

GAHC010116792023



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

Case No. : WP(C)/3116/2023

LALSAWMLIANI
D/O- LATE HRANGKHUMA, R/O- VILL.- NORTH BAGETAR, P.O. AND P.S.
HAFLONG, DIST. DIMA HASAO, ASSAM, PIN- 788819.

VERSUS

THE STATE OF ASSAM AND 4 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE GOVT
GOVT. OF ASSAM, NON FORMAL AND ADULT EDUCATION DEPARTMENT,
DISPUR, GUWAHATI-781006.

2:DIMA HASAO AUTONOMOUS COUNCIL
REPRESENTED BY ITS PRINCIPAL SECRETARY.

3:THE DIRECTOR
NON FORMAL AND ADULT EDUCATION
ASSAM
JATIA
KAHILIPARA ROAD
GUWAHATI-781019.

4:THE DISTRICT ADULT EDUCATION OFFICER
DIMA HASAO HAFLONG.

5:THE ACCOUNTANT GENERAL (A AND E)
ASSAM
BELTOLA
GUWAHATI

Advocate for the Petitioner : MR. B J GHOSH, MR D MAHANTA

Advocate for the Respondent : SC, EDU, MR. A HASAN, (R-5),MR. R AHMED, (R-3),MS. P.

NAIDING, SC, DIMA HASAO AUTONOMOUS COUNCIL, (R-2,4),SC, AG

**BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR**

Date of hearing : 02.08.2024

Date of Judgment : 02.08.2024

Judgment & order(Oral)

Heard Mr. B. J. Ghosh, learned counsel, appearing on behalf of the petitioner. Also heard Mr. T. Thakuria, learned Government Advocate, appearing on behalf of respondents No. 1 & 3; Mr. C. Sarma, learned CGC, appearing on behalf of respondents No. 2 & 4; and Mr. B. Sarma, learned standing counsel, Accountant General(A&E), Assam, appearing on behalf of respondent No. 5.

2. The petitioner by way of instituting the present writ petition, has presented a challenge to the communication, dated 20.03.2023, issued by the Director, Non-Formal & Adult Education, Assam, wherein, the District Adult Education Officer, Dima Hasao, Haflong, was directed that as the petitioner, herein, basing on her date of birth was required to be superannuated from her service on 31.12.2021 but had over-stayed her service till 31.12.2022; the salaries drawn by her beyond 31.12.2021, was held to be recoverable and accordingly, the over-drawal of salaries in respect of the petitioner, herein, beyond 31.12.2021, was directed to be computed and her pension papers be re-submitted with adjustment of such over-drawal of salaries in respect of the petitioner beyond 31.12.2021.

3. The issue involved in the present proceeding, in brief, pertains to the action on the part of the respondent authorities in purporting to make certain recoveries of the salaries of the petitioner on the ground of overstay in her service. At the outset, it may be noted that such overstay is on the principal ground of wrong calculation of the date of birth of the petitioner, while entering the same in her Service Book, at the time of her recruitment.

4. As projected in the writ petition, the petitioner, herein, was appointed as a Lower Division Assistant-cum-Typist in the office of the District Adult Education Officer, Dima Hasao, Haflong. The petitioner accordingly joined her service on 03.08.1984. In pursuance of the joining of the petitioner in her service; the respondent No. 4 had opened her Service Book and therein, basing on the matriculation certificate as produced by the petitioner, herein, her date of birth of came to be recorded as 28.12.1962. Basing on the said date of birth as recorded in the Service Book of the petitioner at the time of her initial appointment; she continued in her service till 31.12.2022. The petitioner, on 31.12.2022, retired from her service, on attaining the age of superannuation.

5. The pension papers of the petitioner was, thereafter, submitted in the month of January, 2023, and on processing of the same, it came to the notice of the authorities that the date of birth of the petitioner was wrongly recorded in her Service Book as "28.12.1962" instead of "28.12.1961". Basing on the calculation so made; the date of birth of the petitioner, herein, was reckoned as "28.12.1961" and accordingly, the petitioner was to retire from her service on 31.12.2021, on attaining the age of superannuation. However, the petitioner continued in her service till 31.12.2022.

6. The Director, Non-Formal & Adult Education, Assam, on noticing the fact that the petitioner had to retire from her service on 31.12.2021, but, was so retired only on 31.12.2022; proceeded to issue the impugned communication, dated 20.03.2023, requiring the District Adult Education Officer, Dima Hasao, Haflong, to compute the salaries so drawn by the petitioner w.e.f. 01.01.2022 till 31.12.2022, and for re-submission of her pension papers after making provision for recovery of salaries so drawn by the petitioner after 31.12.2021.

7. Being aggrieved, the petitioner, herein, has instituted the present proceeding.

8. Mr. Ghosh, learned counsel for the petitioner, has submitted that the petitioner, herein, had passed her HSLC Examination in the year 1978 and at the time of her appointment; she had submitted a copy of the certificate as issued by the Board of Secondary Education, Assam, in this connection and in the said certificate, her date of birth was recorded as 16 years 2 months and 3 days as on 01.03.1978. Accordingly, basing on the said certificate; the date of birth of the petitioner was so worked-out by the departmental authorities and recorded in her Service Book as "28.12.1962".

9. It is the further contention of Mr. Ghosh, learned counsel, that the date of birth as recorded in the Service Book of the petitioner at the time of her initial entry into the service, continued to hold the field till the date of her retirement from service on attaining the age of superannuation. It is also contended that if the date of birth as recorded in the Service Book of the petitioner, herein, is, in any manner, erroneous; the same was contended to be so done by the respondent authorities and the petitioner had no role in such recording of her date of birth in her Service Book.

10. Mr. Ghosh, learned counsel for the petitioner, has also submitted that the petitioner had actually rendered her service after 31.12.2021 i.e. w.e.f. 01.01.2022 till 31.12.2022 and accordingly, for the said period; the salaries drawn by the petitioner, would not call for any recovery.

11. Mr. Sarma, learned standing counsel, Dima Hasao Autonomous Council, appearing on behalf of respondents No. 2 & 4; has submitted that the date of birth of the petitioner, herein, was recorded by the then District Adult Education Officer, Dima Hasao, Haflong, and it was so recorded, under due endorsement, in the Service Book of the petitioner, as "28.12.1962".

12. Mr. Sarma, learned standing counsel, Dima Hasao Autonomous Council, has also submitted that it is only upon the processing made of the pension papers of the petitioner that it came to the notice of the authorities that the date of birth as recorded in the Service Book of the petitioner, herein, was erroneous and accordingly, the communication, dated 20.03.2023, came to be so issued. It was further submitted that the petitioner although being in the know-how of the wrong recording of her date of birth as recorded in her Service Book, had not approached the respondent authorities for rectification of her date of birth as recorded in her Service Book. The anomalies as arising to the date of birth as recorded in the Service Book of the petitioner; led to a delay in processing of her pension papers and it was contended that the same is not deliberate and/or willful.

13. I have heard the learned counsels appearing for the parties and also perused the materials available on record.

14. The date of birth of the petitioner in her Service Book came to be recorded as "28.12.1962" basing on her matriculation certificate. A perusal of the matriculation certificate as issued by the authorities of Board of Secondary Education, Assam, to the petitioner, herein, reflects that the date of birth was not reflected therein, but her age as on 01.03.1978, was recorded. It is further noticed that the date of birth of the petitioner was calculated/deduced by the respondent authorities from the entries made in the said matriculation certificate, at the time of her initial entry into the service.

15. The recording of the date of birth in the Service Book of the petitioner as "28.12.1962", has not been contended by the respondent authorities to have so occasioned on account of any misrepresentation or manipulation caused by the petitioner, in the matter.

16. The Service Book of the petitioner, herein, was considered for the purpose of her promotion to the post of Upper Division Assistant(now Senior Assistant) and the respondent authorities, had not, at that at the relevant point of time, questioned the entries as made in the said Service Book of the petitioner including her date of birth as recorded therein.

17. It is seen that the petitioner w.e.f. 01.01.2022 till 31.12.2022, had discharged her duties and such service as rendered by the petitioner, herein, beyond 31.12.2021, was not on account of any misrepresentation/manipulation done by her in the matter. Accordingly, the petitioner having rendered actual service during the period w.e.f. 01.01.2022 till 31.12.2022, she would be entitled to her due salaries for the said period of service.

18. In this connection, this Court would refer to the decision of the Hon'ble Supreme Court in the case of ***State of Bihar & ors. v. Pandey Jagdishwar Prasad***, reported in **(2009) 3 SCC 117**, wherein, the incumbent's date of birth was recorded in his Service Book basing on his matriculation certificate. However, there was another date of birth recorded in the Service Book which was made on the basis of an affidavit furnished by the incumbent therein. However, the date of birth so recorded in his Service Book as per his matriculation certificate, was not deleted. The incumbent, therein, was accordingly charged with overstay.

19. The Hon'ble Supreme Court, in this connection, in the above-cited decision, drew the following conclusions:

“16. Moreover, for the sake of argument, even if we consider that the respondent had fraudulently entered another date of birth in his service book, as had been alleged, it should have come to the notice of the authorities during his course of service, and not after he had attained the age of superannuation after the expiry of the date mentioned in the service book which was based on the affidavit of the respondent. To the contrary, none of the officials responsible had noticed this during his service period, even during his time of promotions when the service book was required to be inspected by the officials. Therefore, it clearly points out to the gross negligence and lapses on the part of the authorities concerned and in our view, the respondent cannot be held responsible to work beyond his date of birth as mentioned in the matriculation certificate when admittedly in the service book after affidavit, some other date of birth was also evident.

19. It is not needed for this Court to verify the veracity of the statements made by the parties. If at all the respondent entered the second date of birth at a subsequent period of time, the authorities concerned should have detected it and there should have been a detailed enquiry to determine whether the respondent was responsible for the same. It has been held in a catena of judicial pronouncements that even if by mistake, higher pay scale was given to the employee, without there being misrepresentation or fraud, no recovery can be effected from the retiral dues in the monetary benefit available to the employee.

20. This Court in the case of Kailash Singh vs. The State of Bihar and Ors., [2004 (1) PLJR 289 (SC)], held that recovery sought to be made from the salary of the employees on the ground of alleged over stay in service on the basis of age assessed or considered, despite the fact that the employee has worked during the period of alleged over stay could not be made.

21. In *Sahib Ram vs. State of Haryana & Ors.*, [1995 Supp. (1) SCC 18], this Court has held that even if by mistake, higher pay scale was given to the employee, without there being misrepresentation or fraud, no recovery can be effected from the retiral dues in the monetary benefit available to the employee.

24. Without going into the question whether the appellant was justified after completion of two years from the actual date of retirement to deduct two years' salary and other emoluments paid to the respondent, we may say that since the respondent had worked during that period without raising any objection from the side of the appellant and the appellant had got works done by the respondent, we do not think that it was proper at this stage to allow deduction from his retiral benefits, the amount received by him as salary, after his actual date of retirement. Considering the fact that there was no allegation of misrepresentation or fraud, which could be attributed to the respondent and considering the fact that the appellant had allowed the respondent to work and got works done by him and paid salary, it would be unfair at this stage to deduct the said amount of salary paid to him. Accordingly, we are in agreement with the Division Bench decision that since the respondent was allowed to work and was paid salary for his work during the period of two years after his actual date of retirement without raising any objection whatsoever, no deduction could be made for that period from the retiral dues of the respondent.

25. In *Kailash Singh vs. State of Bihar & Ors.* [2005 (13) SCC 576], this Court observed that the employer-State would not be entitled to recover the salary paid in excess after the due date of superannuation. In our view, this decision was practically based on the concession made by the State before this Court.

26. Again in *Hari Singh vs. State of Bihar & Ors.* [2000 (10) SCC 284], this Court held that since the Government had never put the employee on notice to indicate that the date of birth as entered in the service book was incorrect though it could have done so and since no notice had been given to the employee concerned for accepting a date of birth other than the one entered in the service book, the order of retirement could not be sustained. From the aforesaid decision, it is evident that it was the duty of the State to put the employee on notice about his date of retirement and not having done so, the appellant was not entitled to recover the excess amount paid to the respondent.

28. Before parting with this order, we may refer to a decision of this Court strongly relied on by the learned counsel for the appellant, namely, *Radha Kishun vs. Union of India and Ors.*, [(1997) 9 SCC 239]. Learned counsel for the appellant relying on this decision sought to argue that even if the respondent had worked after his due date of superannuation without having any objection from the appellant, the appellant was entitled to deduct the amount already received by the respondent from his retiral benefits. This case, in our view, is clearly distinguishable from the present case. In the above-mentioned case, there was no dispute as to the date of retirement of the appellant in that appeal, as there was no controversy in the date of birth of that appellant. There was only one date of birth mentioned, and he had not retired on the basis of his date of birth so entered. Therefore, he had wrongly extended his service beyond the date of his superannuation. But in the present case, there were two dates of birth recorded in the service book of the respondent. Therefore, there was a clear confusion in the mind of the respondent as to whether the appellant had accepted his corrected date of birth as entered in his service book when admittedly authorities concerned did not serve any notice of retirement on the basis of the initial entry of date of birth in his service book.

29. It should also be kept in mind that the respondent might have expected that second date of birth shown in the service book was accepted by the authorities for that reason he was allowed to continue in his service and was paid salary. In the absence of any proof that the respondent had manipulated his date of birth by entering a second date at a later stage, and that he had any malafide intentions to continue his service, beyond his date of his retirement, we are of the view that the decision in the case of Radha Kishun vs. Union of India and Ors. (Supra), would not be applicable in the facts of the present case."

20. Applying the decision of the Hon'ble Supreme Court in the case of **Pandey Jagdishwar Prasad**(supra); this Court is of the considered view that the petitioner, herein, cannot be held responsible for her over-stay in service for the reasons recorded hereinabove and as a consequence thereof; the communication, dated 20.03.2023, to the extent it has the effect of recovering the salaries drawn by the petitioner w.e.f. 01.01.2022 till 31.12.2022, stands interfered with by this Court.

21. In other words; the respondent authorities would not be entitled to effect any recovery from the petitioner of the salaries drawn by her for the services rendered by her beyond 31.12.2021.

22. The petitioner, however, would now be only entitled to fixation of retiral benefits w.e.f. 01.01.2022, by reckoning her actual date of birth with a further stipulation that the petitioner having received her salaries for the period w.e.f. 01.01.2022 till 31.12.2022; the pension of the petitioner would be fixed notionally for the period w.e.f. 01.01.2022 to 31.12.2022.

23. In that view of the matter, the respondent authorities are hereby directed to finalize the pension and pensionary benefits of the petitioner, herein, by reckoning her date of retirement to be "31.12.2021" and release to

the petitioner, her dues so working-out.

24. However, it is to be noted that no recovery shall be effected from the petitioner in respect of the salaries so drawn by her w.e.f. 01.01.2022 till 31.12.2022 and her pension, for the said period; shall be notionally fixed with the arrears being released w.e.f. 01.01.2022.

25. The exercise as now required to be carried-out in terms of the directions passed by this Court hereinabove, shall be so initiated and concluded within a period of 2(two) months from the date of receipt of a certified copy of this order.

26. With the above directions and observations, this writ petition stands disposed of.

JUDGE

Comparing Assistant