

IN THE HIGH COURT OF ORISSA AT CUTTACK
WPC(OAC) No.1106 of 2008

Bhakta Charan Mishra

....

Petitioner

Mr. J. Rath, Sr. Adv.

along with

Mr. D.N. Rath, Adv.

-versus-

State of Orissa and Ors.

....

Opposite Parties

Mr. Debasis Mohapatra, SC

(for S & ME Deptt.)

CORAM:

DR. JUSTICE S.K. PANIGRAHI

Order

No.

05.

ORDER

21.12.2022

1. This matter is taken up through hybrid arrangement.
2. In this Writ Petition, the Petitioner has made a prayer to quash the order dated 31.03.2008 passed by the Opposite Party No.2/Director, Secondary Education, Orissa, Bhubaneswar. The petition calls into question the action of Opposite Party No.2 in directing for recovery of excess amount from the salary of the Petitioner as his pay scale was revised erroneously for the second time under 1981 ORSP Rules. The Petitioner has further prayed for a direction from this Court to the Opposite Parties to fix his pay in the senior S.E.S. cadre (Headmaster) with effect from 01.01.2008 as per the

exercise of option suitably in the scale of pay of Rs.5700-9900/- and taking into account the last pay drawn by him in Junior SES cadre at Rs.8000/- as on 01.01.2008.

I. Facts of the case:

3. The Petitioner being a Science Graduate, was appointed as a Science Teacher by the erstwhile Managing Committee of Menda High School, in the Sub- Division of Sonepur, which was earlier in Bolangir District and now in the district of Sonepur. The school in question was an aided educational institution within the meaning of Section 3 (b) of the Orissa Education Act, 1969 (hereinafter referred to as "the Act" for brevity) and was under the Direct Payment Scheme of the State Government when the Petitioner was appointed.
4. In the staffing pattern prescribed by the State Government, the post held by the Petitioner was a Trained Graduate Post. But, as the Petitioner was an untrained candidate at the time of appointment, he was given untrained scale of pay, which was equivalent to trained intermediate scale of pay. The Petitioner acquired his B.Ed. qualification in August, 1979 and thereby he was eligible to draw the Trained Graduate Scale of Pay, since the Petitioner was appointed against a Trained Graduate Post.

5. The Petitioner was also extended the Trained Graduate Scale of pay by the Government with effect from 14.08.1980, though the Petitioner was entitled the same on the date when he acquired the training qualification. Therefore, the Petitioner requested the authority to extend such scale of pay in his favour with effect from the date he acquired the training qualification. However, since the request made by the Petitioner for release of trained graduate scale of pay with effect from August, 1979 was not approved by the Competent Authority. Aggrieved thereby, the Petitioner approached this Court by way of Writ Petition vide O.J.C. No. 2070 of 1991, which was decided by this Court in favour of the Petitioner vide order dated 29.07.1991, giving a direction to the Opposite Parties to release the Trained Graduate Scale of pay in favour of the Petitioner w.e.f. 18.08.1979 when the Petitioner acquired such qualification.
6. Accordingly, the Petitioner's pay had been fixed. But, surprisingly, the Petitioner vide letter No.17747 dated 31.03.2008 was communicated by the Opposite Party No.2 that the pay of the Petitioner in the Trained Graduate Scale (Junior SES) has been wrongly fixed and the Petitioner was paid higher salary than he was

entitled to and thereby a direction was issued to refix the pay of the Petitioner in a lesser scale of pay directing to recover the excess payment made to the Petitioner from his salary.

II. Submissions on behalf of the Petitioner:

7. Learned counsel for the Petitioner submitted that prior to the aforesaid order passed by this Court, since the Petitioner was continuing as a valid and lawfully appointed Science Teacher of the school in question and the appointment of the Petitioner was duly approved by the Competent Authority, the Petitioner was paid his salary component under the Direct Payment Scheme, in accordance with Rule-9 of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974 made under Section 27 of the Act. The Petitioner was also receiving his salary directly from the State Government at par with the scale of pay received by his counter parts in the other Government establishments. It is pertinent to mention here that when the Petitioner was so appointed, Pay Revision Scale of Pay, 1974 was in force. Accordingly, the Petitioner was paid his salary in the untrained graduate scale of pay, i.e. @ Rs.320/- per month in the scale of pay of Rs.320-

500/-. The Petitioner's pay was fixed by the Opposite Party Nos.2 and 3 in the trained graduate scale of pay, i.e. Rs.400-620 with effect from 14.08.1980.

8. While the Petitioner was so continuing, the scale of pay extended in favour of the employees of the aided educational institutions of the Government were revised from time to time by the State Government in accordance with different Pay Revision Rules, such as 1981 Pay Revision Rules, 1985 Pay Revision Rules, 1989 Pay Revision Rules and 1998 Pay Revision Rules and was given with effect from 01.01.1996. The 1981 Pay Revision Rules, 1985 Pay Revision Rules and 1989 Pay Revision Rules and the fixations of the pay of the Petitioner therefore were made prior to the order dated 29.07.1991 passed by this Court in O.J.C. No.2070 of 1991. The pay of the Petitioner was, however, fixed in accordance with 1981 Pay Revision Rules, which carried the pay of the Trained Graduate Assistant Teacher, in the scale of pay of Rs.410-840/-. The Petitioner gave his option for such pay fixation with effect from 14.08.1981, although 1981 Pay Revision Rules came into force with effect from 01.01.1981. Accordingly, the pay of the Petitioner was fixed in accordance with the option exercised by the Petitioner at Rs.425/- in the scale of pay

of Rs.410-840/- with effect from 14.08.1981. In other words, the Petitioner continued to receive in the old scale of pay as per his own option, i.e. in the scale of pay of Rs.400-620/- till 13.08.1981 and in the scale of pay of Rs.410-840/- with effect from 14.08.1981. In so far as the Pay Revision Rules 1985 and 1989 are concerned, the Petitioner opted to come over to such time scale of pay with effect from 18.08.1990 vide option dated 14.09.1986 so far as 1985 Pay Revision is concerned and 23.08.1991 so far as 1989 Pay Revision is concerned.

9. It was submitted that such options exercised by the Petitioner were duly communicated by the Headmaster of the school to the Competent Authority and, accordingly, the Inspector of Schools fixed up the pay of the Petitioner at Rs.425/- in accordance with 1981 Pay Revision Rules with effect from 14.08.1981, at Rs.1560/- with effect from 18.08.1990 in accordance with 1985 Pay Revision Rules and Rs.1750/- with effect from 18.08.1990 in accordance with 1989 Pay Revision Rules and the Petitioner was, accordingly, receiving his salary. It was further submitted that such fixation of pay of the Petitioner were made taking into the fact that the Petitioner was a Trained Graduate with effect from 14.08.1980.

10. It was also submitted that since this Court had made a declaration vide the order 29.07.1991 passed in O.J.C. No.2070 of 1991 that the Petitioner was entitled to get trained graduate scale of pay with effect from the date he acquired the training qualification, i.e. 18.08.1979 and the Opposite Parties had to extend such benefit to the Petitioner with effect from 18.08.1979. Accordingly, the pay of the Petitioner should have been fixed suitably in accordance with the subsequent Pay Revision Rules, in which the pay of the Petitioner has been fixed taking the Petitioner as a Trained Graduate Teacher with effect from 14.08.1980 instead of 18.08.1979. The Petitioner had opted to come over to the Revised Scale of pay of 1981 Pay Revision Rules with effect from 14.08.1981 taking into consideration the fact that the Petitioner was granted Trained Graduate Scale of Pay by the Government with effect from 14.08.1980. The Petitioner's pay in accordance with the Trained Graduate Scale of Pay as fixed in 1981 Pay Revision is Rs.410-15-425-20-465-25-540-EB-25-590-30-680-EB-30-770-35 -840/- and to be fixed with effect from 14.08.1981. The next increment of the Petitioner was Rs.15/- and the Petitioner ought to have been given the benefit of the increment in the month of August 1981 by raising his pay from Rs.410/-

to Rs.425/-. Therefore, on coming to 1981 Pay Revision Rules, the Petitioner ought to have been put on Rs.445/- on 18.08.1981, considering the fact that the Petitioner acquired the B.Ed. qualification on 18.08.1979 in accordance with the order of this Court vide Annexure-1.

11. In fact, the Opposite Party No.3 has rightly fixed up the pay of the Petitioner at Rs.445/ on 18.08.1981. However, a mention has been made in the service book of the Petitioner that the pay of the Petitioner has been fixed in the revised pay Rules of 1981 at Rs.425/- on 01.01.1981. It was contended that taking the fixation of the pay of the Petitioner from any angle by fixing the pay as on 01.01.1981 or on 18.08.1981, in normal fixation, the pay of the Petitioner had to be fixed on 18.08.1981 at Rs.445/-. Therefore, merely because a mention made in the service book that the pay of the Petitioner has been fixed on 01.01.1981 in accordance with the Pay Revision Rules 1981, the pay of the Petitioner could not have been altered in any manner on 18.08.1981 other than fixing the same at Rs.445/-per month. Accordingly, the Petitioner has been drawing his salary in such scale of pay at Rs.445/- on 18.08.1981 fixing his next increment on 18.08.1982 at Rs.465/-. The pay of the Petitioner was

also suitably fixed at Rs.1560/ under the 1985 Pay Revision Rules with effect from 18.08.1990 and at Rs.1750/- under the 1989 Pay Revision Rules with effect from 18.08.1990 and the pay of the Petitioner was fixed at Rs.5900/- with effect from 01.01.1996 in the scale of pay of Rs.5000-150-8000/- in accordance with 1998 Pay Revision Rules, which came into force with effect from 01.01.1996. The pay of the Petitioner was further fixed in accordance with 1998 Pay Revision Rules pursuant to the advancement scale of pay at Rs.6200/- with effect from 01.01.1996 by fixing the next increment of the Petitioner with effect from 01.01.1997.

12.It was further submitted that while the Petitioner was so continuing as an Assistant Trained Graduate Teacher under the Junior Subordinate Education Service (SES) Cadre, the school was taken over by the State Government as a Government institution with effect from 07.06.1994 and the Petitioner was also promoted to the Senior SES Cadre vide office order No.37935 dated 06.08.2007 by the Opposite Party No.2. The scale of pay prescribed for the post of Senior SES Cadre (Headmaster) was Rs.5700-9900. Therefore, the Petitioner was entitled to have his fixation of pay in the Senior SES Cadre, to which the Petitioner has been

promoted considering the scale of pay last drawn by him in the Junior SES Cadre. The Petitioner, therefore, gave his option on 11.09.2007, on being promoted to the Senior SES Cadre to come over to the promotional scale of pay with effect from 01.01.2008, on the date of accrual of his next increment in the lower post. It was further submitted that the Petitioner was granted increment by the Opposite Party No.3 on 01.01.2008 by raising his scale of pay from Rs.7850/- to Rs.8000/- on 01.01.2008. While the matter stood thus, the pay of the Petitioner was to be fixed in the post of Senior SES Cadre (Headmaster) with effect from 01.09.2007, since the Petitioner joined as the Headmaster on 30.08.2007. But, surprisingly the Petitioner was communicated a letter by the Opposite Party No.2 bearing No.17747 dated 31.03.2008 vide Memo No.5172 dated 03.05.2008 of the Inspector of School, Bolangir Circle indicating therein that the pay of the Petitioner in the Trained Graduate Scale (Junior SES) has been wrongly fixed and the Petitioner was paid higher salary than he was entitled to and thereby a direction was issued to refix the pay of the Petitioner in a lesser scale of pay directing to recover the excess payment made to the Petitioner from his salary. He further submitted that that the communication made

by Opposite Party Nos.2 and 3 to the Petitioner vide Annexure-9 does not stand to scrutiny in view of the fact that the pay of the Petitioner was fixed in accordance with the Pay Revision Rules and as well as the option exercised by the Petitioner in its proper prospective and the so called refixation made in Annexure-9 was without any notice and without asking the Petitioner in this regard. Therefore, such unilateral fixation of pay of the Petitioner by the Opposite Party Nos.2 and 3 vide Annexure-9 is a nullity and needs to be quashed.

13. It was further submitted that all the pay fixations made in favour of the Petitioner were duly approved by the Opposite Party No.3 and also approved by the Audit Department of the Opposite Party No.2. At no point of time, any objection was raised either by Opposite Party No. 2 or Opposite Party No.3 pertaining to fixation of the pay of the Petitioner. The fixation of pay of the Petitioner by taking the petitioner's entitlement in the Trained Graduate Scale of pay, as directed by this Court with effect from 18.08.1979 and in accordance with the option exercised by the Petitioner for each scale of pay was verified and found correct by all concerned. Therefore, while fixing the pay of the Petitioner in the

Senior SES Cadre, objection raised by the Opposite Party No.2 after 27 years of receipt of the salary by the Petitioner, not only appears to be malafide one, but also meant to cause harassment to the Petitioner at the fag end of his service career. Hence, such order passed by the Opposite Party No.2 is in contravention with the service Rules is liable to be quashed. The option exercised by the Petitioner was duly accepted by the authorities and the pay has been fixed in accordance with the Rule 74 of the Orissa Service Code. A right has accrued in favour of the Petitioner and, therefore, any order passed by the Opposite Party No.2 affecting the right of the Petitioner needed a show cause as the Petitioner is the affected party. By this impugned exercise, the Petitioner will be losing more than Rs. 1200/- per month from the date such order was passed and also a substantial amount is going to be recovered from the salary of the Petitioner for such incorrect and wrong order passed by the Opposite Party No.2. It was, therefore, submitted that the pay of the Petitioner is to be fixed with effect from 01.01.2008 in the Senior SES Cadre, i.e. in the scale of pay of Rs.5700-9900/- suitably as on 01.01.2008 considering the last pay drawn by the

Petitioner at Rs.8000/- per month in the Junior SES Cadre on that date.

14. The Petitioner seeks to quash the order dated 31.03.2008 passed by the Opposite Party No.2/Director, Secondary Education, Orissa, Bhubaneswar with a direction to the Opposite Parties to fix the pay of the Petitioner in the Senior SES Cadre (Headmaster) with effect from 01.01.2008 as per the option exercised by the Petitioner suitably in the scale of pay of Rs.5700-9900/ taking into account the last pay drawn by the Petitioner in the Junior SES Cadre at Rs.8000/- as on 01.01.2008.

III. Submissions on behalf of the Opposite Party No.3:

15. Learned Standing Counsel for the Department of School and Mass Education submitted that the Petitioner has filed the present Writ Petition with a prayer to quash the order dated 31.03.2008 passed by the Opposite Party No.2/Director, Secondary Education, Orissa, Bhubaneswar vide Annexure-9, wherein the Director, Secondary Education has put the scale of pay of the Petitioner to recast as he was found to have been allowed the date of next increment with effect from 01.08.1981 instead of 01.01.1982 due to allowance of Trained Graduate scale of pay for the second time in his

favour with effect from 18.08.1979 vide Inspector of School office order No.69 dated 04.01.1992.

16. He further submitted that the Managing Committee of Menda High School appointed the Petitioner as an Asst. teacher on 12.11.1974. At the time of his appointment, the school was an aided school. At the time of appointment the Petitioner did not possess any training qualification and he subsequently acquired his training qualification i.e. B.Ed. on 18.08.1979. The Petitioner was allowed Trained Graduate scale of pay, i.e. Rs.400-620/ with effect from 14.08.1980 vide order No.10326 dated 03.09.1980 of the Inspector of Schools, Bolangir pursuant to G.O. No.35635/EYS dated 20.08.1980.

17. It was further submitted that earlier the Petitioner had approached this Court seeking a direction to the Opposite Parties to give him Trained Graduate scale of pay with effect from the date of acquisition of B.Ed. qualification i.e. 18.08.1979 vide O.J.C. No.2070 of 1991. He further made a prayer therein that he should be treated as Trained Graduate teacher with effect from the date of his appointment to the post of Science teacher for the purpose of determining his seniority inter se via-a-vis other teacher for placement in the common cadre. This Court vide order dated 29.07.1991 directed the

Opposite Parties to give the Petitioner Trained Graduate scale of pay with effect from 18.8.1979 i.e., the date of acquisition of training qualification. Pursuant to order dated 29.07.1991 of this Court, the Petitioner was allowed Trained Graduate scale of pay with effect from 18.08.1979 i.e. the date of passing of B.Ed. examination, vide order No.69 dated 04.11.1992 of the Inspector of Schools, Bolangir, wherein it was mentioned that the Petitioner is entitled to the next periodical increment on completion of one year.

18. He further submitted that the Department was pleased to allow revised scale of pay to the employees of aided High schools under O.R.S.P. Rules-1981 with effect from 01.01.1981 vide G.O. No.13233/EYS dated 08.04.1982. As per para-9(1) of the said G.O. the option under the proviso to rule-8 shall be exercised in writing in the form appended (Annexure-C) hereto so as to reach the concerned authority mentioned below in sub-rule (2) within a period of two months from the date of issue of this Resolution. As per Sub-rule-2, the option shall be intimated by the employees of Non-Government Colleges, High Schools and M.E. Schools to the Director of Public Instruction (HE), concerned circle Inspector and District Inspector of Schools respectively. It is

further mentioned that option once exercised shall be final and it shall not be altered on any account.

- 19.** It was further submitted that at para-11 of ORSP Rules, 1981 it has been prescribed that where the pay has been fixed at the minimum of revised scale or at the stage of the revised scale which is equal to the existing scale, his next increment shall be granted on completion of one year from the date of which it so fixed. However, where the pay is fixed in revised scale at the stage next below the pay in respect of existing scale with an increment at that stage, the next increment shall be granted on the anniversary of last increment in the existing scale of pay.
- 20.** Learned Standing Counsel for the Department of School and Mass Education further contended that in the instant case the pay of the Petitioner was fixed for the first time under ORSP Rule 1981 on 14.8.1981 under Annexure-3 series, but inadvertently taking into consideration the option exercised by the Petitioner on 12.08.1981 under Annexure-2 series i.e. much before the extension of benefit under ORSP Rules, 1981 to the teachers of aided schools vide G.O. No.13233/EYS dated 08.04.1982. He further contended that the above said G.O. came into force on 08.04.1982 and the option was exercised by the Petitioner on 12.08.1981 which was

much prior to publication of the above said G.O. and as per the said G.O. the option should have been exercised by the Petitioner within two months from the date of publication of G.O. In view of such fact, the said option exercised by the Petitioner is nothing but the nullity and the same should not have been taken into consideration. But inadvertently the said option was considered and the pay of the Petitioner was wrongly fixed at the scale of pay as per Annexure-3 series.

21. He further submitted that after allowing the Trained Graduate scale of pay to the Petitioner from 18.08.1979, the scale of pay to be fixed at Rs.425/- on 01.01.1981 under ORSP Rules,1981 with next date of increment on 18.08.1981 was not correct as per the procedures prescribed in the said Rules relating to sanction of increment.

22. It was also contended that the Petitioner was promoted to the rank of Senior S.E.S. grade in the scale of pay Rs.5700-200-9900/- vide order No.37935 dated 06.08.2007 of the Director, Secondary Education, Orissa and he joined in the rank of Senior S.E.S, Headmaster, on 30.08.2007. Accordingly, necessary proposal for fixation of pay in favour of the Petitioner in Senior S.E.S. grade has been submitted to the Director, Secondary

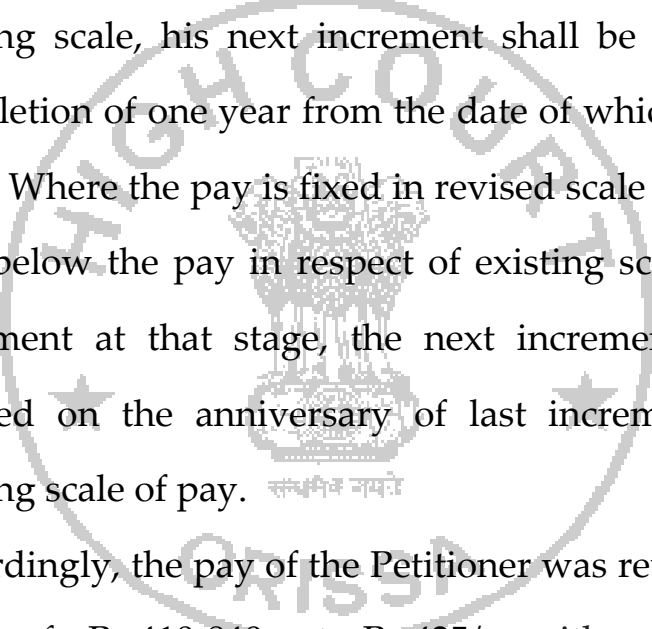
Education, Orissa, according to the option exercised by the Petitioner under Annexure-7. In view of the facts narrated above, considering the option exercised by the Petitioner on 12.08.1981 i.e. much prior to publication of G.O. dated 08.04.1982 and the same option being the nullity, the Director, Secondary Education, Orissa has rightly passed the order under Annexure-9 recasting the scale of pay of the Petitioner. Therefore, this Writ Petition being devoid of any merit is liable to be dismissed.

III. Court's reasoning and orders:

23. In the present case, when the Petitioner was appointed, when Pay Revision Scale of Pay, 1974 was in force and accordingly, the Petitioner was paid his salary in the untrained graduate scale of pay, i.e. @ Rs.320/- per month in the scale of pay of Rs.320-500/-. The Petitioner's pay was fixed by the Opposite Party Nos.2 and 3 in the trained graduate scale of pay, i.e. Rs.400-620 at Rs.410 with effect from 14.08.1980. However, the Petitioner approached this Court vide O.J.C. No. 2070 of 1991 seeking fixation of graduate scale of pay in his favour with effect from 18.08.1979 as he had obtained the training qualification from said date.

24. This Court vide order dated 29.07.1991 directed the Opposite Parties to give the Petitioner Trained Graduate scale of pay with effect from 18.8.1979 i.e., from the date of acquiring training qualification. Pursuant to order dated 29.07.1991 of this Court, the Petitioner was allowed Trained Graduate scale of pay with effect from 18.08.1979 i.e. the date of passing of B.Ed. examination, vide order No.69 dated 04.11.1992 of the Inspector of Schools, Bolangir, wherein it was mentioned that the Petitioner is entitled to the next periodical increment on completion of one year. Therefore, the Petitioner was entitled to periodical increment on August 1980, August 1981 and so on.

25. While the matter stood, the Government revised the scale of pay of the employees of aided High schools under O.R.S.P. Rules-1981 with effect from 01.01.1981 vide G.O. No.13233/EYS dated 08.04.1982. As per para-9(1) of the said G.O. the option under the proviso to rule-8 shall be exercised in writing in the form appended (Annexure-C) thereto so as to reach the concerned authority mentioned below in sub-rule (2) within a period of two months from the date of issue of this Resolution. As per Sub-rule-2, the option shall be intimated by the employees of Non-Government

Colleges, High Schools and M.E. Schools to the Director of Public Instruction (HE), concerned circle Inspector and District Inspector of Schools respectively. The option once exercised shall be final and it shall not be altered on any account. Further, at para-11 of ORSP Rules, 1981 it has been prescribed that in cases where the pay has been fixed at the minimum of revised scale or at the stage of the revised scale which is equal to the existing scale, his next increment shall be granted on completion of one year from the date of which it was so fixed. Where the pay is fixed in revised scale at the stage next below the pay in respect of existing scale with an increment at that stage, the next increment shall be granted on the anniversary of last increment in the existing scale of pay. 

26. Accordingly, the pay of the Petitioner was revised in the scale of Rs.410-840 at Rs.425/- with effect from 14.08.1981 in accordance with the 1981 ORSP Rules. Subsequently, the Opposite Parties revised the pay of the Petitioner at Rs.445/- with effect from 18.08.1981 but, a mention was made in the service book of the Petitioner that the pay of the Petitioner has been fixed in accordance with the revised pay Rules of 1981 at Rs.425/- with effect from 01.01.1981. It has been

contended by the Opposite Parties that since O.R.S.P. Rules-1981 came into effect from 01.01.1981 vide G.O. No.13233/EYS dated 08.04.1982, the option for coming under such rules could have only been exercised after 08.04.1982, within a period of two months. However, the pay of the Petitioner was fixed for the first time under ORSP Rules 1981 on 14.08.1981. Taking into consideration the option exercised by the Petitioner on 12.08.1981 i.e. much before the extension of benefit under ORSP Rules, 1981 to the teachers of aided schools. Therefore, the Opposite Parties are of the view that the Petitioner's pay has been revised twice under the 1981 ORSP Rules, the first one with effect from 01.01.1981 and the second with effect from 01.08.1981. This revision was alleged to have been done in a wrongful manner as the same is contrary to the guidelines prescribed in Para-11 of vide G.O. No.13233/EYS dated 08.04.1982.

27. However, this Court is of the opinion that even though the 1981 ORSP Rules had not been extended to the Petitioner in the year 1981, considering the resolution was issued on 08.04.1982 and any cause of action pertaining to the said Rules would have arisen after 08.04.1982, the Petitioner would have still been entitled to the pay at Rs.445 per month with effect from

18.08.1981. Since the Petitioner was extended Trained Graduate scale of pay at Rs.410/- with effect from 14.08.1980 and he would've been eligible for next revision in the Trained Graduate Scale of pay after completion of one year i.e. on 14.08.1981. Therefore, the Petitioner would have been entitled to revision at Rs.425/- under the Trained Graduate scale of pay with effect from 14.08.1981, even if the applicability of 1981 ORSP Rules were to be ousted.

28. Further, the decision of this Court in O.J.C. No. 2070 of 1991, whereby, the Petitioner was allowed to draw Trained Graduate Scale of Pay with effect from 18.08.1979 i.e., the date of acquiring qualification, had not been complied and therefore, the Petitioner's pay was revised yet again at Rs.445/- with effect from 18.08.1981. The only error crept into the revision of pay scale of the Petitioner was that the option under 1981 ORSP Rules was exercised before the resolution. The Petitioner's pay scale was revised in accordance with 1981 ORSP Rules on the basis of option exercised on 12.08.1981 when the said resolution had not even been issued. However, such an error cannot be attributed to the Petitioner as there was no misrepresentation or fraud on his part. In fact, it was a result of mechanical

action on the part of the Opposite Parties as the option exercised by the Petitioner were duly accepted by the authorities and the pay was fixed in accordance with Rule 74 of the Orissa Service Code. Moreover, no illegality on the part of the Petitioner has been alleged by the Opposite Parties nor have they objected the revision of pay of the Petitioner.

29. Since the Resolution dated 08.04.1982 was not in force on the day the Petitioner exercised his option under 1981 ORSP Rules, it was incumbent upon the Opposite Party No.2 & 3 to issue clarificatory order regarding the same and the entire confusion could have been avoided. However, the Opposite Parties sat over the matter and the Petitioner was allowed such revision. Subsequently, vide order dated 31.03.2008, the Opposite Parties issued a communication to the Petitioner that the scale of pay of the Petitioner in the Trained Graduate Scale (Junior SES) had been wrongly fixed and the Petitioner was paid higher salary than he was entitled to. A direction was issued to refix the pay of the Petitioner in a lesser scale of pay and the excess payment sanctioned to the Petitioner was directed to be recovered from his salary. The Opposite Parties raised this claim after a period of 27 years at the fag end of Petitioner's service career and

the order of recovery of excess amount was directed unilaterally without any show cause notice which affronts the principles of natural justice.

30. The Apex Court has dealt with such an issue in *Syed Abdul Qadir v. State of Bihar*¹, wherein in paragraph 58 the following observation has been recorded:

"58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess."

31. The Supreme Court in its judgment in *Syed Abdul Qadir* (supra) recognized that the issue of recovery revolved on the action being iniquitous. Dealing with the subject of the action being iniquitous, it was sought to be concluded, that when the excess unauthorized payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely,

¹ (2009) 3 SCC 475

if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. Interference is that because an action is iniquitous, must really be perceived as interference because the action is arbitrary. All arbitrary actions are truly, actions in violation of Article 14 of the Constitution of India. The logic of the action in the instant situation, is iniquitous, or arbitrary, or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Based on the above consideration, the Supreme Court iterated that if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee.

32.In *Shyam Babu Verma v. Union of India*², the Supreme Court observed as under:

"11. Although we have held that the petitioners were entitled only to the pay scale of Rs 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same."

33.In *State of Punjab v. Rafiq Masih*³, the Supreme Court observed:

"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 herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

² (1994) 2 SCC 521

³ (2015) 4 SCC 334

- (i) *Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).*
- (ii) *Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.*
- (iii) *Recovery from 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."*

34. Even if it were to be assumed that the Petitioner was extended the revision of pay scale under 1981 ORSP Rules for the second time, a belated claim/order of recovery after 27 years is not only arbitrary, iniquitous but also violative of Article 14 of the Constitution of India. Moreover, neither was any sort of fraud or misrepresentation alleged against the Petitioner, nor has any material or evidence been brought on record to substantiate such allegations. As a matter of fact, the options exercised by the Petitioner was scrutinized,

verified, and duly approved by the Opposite Party No.3 and the Audit Department of the Opposite Party No.2. Therefore, the letter issued by the Opposite Party No.2 bearing No.17747 dated 31.03.2008, refixing the pay of Petitioner in a lesser scale of pay and the order of recovery of excess amount is illegal and arbitrary and hence, not sustainable. In addition, nothing has been adduced by the Opposite Parties to show that while issuing the impugned order for recovery of excess salary, they have considered the decision of the Supreme Court in the case of *Rafiq Masih* (supra).

35. On conspectus of the above facts and guided by the precedents cited hereinabove, this Court is of the view that the order dated 31.03.2008 issued by the Opposite Party No.2 is liable to be quashed and hereby, set aside. Accordingly, the Opposite Parties are directed to consider the Petitioner's fixation of pay in the senior S.E.S. cadre (Headmaster) with effect from the appropriate date, taking into consideration his last drawn salary in the junior S.E.S. cadre. The said pay fixation shall be complete within a period of three months from today.

36. In the final evaluation, the Writ Petition is hereby allowed and accordingly, disposed of. There shall be no order as to costs.

(Dr. S.K. Panigrahi)
Judge

B.Jhankar

