

GAHC010176942024



2024:GAU-AS:9037

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

Case No. : WP(C)/4614/2024

MD. ABDUL HAI MIAH
S/O- LATE ABDUL JABBER, VILLAGE- MOIRAKUCHI PART-I, P.O.-
AIRKATA, P.S.- FAKIRGANJ, DIST.- DHUBRI, ASSAM, PIN- 783330

VERSUS

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

2:THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF
ASSAM
FINANCE DEPARTMENT
DISPUR
GUWAHATI-6

3:THE DIRECTOR OF PENSION
ASSAM
DISPUR
GUWAHATI-06

4:THE FINANCE AND ACCOUNTS OFFICE
DIRECTORATE OF PENSION
ASSAM
DISPUR
GUWAHATI-06

5:THE DISTRICT ELEMENTARY EDUCATION OFFICER
DHUBRI
ASSAM
PIN- 783301

6:THE BLOCK ELEMENTARY EDUCATION OFFICER
SOUTH SALMARA
ASSAM
PIN- 783127

7:THE INSPECTOR OF SCHOOLS
D.D.C.
DIST.- DHUBRI
ASSAM
PIN- 783301

8:HEAD MASTER OF AIRKATA HIGH SCHOOL
VILL. AND P.O.- AIRKATA
P.S. FAKIRGANJ
DIST.- DHUBRI (ASSAM)
PIN- 78333

Advocate for the Petitioner : MR. P K DEKA, MR. R. KARIM,MR. P DAIMARY,MS. N M LONGKENG

Advocate for the Respondent : SC, SEC. EDU., GA, ASSAM,SC, FINANCE

BEFORE

HON'BLE MR. JUSTICE MANASH RANJAN PATHAK

11/09/2024

Heard Mr. P K Deka, learned counsel for the petitioner and Mr. U Sharma, learned Standing counsel, Department of School (Secondary) Education, Assam for the respondent Nos. 1 & 7. Also heard Mr. A Chaliha, learned Standing counsel, Finance Department for the respondent No. 2; Mr. B Deuri, learned Government Advocate, Assam for the respondent Nos. 3 & 4 and Mr. S M T Chistie, learned Standing counsel, Department of School (Elementary) Education for the respondent Nos. 5 & 6.

2. Petitioner, namely, Md. Abdul Hai Miah, son of late Abdul Jabber, was appointed as an Additional Assistant Teacher in Noshkara M.E. School by its School Management Committee vide its resolution dated 08.01.1991. Pursuant to the same, he joined the said school. Later, his service in the said M.E. School was regularized by order dated 22.02.2002. Said Noshkara M.E. School was subsequently amalgamated with Airkata High School, District-Dhubri and he become an Assistant Teacher of said

Airkata High School. Later, on attaining the age of superannuation, the petitioner retired from service on 30.06.2021 at his 60 years as an Assistant Teacher of said Airkata High School.

3. After his retirement, the Inspector of Schools, Dhubri submitted the Pension Proposal of the petitioner to the Director of Pension, Assam on 23.07.2021. But the Finance & Accounts Officer of the Directorate of Pensions, Assam by its communication dated 22.09.2021 returned the pension proposal of the petitioner stating that his pay on 01.07.2012 while serving as an Assistant Teacher in the said M.E. School should have been Rs.11,120/- instead of Rs.11,160/- and accordingly, his pay as on 01.04.2016 should have been Rs.33,200/-. Since the petitioner had drawn an excess pay w.e.f. 01.07.2012 to 30.06.2021 same should be worked out with due & drawn statement and submit along with an assessment report as to whether there are any fault on the part of the said retired teacher (the petitioner) so that the Pension Department can forward the waiver proposal to the Government. By the said communication dated 22.09.2021, the Directorate of Pension also informed the Inspector of Schools, Dhubri to furnish LPC (Last Pay Certificate) and LPS (Last Payment Supplement) of the petitioner for consideration of his pension.

4. Pursuant to the said letter dated 22.09.2021 of the Pension Department, the Inspector of Schools, Dhubri on 19.02.2022 forwarded the Pension Proposal, Pension Papers, relevant records, Service Book in original, Excess Drawal Statement, corrected LPC, Last 10 months average pay etc. of the petitioner to the Directorate of Pension, Assam for finalization of pension intimating that an amount of Rs.1,04,661/- was drawn in excess by the petitioner while in service though he did not have any fault on his part towards the drawal of such excess pay and allowances. By the said letter dated 19.02.2022, the Inspector of Schools, Dhubri also informed the Directorate of Pension, Assam that the petitioner being a retired teacher, he cannot refund the excess drawal amount as been informed by him.

5. Accordingly, by the said letter dated 19.02.2022, the Inspector of Schools, Dhubri requested the Director of Pension, Assam to take necessary steps in the said matter and move the Government in the Finance Department for its approval to waive the excess drawal amount and for finalization of pension of the petitioner.

6. By communication dated 31.03.2022, the Finance & Accounts Officer, Directorate of Pension, Assam again returned the Pension Proposal of the petitioner to the Inspector of Schools, Dhubri stating that while checking the pension proposal of the petitioner certain deficiencies were found for which the Directorate of Pension could not finalize the pensionary benefit of the petitioner and the deficiency/shortcoming in the service book/pension paper of the petitioner may be examined and if

found in order, appropriate steps to be taken to remove such deficiency with an observation that while submitting New Pension Proposal of the petitioner steps should be taken to see that such deficiency does not recur again leading to return of the pension proposal of the petitioner.

7. By the said communication dated 31.03.2022, the Directorate of Pension, Assam also informed the Inspector of Schools, Dhubri that the pension case will be settled on receipt of waiving certificate from the Government.

8. The Headmaster of Airkata High School, Dhubri on verification of the records came to a finding that the petitioner while in service w.e.f. 01.07.2012 to 30.06.2021 had drawn an amount of Rs. 1,04,661/- in excess due to wrong fixation of his salary that includes his revised scale of pay w.e.f. 01.04.2016 till his retirement on 30.06.2021.

9. The Headmaster of Airkata High School on 10.09.2022 pertaining to the excess drawal by the petitioner also issued a certificate certifying that the petitioner, retired Assistant Teacher of Airkata High School did not commit any fault nor he has any hand towards contribution on his part towards the drawal of excess pay and allowances.

10. The Inspector of Schools, Dhubri on 13.09.2022 again wrote to the Directorate of Pension resubmitting the pension proposal of the petitioner with the excess drawal statement of Rs.1,04,661/-. But the Directorate of Pension again returned the pension proposal of the petitioner by communication dated 06.01.2023 stating that Head of the Office should fix the responsibility for such wrong fixation leading to excess drawal in terms of para-5 of Government of Assam, Finance Department Notification dated 27.01.2022 and appropriate action should be considered on identification of responsible person in the said case and that case of the petitioner be resubmitted after taking necessary action at his end asking the said Inspector to submit his reply within 20 days from the date of receipt of said letter.

11. The Inspector of Schools on 09.02.2023 wrote to the Headmaster of Airkata High School that as the petitioner was serving as an Assistant Teacher in Airkata M.V. School now amalgamated with Airkata High School, in the year 2018 his pay was drawn and disbursed by the then Headmaster of Airkata High School and maintained the service book of the petitioner showing his basic pay as on 01.07.2012 at Rs.11,460/- instead of Rs.11,120/- and as such, said Headmaster of Airkata M.V. School is responsible for the wrong fixation of pay of the petitioner. Accordingly, the Inspector of Schools, Dhubri directed the Headmaster of Airkata High School to take necessary steps on the matter and submit his reply within 2 (two) days considering the matter to be urgent.

12. The Headmaster of Airkata High School on 11.02.2023 informed the Inspector of Schools, Dhubri that the petitioner served as an Assistant Teacher in Airkata M.V. School and the said M.V. School was amalgamated with Airkata High School in the year 2018. The pay of the petitioner was fixed wrongly @ Rs.11,460/- on 01.07.2012 instead of Rs.11,120/- by the then Headmaster of Airkata M.V. School after getting the benefit of financial upgradation order from the District Elementary Education Officer, Dhubri but before amalgamation of said Airkata M.V. School with Airkata High School, the Headmaster of the said M.V. School had already retired from service. As such, the Headmaster of Airkata High School requested the Inspector of Schools, Dhubri to consider the matter of the petitioner sympathetically and finalize his pension case to mitigate the matter without any recovery so that the family of the retired petitioner may get leave from the hardship.

13. Accordingly, the Inspector of Schools, Dhubri again forwarded the matter of pension of the petitioner to the Directorate of Pension on 14.02.2023. Even on this time, the Director of Pension by its letter dated 03.10.2023 returned the pension proposal of the petitioner stating that – after a thorough examination of the pension papers, it has become evident that the response and clarification provided by the Inspector of Schools, Dhubri concerning this office letter dated 06.01.2023 is inadequate. Furthermore, the essential excess drawal statement is also not furnished by the Inspector of Schools, Dhubri. Now, in order to expedite the next step at this end the Inspector of Schools, Dhubri may be asked to promptly provide the proper clarification/reply and requisite excess drawal statement in favour of the petitioner, retired Assistant Teacher.

14. Petitioner is running from pillar to post for his pension and consequential retirement benefits as per his entitlement. But he failed to get his pension and pensionary benefits in spite of the fact that he did not commit any wrong as his salary was not fixed by him, he merely being an Assistant Teacher and not a Drawing and Disbursing Officer of the said M.V. School as well as the High School.

15. Hence, this writ petition by the petitioner praying amongst others to set aside the orders dated 22.09.2021 and 03.10.2023 of the Directorate of Pension, Assam pertaining to recovery of excess payment of Rs.1,04,661/- from him and to direct the respondents not to deduct/recover the said excess drawal of Rs.1,04,661/- from the retiral benefit of the petitioner.

16. Apparently, the petitioner was only an Assistant Teacher on 01.07.2012 in Airkata M.V. School and he was neither the Headmaster of the said M.E. School nor was he the Drawing and Disbursing Officer of the said school. His pay on 01.07.2012 was fixed at Rs.11,420/- instead of Rs.11,160/- by the respondent authorities wrongly in which the petitioner has no hand nor involved in such fixation of pay. Pursuant to such fixation of pay as on 01.07.2012 at Rs.11,420/- his Pay Scale was revised w.e.f.

01.04.2016 and he continued to receive revised Scale of Pay on the said basis till his retirement from service on 30.06.2021 as an Assistant Teacher of Airkata High School as in the meantime said Airkata M.V. School was amalgamated with the said Airkata High School in the year 2018.

17. 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).

18. 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.

19. 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.

20. 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.

21. It is contended by the petitioner that his monthly salary was determined by the respondents in the Elementary Education Department and it was accordingly, granted and was allowed to him to draw the revised scale of pay of Rs.11,420/- as on 01.07.2012 instead of Rs.11,160/-. Accordingly, he was paid the said amount and on the basis of his said pay scale, the respondents enhanced his pay again from 01.04.2016 on revision of pay made by the Government to its employees, till his retirement from service on 30.06.2021.

22. It is also submitted by the petitioner that all along his service book was signed and countersigned by the respondent authorities in the Elementary Department till said Airkata M.V. School was amalgamated with Airkata High School and after such amalgamation his service book was signed by the respondents in the Secondary Education Department during the relevant period of time and that he did not draw any amount in excess towards his pay fraudulently during his said service life.

23. In the present case, it is not on account of any misrepresentation or fraud on the part of the

petitioner during his service tenure that the benefit of the higher pay scale was given to him, but it was paid to him due to wrong fixation of his salary by the authorities in the Elementary/Secondary Education Department for which the petitioner cannot be held to be at fault. From 01.07.2012, till his retirement on 30.06.2021, for a long period of about 9 (nine) years, he might have genuinely believed that said Scale of Pay and amount is entitled by him and therefore, any such subsequent action to recover the excess payment from his pension amount payable to the petitioner now will cause undue hardship to him.

24. As such, in the said circumstances, the amount already paid to the petitioner during his tenure in service cannot be recovered now from his pension amount that is payable to him. Moreover, after retirement from service, the respondents in the Directorate of Pension and the Secondary Education Department unilaterally cannot decide to deduct the excess pay allowance paid to the petitioner from his pensionary benefit.

25. 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 him, he 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.

26. For the reasons above, the respondents are directed not to make any recovery of excess pay allowance from the pensionary benefit payable to the petitioner in terms of the communication Nos. (i) DP.ADP/2021-22/2021/08/0342 dated 22.09.2021; (ii) DP.ADP/2021-22/2021/08/0342 dated 31.03.2022; (iii) DP.ADP/2021-22/2021/08/0342 dated 06.01.2023 and (iv) DP.ADP/2021-22/2021/08/0342 dated 03.10.2023 of the Finance & Accounts Officer of the Directorate of Pension, Assam to the Inspector of Schools, Dhubri, being bad in law as well as in violation of the law as laid down by the Hon'ble Apex Court, noted above.

27. As such, those communication Nos. (i) DP.ADP/2021-22/2021/08/0342 dated 22.09.2021; (ii) DP.ADP/2021-22/2021/08/0342 dated 31.03.2022; (iii) DP.ADP/2021-22/2021/08/0342 dated 06.01.2023 and (iv) DP.ADP/2021-22/2021/08/0342 dated 03.10.2023 of the Finance & Accounts Officer of the Directorate of Pension, Assam are hereby set aside and quashed.

28. It is accordingly directed that the alleged excess pay allowance already paid to the petitioner herein, the retired Assistant Teacher in Airkata M.V. School / Airkata High School under the District Elementary Education Officer, Dhubri and the Inspector of Schools, Dhubri; who retired from service on 30-06-2021, now shall not be recovered by the respondents herein from the pension amount as

well as other retirement benefit payable to the petitioner.

29. It is also made clear that if in the meanwhile, said amount of Rs.1,04,661/- towards excess drawal by the petitioner during his service tenure, that was drawn by him without any fault on his part due to wrong fixation of his salary was recovered by the respondent authorities in the Elementary and Secondary Education Department of the State, then the respondent authorities including the Directorate of Pension, Assam as well as the Finance Department of the State shall redeposit the said amount of Rs.1,04,661/- or any other amount to the petitioner towards such excess drawal of salary with prevailing bank interest forthwith.

30. During the deliberation of the matter, Mr. U Sharma, Standing counsel, Department of School Education placed before the Court an order of the Inspector of Schools, Dhubri under Memo No. F-Pan/12/2023/02/510-515 dated 06.02.2024, by which the petitioner has been allowed to draw provisional pension amounting to Rs.15820/- only per month with other allowances as admissible under the Rules, w.e.f. 01.07.2021 till finalization of his pension.

31. However, the respondents in the Secondary Education Department shall correctly determine the pension amount of the petitioner as per his entitlement to the correct scale of pay w.e.f. 01.07.2012, at an early date 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.

32. The respondent authorities shall also pay the petitioner all the consequential pensionary benefits like Death cum Retirement Gratuity, Leave Encashment Benefit and other retirement benefit as per his entitlement without deducting any amount towards excess drawal by the petitioner during his service tenure due to wrong fixation of his salary by the respondent authorities.

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

JUDGE

Comparing Assistant