

GAHC010191512022



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

Case No. : WP(C)/6439/2022

BANI PATHAK
S/O LATE KRISHNA KANTA PATHAK, R/O HOUSE NO. 4, BYE LANE-1,
KAILASH NAGAR, BELTOLA, P.S.-DISPUR, GUWAHATI, DIST-KAMRUP(M)

VERSUS

THE TEZPUR UNIVERSITY AND 3 ORS
REPRESENTED BY THE REGISTRAR OF TEZPUR UNIVERSITY, P.O.-NAPAM,
P.S.-BORGHAT, DIST- SONITPUR, ASSAM, PIN-784028

2:THE VICE CHANCELLOR
TEZPUR UNIVERSITY
P.O.-NAPAM
P.S.-BORGHAT
DIST- SONITPUR
ASSAM
PIN-784028

3:THE REGISTRAR
TEZPUR UNIVERSITY
P.O.-NAPAM
P.S.-BORGHAT
DIST- SONITPUR
ASSAM
PIN-784028

4:THE DIRECTOR GENERAL OF AUDIT (CENTRAL)
KOLKATA
8 KIRAN SANKAR ROY ROAD
G.I. PRESS BUILDING
KOLKATA-70000

Advocate for the Petitioner : MR S BORTHAKUR

Advocate for the Respondent : DY.S.G.I.

**BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA**

Judgment and Order (Oral)

Date of Hearing & Judgment : 06.03.2024

Heard Mr. S. Borthakur, learned counsel for the petitioner. also heard Mr. S.K. Medhi, learned Standing Counsel, Tezpur University and Mr. R.K. Talukdar, learned Standing Counsel, Director General of Audit.

2] The petitioner before this Court joined the Tezpur University as an Assistant Finance Officer on 22.01.1995 in pursuance to the selection in terms of advertisement No. TU/Estt/18/06/94 dated 04.06.1994. After rendering his services for nine years, the petitioner became eligible for senior scale and was accordingly recommended for grant of senior scale and was also granted senior scale with effect from 13.04.2002. The petitioner, although never promoted to higher post, however, he performed his duties in different capacities on deputation basis and upon due completion of the deputation period he was reverted to his original post of Assistant Finance Officer. The petitioner served on as a Deputy Registrar, Internal Audit Officer as well as Finance Office on deputation. Although the petitioner became eligible, he was never promoted to

a higher post. He accordingly approached this Court by filing WP(C) No. 1323 of 2020, which writ petition came to be disposed of by order date of 23.03.2021 directing the respondents to consider the petitioner for promotion within a period of four weeks from the date of the order. Consequent to the directions of this Court and upon recommendations of the Departmental Promotion Committee, the petitioner was promoted to the post of Deputy Registrar in the pay level of 12 (Pre revised pay band -3, Rs.15600 -39100 plus Grade Pay of Rs.7600/-) with effect from the date of joining the post vide order dated 22.04.2021. Shortly thereafter, the petitioner was superannuated from his service as a Deputy Registrar in the Pay Level of 12 (Pre-revised Pay Band 3, Rs.15600-39100/- plus Grade Pay of Rs.6000/-). Pursuant to his superannuation, the petitioner was entitled to be granted his retirement benefits. By order dated 30.06.2021 the pension and other pensionary benefits to the petitioner were released. However, an amount of Rs.20,77,976/- (Rupees Twenty Lakh Seventy Seven Thousand Nine Hundred Seventy Six) was stated to be kept on hold from leave encashment, retirement and gratuity till settlement of the pending audit objections raised in Para No. 2.3 of part II B of the Inspection Report insofar as the accounts of the Tezpur University for the year 2018 -2019 is concerned. This audit objection was raised by the Director General of Audit (Central), Kolkata on decision taken by the Standing Audit

Committee of the University. It is the claim of the petitioner that another amount of Rs.4,11,250/- (Rupees Four Lakhs Eleven Thousand Two Hundred Fifty) was also kept on hold from the pensionary benefits on the pretext of deduction towards Income tax. It is the further claim of the petitioner that an increment payable to the petitioner has also not been granted. The petitioner thereafter filed a writ petition being WP(C) No.4447/2021, which was disposed of by the order dated 26.07.2022 by directing the respondent authority to give the annual increment to the petitioner.

3] The learned counsel for the petitioner submits that the Director General of Audit has raised the audit objection in his report that the appointment of the petitioner to the posts of Internal Audit Officer and Finance Officer were irregular. the objection was raised as the advertisement for Internal Audit Officer requires educational qualification of a Master's Degree with at least 55% marks or its equivalent of grade 'B' in the UGC Seven Point Scale. The audit objection further states that the petitioner was selected although he did not satisfy the qualification of having a Master's Degree as per UGC norms and therefore, he did not meet the criteria in the advertisement for appointment to the post of Internal Audit Officer. The appointment of the petitioner was recommended by the Board of Management and he was appointed in the post with effect from 14.05. 2008 to 04.07.2013 and he drew the pay attached to that post during the

above period. The audit objection was further raised in respect of the appointment of the petitioner for the post of Finance Officer in the scale of pay of Rs.37,400/- - 67,000/- (PB-4) with Grade Pay of Rs.10,000/- in response to the selection made pursuant to an advertisement no.04/ 2013 dated 20.02.2013. In the said post also the minimum educational qualification set for the said post was a Master's Degree with 55% marks or its equivalent grade 'B' in the UGC Seven Point Scale. The Audit raised objections that the petitioner was selected for the above post by the Selection Committee on deputation with effect from 05.07.2013 for tenure of five years. After completion of his tenure, the petitioner was reverted back to the post of Assistant Finance Officer on 17.08.2018. During the period he performed as a Finance Officer on deputation, he drew the scale of pay attached to the said post. The Audit made the following observations in this regard:

(I) that the petitioner did not possess 55% marks for the said posts as required. Rather, upon scrutiny of mark sheets, it is found that he obtained 48% marks in his Master's Degree.

(II) There was no specific recommendation for relaxation in respect of educational qualification given by the Board of Management's resolution or by the Selection Committee.

(III) The University was also requested to intimate the audit whether any such relaxation with respect to the educational qualification was given to the petitioner by any other means at the time of his appointment to the post of Internal Audit Officer or Finance Officer. If so, the basis of giving such relaxation was also requested to be intimated to audit.

4] As the appointment of the petitioner was made to a post where the minimum prescribed qualification was a Master's Degree with 55% marks or its equivalent Grade of 'B' in the UGC Seven Point Scale and admittedly the petitioner did not possess the same and there being no relaxation given by the Board of Management and the Selection Committee as well; the appointment of the petitioner on deputation to the post of Finance Officer was held to be irregular and accordingly, an excess payment of Rs.20,77,976/- (Rupees Twenty Lakh Seventy Seven Thousand Nine Hundred Seventy Six) was found to be made to the petitioner. Being aggrieved, the present writ petition is filed putting to challenge the said deduction and/or non release of the amount of Rs.20,77,976/- (Rupees Twenty Lakh Seventy Seven Thousand Nine Hundred Seventy Six) on the ground that his appointment to the posts were irregular.

5] Learned counsel for the petitioner submits that the petitioner was appointed in his substantive capacity as an Assistant Finance Officer in the

Tezpur University. Being eligible, he had applied for the appointment to the post of Finance Officer in terms of advertisement dated 20.02.2013. He duly appeared before the Departmental Selection Committee. All documents and papers were placed in support of his candidature before the selection committee and the same was thoroughly scrutinized. It is submitted that there was no attempt by the petitioner to suppress any documents or misrepresent before this Selection Committee. In other words, there was no fault on the part of the petitioner if the Selection Committee had found him suitable for being appointed on deputation for a period of five years as a Finance Officer in terms of the advertisement dated 20.02.2013.

6] It is submitted that in the circumstances the objection raised by the audit that the petitioner's appointment was irregular and as a consequence thereof the amount of Rs.20,77,976/- (Rupees Twenty Lakh Seventy Seven Thousand Nine Hundred Seventy Six) having not been released is totally contrary to law and the same requires interference by this Court.

7] In support of his contentions, the learned counsel for the petitioner has placed reliance on the judgments of the Apex court rendered in *MP Medical Officers Association vs. State of Madhya Pradesh & Ors* reported in 2022 SCC Online SC 1099 and *Thomas Daniel vs. State of Kerala & Ors.* reported in 2022

SCC Online SC 536. These judgments have been pressed into service by the learned counsel for the petitioner in support of his contentions that where there is no misrepresentation or falsity or any suppression of facts by the petitioner or by a candidate and his appointment was made pursuant to a proper selection procedure adopted by the Selection Committee, as had been done in the present case also, the candidate cannot be made to suffer by withholding or curtailing the financial dues payable to him as per the advertisement. It is also submitted that there is no observation or finding by the audit or by the University authorities that the petitioner did not perform or function as an Internal Audit Officer and a Finance Officer respectively pursuant to the selections made.

8] Mr. S.K. Medhi, learned Standing Counsel for the Tezpur University submits that an affidavit-in-opposition was filed on behalf of the University on 08.12.2022. It is submitted that the amount of Rs.20,77,976/- (Rupees Twenty Lakh Seventy Seven Thousand Nine Hundred Seventy Six) is kept on hold from the petitioner on account of the audit objection raised by Department. Learned Standing Counsel for the University submits that in response to the audit objection, a reply has already been furnished justifying the reasons as to why the appointment on deportation had to be made to the writ petitioner. Referring to the communication dated 13.07.2020 issued by the University to the Senior

Audit Officer, Office of the Director General of Audit (Central) Kolkata, learned Standing Counsel for the University submits that pursuant to the advertisement No. 1/2006, dated 13.12.2006 and the advertisement No.1/2008 dated 11.01.2008, no suitable candidates other than the petitioner were found. Under such circumstances, the Board of Management of the University in its 52nd meeting held on 13.05.2018, took a decision to appoint the petitioner, who was then Assistant Finance Officer (Senior Scale), as the Internal Audit Officer on deputation for a period of three years. The term of appointment was further extended for another period of three years by decision of the Board of Management in its 61st meeting held on 22.06.2011. Insofar as the appointment of the petitioner to the post of Finance Officer is concerned, the petitioner was called for an interview by the Selection Committee after condoning 2% marks in the Master's Degree by the competent authority considering him to be an internal candidate on recommendation of the newly constituted Selection Committee out of the five candidates who were called for personal interview. However pursuant to the reply/comments submitted, no further instructions or clarification was received by the Office of the Department of Director General of Audit from the University. As such, in terms of the audit objection raised, the amount has not been released to the petitioner.

9] Mr. RK Talukdar, learned Standing Counsel, Director General of Audit, submits that the objections were raised by the audit as the petitioner failed to satisfy the minimum eligibility requirement for the post of Internal Audit Officer as well as the Finance Officer for which the petitioner was selected and had served for the period of his deputation. It is submitted that the Director General of Audit has also filed an affidavit and as per the UGC norms, the petitioner did not fulfill the requirement of having a minimum 55% in the Master's Degree, or its equivalent Grade 'B' in the UGC Seven Point Scale. Accordingly, the audit had rightly raised an objection as the University could not place before the authorities any decision taken by the competent authority expressly as there is no expressed order or decision with regard to relaxation of the educational qualification in the case of the present petitioner for his selections to the post of Internal Audit Officer as well as the Finance Officer are respectively.

10] Mr. R.,K. Talukdar, however, submits that the reply of the University has been received and in view of the fact that the University has not released the amount of Rs.20,77,976/- , the objections have been held to have been met with and accordingly, no further instructions or clarifications are called for from the Director General Audit.

11] Learned counsel for the parties have been heard. Pleadings available on

record have been carefully perused and the Judgments cited at the bar are also carefully perused.

12] The facts in the present case are within a short compass and the same are also not disputed by the parties before the Court. The petitioner was serving as an Assistant Finance Officer and pursuant to an advertisement dated 13.12.2006 as well as 11.01.2008, he was selected and appointed to the post of Internal Audit Officer. He was appointed for a fixed period of term on deputation to the post of Internal Audit Officer. Subsequently, in response to another advertisement dated 20.02.2013, the petitioner again applied for the post of Finance Officer and in the selection process, the petitioner was again selected and appointed as a Finance Officer for a fixed tenure on deputation basis. After completion of his tenure on deputation, the petitioner was reverted back to his post of Assistant Finance Officer. Thereafter, he was promoted to the post of Deputy Registrar from which office he finally superannuated on 30.06.2021. It is the grievance of the petitioner that the financial benefits and his service periods which he rendered as an Internal Audit Officer and as a Finance Officer on deputation basis was not released by the Tezpur University authorities. These amounts found due to the petitioner were not released by the University authorities in view of the audit objection raised by the Director General of Audit. In response to the objections raised by the Director General, the Tezpur

University authorities have also submitted their replies by the communication dated 23.09.2022, whereby they have categorically mentioned that notwithstanding the advertisements issued for the posts of Internal Auditor Officer or Finance Officer, candidates were not available. The petitioner was selected notwithstanding the fact that he did not secure a Master's Degree with 55% marks or its equivalent Grade of 'B' in the UGC Seven Point Scale. So far as his selection and appointment to the post Finance officer is concerned, the Department in its reply had held that there was a condonation of 2% marks in the Master's degree by the competent authority by considering the petitioner to be an internal candidate.

13] From the discussions above, it is seen that no objection is raised in respect of the services rendered by the petitioner as an Internal Audit Officer or Finance Officer or that he failed to perform the duties assigned to him or that he did not perform his duties as required. There is also no dispute that pursuant to the audit objections raised, the University had already furnished its views/reply and explained the circumstances under which the petitioner was appointed as an Internal Audit Officer and a Finance Officer respectively. The objections raised by the audit are considered to be met in view of the fact that the amount, against which the objections were raised, have not yet been released to the petitioner and/or is accepted to have been deducted from his service and

pensionary dues.

14] A close scrutiny of the objections raised by the Director General of Audit reveals that these objections were raised because there was no expressed relaxation of the qualifications mandated under the advertisements dated 11.01.2008 calling for selection to the post of Internal Audit Officer and advertisement dated 20.02.2013 calling for selection to the post of Finance Officer issued by the authorities in the Tezpur University.

15] In the M.P. Medical Officers Association (supra), the Apex Court was examining the recovery of excess amount along with interest paid to medical officers working as specialists and dental specialists in the state of Madhya Pradesh. These amounts were sought to be recovered as it was held that the said benefits were granted without the approval of the Finance Department. As these benefits were wrongly paid, the State Government ordered recovery of the excess payment along with interest. The Medical Officers' Association challenged this recovery before the Single Judge of the High Court, Madhya Pradesh, Jabalpur and the learned Single Judge allowed the writ petition and quashed the orders of recovery of excess amount along with interest. Thereafter, an intra Court appeal was filed and the appellate Court, however, allowed the appeal and set aside the judgment passed by the learned Single

Judge. Thereafter, the State preferred an appeal before the Division Bench of the said High Court and learned Division Bench set aside and quashed the judgment of the learned Single Judge and ordered to recovery of the excess amount paid along with the interest. The judgment of the Writ Appellate Court was assailed before the Apex Court. The Apex Court held that since there was no misrepresentation on the part of the concerned employees nor can any mistake be attributed to them, the State Government was not justified in ordering recovery of excess amount paid along with interest.

16] The Apex Court held that while the principles laid down by the Apex Court in *the State of Punjab vs. Rafiq Masih* reported in (2015) 4 SCC 334 may not be strictly applicable, the Apex Court held that the State was not justified in ordering recovery of the excess amount paid along with interest, more particularly, when it is reported that some of excess amount were paid to the doctors/the dentists who are members of the said Association and who have already been retired. The Apex Court, therefore, set aside and quashed the judgment of the Division Bench of the High Court of the Madhya Pradesh upholding the recovery in the excess amount paid along with interest from the appellants before the Apex Court.

17] In *Thomas Daniel (supra)*, the Apex Court was examining the recovery of

increments granted to the appellant almost ten years after his retirement on the ground that the said increments were granted on account of an error. Herein the appellant was an Assistant Teacher in the High School and during this tenure he availed leave without allowance for two specific periods for pursuing post graduation which is M. Sc (Chemistry) course. Subsequent thereto, the appellant was promoted as Headmaster of the school and he was granted to the senior grade promotion and his pay scale was revised accordingly.

18] The Account General of Kerala served a notice on the appellant therein raising an objection that the period of leave obtained by the appellant for undergoing higher education could not be included while determining his total qualifying service. Accordingly, the pay and subsequent increments granted to the appellant should be recovered from him. The appellant had meanwhile superannuated from service on 31.03.1999 and he was neither paid pensionary benefits nor death-cum-retirement gratuity (DCRG). So the appellant approached the High Court by filing a writ petition. During the pendency of the writ petition the remaining amount of DCRG was released to the appellant. The learned Single Judge of the Kerala High Court dismissed the writ petition upholding the recovery sought to be made by the State of Kerala. It was held that the mistake committed by the Department concerned can be rectified subsequently by way of the proposed recovery to be made from the DCRG

payable. An Intra Court appeal filed before the High Court also came to be dismissed. Accordingly, the matter came to the Apex Court.

19] Upon examining the matter and other judgments rendered by the Apex Court, the Apex Court held that since there was no allegation of misrepresentation or fraud relieved by the appellant therein, the excess amounts sought to be recovered due to a mistake in interpreting the relevant rules was considered to be unjustified and the recovery after ten years of retirement of the appellant was held to be unjustified. Accordingly, the relevant notices issued by the respondent government were set aside and the appeal was allowed.

20] Coming to the facts of this case as had been discussed above, it is seen that there is no evidence placed by the respondents that there was any misrepresentation or falsification or suppression of relevant materials by the petitioner at the time of his selection and appointment to the post of Internal Audit Officer as well as to the post of Finance Officer respectively. All the relevant materials, including his educational qualifications were available before the competent authority and the duly constituted Selection Committee. What is also required to be taken note of is that the petitioner was already employed under the Tezpur University as an Assistant Finance Officer and only as an

internal candidate he had applied to the advertisements dated 11.01.2008 and 20.02.2013 for selection to the posts of the Internal Audit Officer and Finance Officer respectively. Therefore, it cannot be said that the competent authorities in the Tezpur University and/or the new constituted Selection Committee, were not posted with the relevant documents or papers or information reflecting the educational qualifications attained by the petitioner at the time of his selection and interview. The communication dated 13.07.2020 issued by the Tezpur University which is a reply of the Tezpur University in response to the audit objection raised by the Director General of Audit clearly reveals that insofar as the Internal Audit Officer's selection and appointment is concerned, the petitioner was selected pursuant to a decision taken by the Board of Management as no suitable candidate could be found. Insofar as his selection and appointment to the Finance Officer is concerned, the petitioner was called for interview after condonation of 2% of the marks in Master's degree by the competent authority considering him to be the internal candidate.

21] It is seen that notwithstanding the reply issued by the Tezpur University clarifying the above position, the respondent no.4, the Director General of Audit did not drop the objections raised only on the ground that no expressed order is found from the competent authority in relaxing the educational qualifications of the petitioner as against the prescribed qualifications as per UGC norms. From

the pleadings it is seen that the Director General of Audit has considered the objections raised to have been met only because the amount against which the objection has been received, has not been released or has been considered to have been deducted by the Tezpur University authorities.

22] Upon a due consideration of the facts and circumstances as is available from the pleadings before this Court and also upon a careful perusal of the judgments referred, it is seen that ordinarily, when there is no mistake or misrepresentation attributable to a government servant and any amount or excess payment is seen to be granted, then such amounts have been held by the Apex Court to be not justifiable for recovery. However, in the facts and circumstances of this particular case, it cannot be said that the objections raised are in respect of excess payment already made.

23] As discussed, there are no averments that the petitioner had willfully suppressed or misrepresented before the competent authority in respect of his educational qualification. The only ground for raising the audit objection is that the competent authority did not expressly relax the qualification of the petitioner.

24] Under such circumstances, this Court is of the considered view that objection raised by the audit can be overruled in view of the law laid down by

the Apex Court and on the principle laid out by the Apex Court in *M.P. Medical Officer's Association (supra)*. From the communications issued by the Tezpur University in response to the audit objection, it is apparent that the authorities concerned were conscious of the fact that the petitioner did not satisfy the required educational qualification and notwithstanding that the authorities proceeded to appoint the petitioner as an Internal Audit Officer and a Finance Officer respectively following the selection in pursuance to the advertisements issued. Such reply to the authority in response to the objections raised by the Director General of Audit, according to this Court expresses explicitly the decision of the competent authorities in the Tezpur University that they have accepted the petitioner's candidature, notwithstanding that he did not meet the requirement as per UGC norms. The Tezpur University authorities had selected him for the post, as he was found to be the most suitable candidate. Nevertheless, if the competent authorities of the Tezpur University did not expressly issue any orders relaxing the qualification, the same shall now be carried out by the competent authority of the Tezpur University, by issuing appropriate orders post facto. Upon issuance of such orders, the amounts which are found to be due to the petitioner be released forthwith thereafter. The writ petition is accordingly allowed and the objections raised by the Director General of Audit are overruled and held to be not sustainable. Nevertheless, the

competent authorities, as directed above, will now issue orders post facto giving relaxation to the eligibility criteria for the posts of Internal Audit Officer as well as Finance Officer, more particularly, when the petitioner had applied for and was accordingly selected and given appointment in these posts. The respondents will issue such post facto order relaxing the qualification as directed and thereafter, release the dues payable to the petitioner. This entire exercise will be carried out within 30 (thirty) days from the date of receipt of a certified copy of this order.

25] In terms of the above, the writ petition stands disposed of.

No order as to cost. Interim order, if any, stands merged.

Pending Interlocutory Application, if any, is also disposed of.

JUDGE

Comparing Assistant