(2016) 02 GAU CK 0010

In the Gauhati High Court

Case No : W.P.(C) 4010, 4193 of 2013 and 151 of 2015

Bhaben Kakoti APPELLANT

Vs

State of Assam RESPONDENT

Date of Decision : 03-02-2016

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2016) 3 GauLJ 99 : (2016) 3 GauLR 401 : (2016) 2 GauLT 500

Hon'ble Judges : Ujjal Bhuyan, J.

Bench : Single Bench

Advocate : Manik Chanda, S. Choudhury and S. Nath, Advocates, for the Appellant; Dr. B. Ahmed, SC, Irrigation, for the Respondent

Final Decision : Allowed

Judgement

Ujjal Bhuyan, J. - This order will dispose of all the three writ petitions.

2. Since the core issue arising for consideration in the three writ petitions is identical, the three cases have been heard together and are being disposed of by this common order.

3. Issue for consideration is the permissibility of deduction from the retirement dues of the petitioners of what is contended to be excess salary drawn by the petitioners on account of annual increment and stepping up of pay.

4. Bare essential facts necessary for adjudication may be briefly stated at the outset.

5. WP(C) Nos. 4010/2013 and 4193/2013 have been filed by the same petitioner, Sri Bhaben Kakoti. While serving as Upper Division Assistant (UDA) (since re-designated as Senior Assistant) in the Irrigation Department, an order dated 14.05.1999 was issued by the Director (Design), Irrigation Department, Assam fixing the date of annual increment of his pay on 01.05.1999 after counting the previous officiating service rendered by him in the same post. Consequently, his

pay was fixed at Rs. 6075.00 per month w.e.f. 01.05.1999. Thereafter petitioner was promoted to the post of Head Assistant. Shri Kakoti retired from service on attaining the age of superannuation on 31.03.2013.

6. After his retirement, office order dated 16.05.2013 was passed by the Director (Design) cancelling his promotion to the post of Head Assistant and reverting him back to the post of Senior Assistant. This was followed by office order dated 17.06.2013, issued by the same authority cancelling the order dated 14.05.1999 on the ground of non-approval of Finance Department and directing re-fixation of the salary of the petitioner. Such re-fixation would lead to recovery of what the respondents would contend to be the excess drawal of salary by the petitioner. Aggrieved, the two writ petitions have been filed, the first one against the order of re-fixation of salary and the second one is against the reversion.

7. Director (Design) i.e., respondent No. 3 has filed affidavit. Basic contention is that the order dated 14.05.1999 was passed without the approval of the Finance Department.

Therefore, such stepping up of pay was not justified. Because of such wrong fixation of pay, petitioner had drawn salary far in excess of what he was entitled to. This also led to undeserving promotion of the petitioner. This could be detected only after the superannuation of the petitioner. Thereafter impugned orders were issued.

8. WP(C) No. 151/2015 has been filed by Sri Benoyendra Nath Bhattacharjee, who was also an UDA (Senior Assistant) in the Irrigation Department. He was posted in the establishment of Executive Engineer, Hailakandi Irrigation Division. In this case, one Sri Kamaruddin Ahmed Choudhury, who was also an UDA of the same establishment, was junior to the petitioner in the gradation list of UDA in the said establishment. Though Sri Kamaruddin Ahmed Choudhury had joined the Department earlier than the petitioner i.e., on 04.10.1971 as against 30.06.1975 by the petitioner, his initial posting was at Haflong where after, he was transferred to Guwahati. While at Guwahati, he had sought for transfer to Silchar. His request was accepted by the Department and thereafter on his own request, he was transferred to the than Silchar Irrigation Division on 09.01.1976. After trifurcation of the composite Silchar Irrigation Division, both petitioner and Sri Kamaruddin Ahmed Choudhury were placed in the establishment of Executive Engineer, Hailakandi Irrigation Division. In view of his transfer at his request, his date of joining in the composite Silchar Irrigation Division was treated as entry into the Division for the purpose of counting seniority.

9. As Sri Kamaruddin Ahmed Choudhury was drawing higher pay than the petitioner in the same cadre of UDA due to accretion of increments etc. because of longer service, order dated 03.07.2001 came to be passed by the office of the Chief Engineer, Irrigation stepping up the pay of the petitioner to be at par with that of Sri Kamaruddin Ahmed Choudhury. Pay of the petitioner was stepped up to Rs.5,900.00 w.e.f. 01.10.1996 bringing his pay at par with that of Sri

Kamaruddin Ahmed Choudhury. This position continued till superannuation of the petitioner on 31.12.2010.

10. After the petitioner retired from service, a communication dated 01.07.2011 was issued by the office of the Accountant General to the Executive Engineer, Hailakandi Irrigation Division stating that stepping up of pay of the petitioner as on 01.10.1996 was done without invoking FR 27 and without obtaining the approval of the Finance Department. The Executive Engineer was requested to calculate the salary over-drawn by the petitioner and to prepare a statement for recovery of excess amount of pay and allowance etc. This was followed by order dated 01.08.2014, issued by the Executive Engineer re-fixing the pay of the petitioner at Rs. 5900.00 as on 01.10.1997, which was earlier stepped up w.e.f. 01.10.1996.

11. Aggrieved, present writ petition has been filed.

12. While the Irrigation Department has not filed any affidavit, respondent No. 5 representing the Finance Department has filed affidavit. Stand taken in the affidavit is that Irrigation Department without seeking concurrence of the Finance Department had stepped up the pay of the petitioner at par with Sri Kamaruddin Ahmed Choudhury.

Therefore, in the absence of concurrence of Finance Department, such stepping up was not permissible.

13. While Mr. Dasgupta, learned Senior Counsel representing the petitioner in WP(C) No. 151/2015 submits that objection raised by the Finance Department is more of form than of substance. The respondents had rightly stepped up the pay of the petitioner to be at par with that of his junior, Sri Kamaruddin Ahmed Choudhury. It would have been wholly incongruous if the senior had drawn pay lesser than that drawn by the junior. By stepping up the pay of the petitioner at par with his junior, the departmental authorities had restored uniformity of pay in the cadre. Reference to FR 27 is unwarranted as the said provision is not attracted in the present case. Therefore, objection raised by the respondents is not at all tenable inasmuch as such stepping up was legally sound.

14. Ms. U Dutta, learned counsel for the petitioner in WP(C) No. 4010/2013 and WP(C) No. 4193/2013 while adopting the submissions made by Sri Dasgupta, learned Senior Counsel, further submits that in her case, it was not a case of stepping up of pay, rather an annual increment was granted to the petitioner which was rightly granted. On such benefit, petitioner was granted promotion in his service career. Long 14 years thereafter, that too, after superannuation of the petitioner, respondents have now come up with the plea that granting of such annual increment was not justified and accordingly, impugned orders have been passed. No notice or opportunity of hearing was granted to the petitioner before taking recourse to the impugned action.

15. Consequently, the impugned orders suffer from violation of the principles of

natural justice and therefore should be quashed.

16. Dr. B. Ahmed, learned Standing Counsel, Irrigation Department submits that petitioners while serving as UDA had the custody of their respective service files and they had advanced their own interest by ensuring stepping up of pay and grant of annual increment. He has made submissions regarding the concept of stepping up of pay and submits that in the case of the petitioners, such stepping up would not be applicable. Since petitioners had the custody over their service record, these anomalies remained unnoticed. Only after they demitted office and when pension papers were finalised, the anomalies came to the notice of the authorities and prompt steps were thereafter taken.

17. Ms. A. Verma, learned Standing Counsel, Finance Department submits that in so far stepping up of pay and grant of annual increment is concerned, it was incumbent upon the administrative department, in this case, the Irrigation Department, to have taken the prior concurrence of the Finance Department. The benefits were granted to the two petitioners without the knowledge and concurrence of the Finance Department. Therefore, such benefits cannot be sustained.

18. Submissions made by learned counsel for the parties have been considered. Also perused the materials on record.

19. At the outset certain admitted facts may be noticed.

20. Sri Bhaben Kakoti was granted the benefit of annual increment w.e.f. 01.05.1999 vide order dated 14.05.1999. He continued to avail this benefit thereafter till his superannuation on 31.03.2013, i.e., for almost 14 years. After his superannuation, this order was cancelled, that too, without hearing him. Not only that, further benefit by way of promotion to the post of Head Assistant that he had availed, was cancelled, again without any notice or hearing. In the case of Sri Benoyendra Nath Bhattacharjee, the benefit of pay step up was granted to him w.e.f. 01.10.1996 vide order dated 03.07.2001. This benefit he continued to avail till his superannuation on 31.12.2010 i.e., for 14 years. Only after his retirement, impugned order dated 01.08.2014 came to be passed, which is again four years after his retirement.

21. While the learned counsel for the petitioners have justified stepping up of pay and grant of annual increment, learned Standing Counsel, Irrigation Department and Finance Department would contest the same. At this stage, Court is of the considered opinion that having regard to the law laid down by the Apex Court in the recent case of State of Punjab v. Rafiq Masih, reported in (2015) 4 SCC 334, it may not be necessary to delve into and adjudicate the rival contentions as regards validity of the pay step up and grant of annual increment.

22. After surveying all the decisions relating to recovery of excess pay from retired employees, the Apex Court in Rafiq Masih (supra), held that though it may not be 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 entitlements, a few situations have been summarised wherein recoveries by the employers have been held to be impermissible in law. These situations are as under: -

(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.

The above decision has been applied by this Court in Dipendra Nath Thakuria v. APDCL, reported in 2015 (4) GLT 32 : (2016) 1 GLR 138.

23. In so far petitioners are concerned, admittedly they served as UDA (Senior Assistant) and Head Assistant respectively which are Grade-III posts. In both the cases recovery of what is contended to be excess payment has been sought to be made after more than five years, that too after retirement. Evidently, case of the both the petitioners would be covered by situation Nos. (i), (ii) and (iv) of the 5 situations summarised by the Hon''ble Supreme Court in the above decision. Therefore, irrespective of whether stepping up of pay and grant of annual increment were justified or not, recovery of such amount in the case of the petitioners would be impermissible in law.

24. Moreover, in the case of Sri Bhaben Kakoti, the reversion would be untenable as it was made without giving any notice or hearing to the petitioner and that too after his retirement from service.

25. Accordingly, the impugned orders dated 16.05.2013 and 17.06.2013 in the case of Sri Bhaben Kakoti and 01.08.2014 in the case of Sri Benoyendra Nath Bhattacharjee are hereby set aside and quashed. Respondents are directed not to make any deduction from the retirement dues of the two petitioners, who shall be paid their retirement dues on the basis of stepped up pay and annual increment in terms of orders dated 14.05.1999 and 03.07.2001.

26. Both the writ petitions are allowed. No costs.