Harmotigarh M.E. School in Narayanpur Education Block of Lakhimpur district who retired from service on 31-05-2018, now shall not be recovered by the respondents herein from the pension amount payable to the petitioner.

20) It is also made clear that any such excess drawal made by the petitioner due to wrong fixation of her pay as on 01.01.1988 determined by the respondent authorities, if in the

meanwhile has been recovered from the petitioner then the same shall be returned to her by the respondents forthwith.

21) However, the respondents in the Elementary Education Department shall correctly determine the pension amount of the petitioner as per her entitlement to the correct scale of pay w.e.f. 01.01.1988 and shall forward it with petitioner's Service Book and other relevant documents to the Directorate of Pension, Assam; who in turn, after proper verification, shall issue the pension pay order to the petitioner.

22) With the above observation and direction, this writ petition stands disposed of.

JUDGE

Comparing Assistant