

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Rai Chattopadhyay

**W.P.A No. 6003 of 2020
With
CAN 5 of 2024**

**Mominul Islam
Vs.
The State of West Bengal & Ors.**

For the Petitioner : Mr. K.M. Hossain,
: Mr. Kazi Ardan Ali.

For the State : Mr. Pantu Deb Roy, Ld. A.G.P.,
: Mr. Pannalal Bandopadhyay.

**Heard on : 20/01/2025
Judgment on : 20/01/2025**

Rai Chattopadhyay, J. :-

1. In the present writ petition, the petitioner has challenged the observation/order of the respondent no. 3/the Director of Pension, Provident Fund & Group Insurance, Government of West Bengal, directing review of the **order dated September 23, 2009**, granting the honours' graduate scale of pay to the writ petitioner, from the date of his appointment, that is **May 24, 1986**.

2. Let the crux of the said impugned order be mentioned, as herein bellow:

That, the petitioner has been appointed on May 24, 1986 and has been given approval after more than 22 years on **September 23, 2009**; at the time of appointment, he was allowed the graduate scale of pay, but subsequently, the honours graduate scale of pay has been granted to him with effect from the date of first joining; the respondent no. 3 has granted the honours graduate scale of pay to the petitioner, contrary to paragraph (3) of **G.O.No. 401-Edn(B) dated September 10, 1991**(issued in partial modification of (G.O.No. 33-Edn(B) dated March 7, 1990 that is ROPA 1990).

3. On the findings as mentioned above, the respondent no. 3 has directed for review of grant of honours graduate scale of pay to the writ petitioner with effect from the date of his joining in the service.
4. Mr. Hossain, learned advocate appearing for the petitioner, has stated that the petitioner at the time of joining on May 24, 1986, was granted graduate scale of pay. It is submitted that a formal order granting post facto approval of the honours graduate scale of pay to the petitioner was issued by the District Inspector of Schools (Secondary Education), Murshidabad/respondent no. 4, by dint of the **letter dated September 23, 2009**, thereby allowing grant of honours graduate scale of pay to the petitioner, with effect from his date of initial appointment. He would say

that the writ petitioner, though was already qualified with the honours graduate degree at the time of entering into the service, but he has been appointed and approved as a B.Sc. assistant teacher, with a graduate scale of pay. According to Mr. Hossain, the writ petitioner would be eligible for the honours graduate scale of pay, from the date of his initial appointment, in terms of provisions under ROPA 1981, as prevalent at the time of his entering into the service, as well as ROPA 1990 and its subsequent amendment vide Government Notification No. 401-Edn(B) dated September 10, 1991. That, therefore, the impugned order as mentioned above, would not have any legs to stand and would not be tenable in the eye of law. He seeks that the said direction may be set aside, thereby directing grant of pension to the writ petitioner immediately, as per the last drawn salary of the writ petitioner.

5. He has mentioned that the petitioner has retired on September 23, 2009 and since thereafter he has been granted ad-hoc pension till date in terms of Court's order. That the petitioner has not yet been released with the actual pension.
6. Mr. Deb Roy, learned AGP, has represented the State. He submits in the Court an **instruction sheet dated January 8, 2025**, along with the relevant documents, forwarded to him by the respondent/District Inspector of Schools (Secondary Education), Murshidabad, which is taken on record.
7. His first submission is that as per the amended provision of ROPA 1990, by dint of the Government Order No. 401-Edn(B) dated September 10, 1991, the petitioner would not be eligible for grant of higher scale of pay, insofar

as, the said amended provision (vide G.O.No.401-Edn(B) dated September 10, 1991), has spelt out grant of higher scale of pay to the inservice teacher, who will improve qualification in the relevant subject, after being inducted in service.

- 8.** It is submitted further that the petitioner having improved his qualification even before entering into the service, would not be eligible for such grant, in terms of the G.O.No. 401-Edn(B) dated September 10, 1991.
- 9.** Secondly, it has been submitted that, while granting post facto approval to the honours graduate scale of pay to the writ petitioner by dint of the letter dated September 23, 2009, the District Inspector of Schools (SE), Murshidabad, has not taken into account the amended provision in G.O.No. 401-Edn(B) dated September 10, 1991 and has thus erroneously granted the honours graduate scale of pay to the petitioner, from the date of his appointment.
- 10.** According to the said respondent, therefore, there is no impropriety or illegality as claimed, in the impugned order passed by the respondent no. 3 directing review of grant of honours graduate scale of pay to the writ petitioner.
- 11.** At the time of induction in the service with effect from May 24, 1986, the petitioner was governed under ROPA Rules 1981. Later on, with coming into force of the ROPA Rules 1990, the petitioner would be governed by the same. As a matter of fact, admittedly the petitioner has exercised option, in terms of the ROPA Rules 1990. Later on, vide the G.O.No. 401-Edn(B) dated September 10, 1991, the ROPA 1990 has further been amended.

12. The writ petitioner, by dint of the order of the respondent/ District Inspector of Schools (SE), Murshidabad, dated September 23, 2009, has been granted on post-facto basis, the honours' scale of pay, with effect from May 24, 1986, that is the date of his appointment. The said grant has been on the basis of the provisions under ROPA 1990, whereas on the date of the said order, the amendment to ROPA 1990, vide G.O. No. 401-Edn(B) dated September 10, 1991, also came into force. Therefore, it is required that relevant provision of both the documents as mentioned above should be taken into account for adjudication of this case.

13. Relevant provision under the ROPA 1990:

“ 16. Career Advancement Scheme & related issues:

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(3) All teachers and librarians of Secondary Schools who have improved/will improve their qualification or who were appointed with higher qualification in the subject or group relevant to their teaching/appointment shall get higher scale of P appropriate to their qualifications with effect from the 1st January, 1986 or the date of improving qualification, which ever is later.

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Let the amendment as to the said provision vide the **G.O.No. 401-Edn(B) dated September 10, 1991**, be also noted as herein bellow:

“ (3) All teachers and librarians of Secondary Schools who will improve their qualification in subjects relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualification with effect from the date of improving qualification. ”

14. Hence, according to the respondents, after coming into force of the G.O.No. 401-Edn (B) dated September 10, 1991, a person would be eligible for grant of higher pay scale, only if he has upgraded his qualification after entering into the service. Thus the word “will” or use of future tense in the said amended provision has motivated the respondent/DPPG, to find that the petitioner being a person qualified with the higher degree since from a date prior to his appointment, benefit of that higher degree in terms of higher pay scale, cannot be granted to him, as in accordance with the said respondent, the amended provision as above would only have application in case of teachers who would upgrade their qualification, during post appointment period only.
15. The reasons shown by the respondent/DPPG, is intertwined in itself, with the antithesis thereof. The said authority would fail to apply its mind to the fact that the petitioner’s right to a particular pay scale is determinable on the basis of the Rules, which would govern him on the date of his entering into Service. That would be the **ROPA Rules 1981** (vide the G.O.No. 372-Edn.(B) dated July 31, 1981). The following provision thereof would be worth consideration:

“NB (2) (a) All existing Secondary school teachers who have improved their qualifications relevant to their teaching subjects will get the higher scale on qualification without any restriction;”.

16. Hence, on the date of appointment, there would not have been any restrictions for the petitioner to be granted with the honours graduate pay scale, since there would not have been any restrictions for the same.
17. The subsequent amendment of “NB(2)(a)” of the ROPA Rules 1981, vide the G.O. No. 52- Edn(B) dated February 14, 1992, would further fortify such claim of the petitioner. Let the amendment be quoted bellow:

“Amendment

In the said Annexure to the said memorandum, in sub paragraph (a) of paragraph (2) under N.B. after the words. “All existing Secondary school teachers” insert the words “who entered Service with higher qualifications or.”

18. After a careful conjoined reading of the same, the said provision should emerge as so beneficial, to allow grant of higher scale without any restrictions, to an existing secondary school teacher who has entered into the service with higher qualifications. Thus, undoubtedly the same covers the present petitioner within its purview.
19. This arrangement has further been fortified with coming into force, of the ROPA Rules 1990, the relevant provision of which has been quoted above.
20. However, it would not be apt to hold, as has been held by the respondents in case of the petitioner, that his rights to the appropriate higher scale of pay only emanates from ROPA 1990 and would therefore, be subject to the amendment made therein vide notification G.O. No. 401-Edn(B) dated September 10, 1991. But instead, the petitioner’s entitlement to the higher scale of pay would certainly emerge from the ROPA Rules 1981 and its

amendment as mentioned above. Hence, the substantive right so available to the writ petitioner would not be subject matter of change to the detriment of his interests with the coming into force of any subsequent notification, having only prospective manner of application and no retrospective effect.

- 21.** The arguments advanced by the respondent would imply that a person with the higher qualification, being obtained prior to his induction in service, would be treated differently than the person who has upgraded his qualification, after entering into the service. Pertinent is to note that as on the date of the petitioner having entered into the service, all the incumbents, irrespective of their qualifications, were subjected to a same and identical process of examination. In that view of the matter, such differentiation being made between the said two groups strikes the perception and intelligence of a prudent person, to the extent to prompt him, consider such a differentiation, to be discrimination being meted out to such two groups of persons, who are virtually circumstanced similarly. Such differentiation made, hits the concept of *intelligible diffentia*, which could have upheld a State action to create a reasonable classification, a class within the class.
- 22.** This would be the other reason, for which the Court finds the decision of the respondent no. 3/the Director of Pension, Provident Fund & Group Insurance, Government of West Bengal, not allowing the honours' graduate scale of pay to the petitioner and directing for review of the said order dated September 23, 2009, to be not in consonance with law and in contradiction

of the settled legal principles. Hence, the said order would be liable to be set aside.

- 23.** The other notable aspect in this case is that, since after exercising his option as per ROPA Rules 1990, the writ petitioner has been granted honours graduate scale of pay, till the time of his retirement.
- 24.** It is now well settled that at the time of retirement, the benefits already advanced to the teacher, even if erroneously, cannot be reclaimed without any justifiable or cogent reason. In this regard it would be beneficial to mention the judgment of **State of Punjab & Others.-vs-Rafiq Masih and Others, reported in (2015) 4 SCC 334**. The Court has been deciding upon the issue of balancing of conflicting claims of the employer, who has an equitable right to recover any excess payment vis-à-vis hardship caused to the employee in case recovery is directed. The Court holds that recovery of the amount paid in excess without fault of the recipient would be impermissible. The Court has determined certain circumstances, though not exhaustive, when recoveries by the employee would be impermissible. Let some portion of the said judgment be quoted as herein bellow:

“18. 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, summarise 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.”

25. Hence, the present writ petition is allowed, with the following directions:

- i. The impugned direction of the respondent no.3/ the Director of Pension, Provident Fund & Group Insurance, Government of West Bengal, directing review of grant of the honours' graduate scale of pay to the petitioner post-facto and with effect from the date of his appointment, is set aside;
- ii. The petitioner shall immediately be granted pension, with effect from the date of his retirement at the scale of pay last drawn by him, that is, the honours' graduate scale of pay and the pension payment order shall be issued immediately;
- iii. The petitioner shall be released forthwith, with arrear amount of pension, as stands due and outstanding till the date he would be released with the amount of pension in terms of this Court's order, as above;

iv. The entire exercise as above, shall be concluded by the respondent no.3/ the Director of Pension, Provident Fund & Group Insurance, Government of West Bengal, positively within a period of ten days from the date of receipt of the copy of this order.

- 26.** With the above observations and directions, the writ petition being WPA 6003 of 2020 is disposed of.
- 27.** Since no affidavit is invited, the allegations contained in the petition are deemed to have been denied by the respondents including the private respondents.
- 28.** Urgent certified website copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Rai Chattopadhyay, J.)