
(2019) 04 CAL CK 0072

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 2209 (W) Of 2018

Brijendra Kumar Singh

APPELLANT

Vs

State Of West Bengal And Others

RESPONDENT

Date of Decision : 23-04-2019

Acts Referred:

Constitution Of India, 1950 — Article 136, 141, 226

Citation : (2019) 04 CAL CK 0072

Hon'ble Judges : Protik Prakash Banerjee, J

Bench : Single Bench

Advocate : Kamalesh Bhattacharya, Asim Halder, S. Sarkar, Moupiya Dey Basu, Tapan Kumar Mukherjee, Bhaskar Prasad Vaisya, Sagnik Chatterjee

Final Decision : Disposed Off

Judgement

Protik Prakash Banerjee, J

1. The writ petitioner retired from service after a long and fulfilling innings as an Assistant Teacher, on October 31, 2017. He had been duly appointed as an Assistant Teacher way back on October 28, 1981 which post he joined on November 3, 1981 and his pay had been revised and fixed several times thereafter. The writ petitioner was entitled to receive his pension and other retirement benefits the very next day (November 1, 2017). He did not get it. He has not got it even today. On or after November 6, 2017 the District Inspector of Schools (Secondary Education), Howrah, wrote to the Head of the Institution where he was serving, to clarify the questions arising out of the observations mentioned in the Memo dated October 26, 2017 sent by the Assistant Director, Pension, Provident Fund and Group Insurance, West Bengal to the said District Inspector and on the basis of that, the petitioner has been deprived of his pension and other retirement benefits, without any decision being taken.

2. This petition under Article 226 of the Constitution of India seeks the release of the pension and retirement benefits of the writ petitioner after quashing the

letters dated October 26, 2017 and November 6, 2017 issued by the respondents no.5 and 3 respectively, seeking to know the government order on the basis of which post graduate scale and normal increments were allowed to the writ petitioner since his qualification is M.A. (Pol. Sc.) with B.P.Ed, (Master of Arts in Political Science and Bachelor of Physical Education) and also seeking to know the "group of teaching" naturally, with reference to the staff pattern. The prayers have been framed for securing the above reliefs. The writ petitioner retired from services on October 31, 2017. The writ petitioner admittedly got to know of the memo dated October 26, 2017 which was not addressed to him but the respondent no. 3, only after November 6, 2017 when the memo dated November 6, 2017 was sent by the respondent no. 3 to the head of his institution. These memoranda together, requested the pension sanctioning authority (the respondent no. 3) to correct the alleged defects in the pension case by clarifying "the basis of which G.O. Post Graduate Scale and normal increments were allowed to" the writ petitioner "as because qualification of" the writ petitioner is "M.A. (Pol. Sc.) with B.P. Ed. It also be clarified his group of teaching." These sought to raise doubts about the fixation of his pay and the qualifications on the basis of which this was done, considering the "group" in which he was appointed as a teacher, which had stood undisturbed over several pay fixations.

3. I will examine, on the face of the records, how far the writ petitioner has been able to make out that case. Annexure P/2 to the writ petition is the appointment letter. It shows that the managing committee of Salkia Shree Mishra Vidyalaya High School appointed the writ petitioner as an Assistant Teacher of the school by the letter dated October 28, 1981. The appointment was on temporary basis. It made it clear, that since the writ petitioner held a Masters' Degree in political science, he would, in addition to the subject Physical Education, also have to take the Additional Subjects named "Elements of Economics" and "Civics" in classes IX and X. Annexure P/3, a memo dated January 15, 1982 is the approval of the said appointment on a temporary basis against permanent vacancy issued by the respondent no. 3. His educational qualifications were mentioned in that memo as "M.A., Dip-in-PhyEdn." and it was expressly mentioned that the appointment was approved on the salaries admissible under the G.A. Rules according to G.O. No.772-Edn (S) dated July 8, 1974 with effect from November 3, 1981.

4. The said G.O No.772-Edn (S) dated July 8, 1974 was therefore the relevant Government Order which governed the salary of the writ petitioner and his "group of teaching". I think a full quotation of the same is warranted, because of the question now raised by the respondents no.5 and 3. The said Government Order is set out hereinbelow: -

GOVERNMENT OF WEST BENGAL

Education Directorate, Secondary Branch

No. 772-Edn (S)

Dated: Calcutta, the 8th July, 1974

To: The Director of Public Instruction, West Bengal

Sub: Pattern of teaching staff in the recognized Non-Government Secondary Schools under the revised pattern introduced from 1.1.74

The undersigned is directed to say that consequent on restructuring of secondary education in conformity with the national pattern and on introduction of revised curriculum and syllabuses from 1.1.74, the question of prescribing revised pattern of teaching staff has become necessary. The West Bengal Board of Secondary Education has calculated minimum number of periods per week required to cover the new syllabuses in different classes from V to X.

After careful consideration of the matter, Governor is now pleased to direct that with effect from 1.1.74 the number of teaching posts admissible to a school having classes V to X with only one section in each class shall be as follows:

Language Group (1st, 2nd and 3rd languages)4

Science and Mathematics3

Social Science (History & Geography)2

Work Education, Physical Education & Social Service
.....2

Headmaster1

12

The maximum number of periods for a pupil, as at present, be limited to 39 per week. Subject to this limit the Head of the institution may fix the number of periods for each class so as to cover satisfactorily the entire syllabuses prescribed for the class within the academic year. The teaching load for a teacher should normally be 36 periods per week, distributed as follows:-

(i) Class-Room teaching --- 25 periods (including occasional work for absentee teachers.

(ii) Tutorial Class-- 11 periods (including correction of home work).

All teachers should be involved in work education programmes. For such involvement two periods may be assigned to the teacher concerned with corresponding adjustment in total teaching load per week.

Although the teaching posts have been shown against different groups of subjects, Head of Institutions should be suitable distribution of teaching load ensure full utilization of the service of the teachers in the best interest of the school. It should be possible to achieve some degree of flexibility in adjustment of teaching load in subjects other than those requiring specialized knowledge.

Existing norms relating to size of a section and additional enrolment in the

section with prior approval of appropriate authorities shall remain in operation. Additional sections may be permitted if the enrolment is steady over a period of at least three years. In case of fluctuating enrolment, the trend over a longer period should be watched. Teaching load should, as far as practicable, be distributed among the teachers in position. If, however, additional work load justifies appointment of additional teachers, sanction would be given initially for a limited period and appointment should be made purely on temporary basis against such posts.

The minimum academic qualification of teacher should be Pass degree with such combination of subjects as would enable the teacher to teach the school courses prescribed by the West Bengal Board of Secondary Education under the new curriculum. The existing orders relating to training qualification shall remain in operation until further orders. The minimum qualification for the Headmaster/Headmistress, Assistant Headmaster/Assistant Headmistress should be as prescribed under the existing orders. In case of teachers in Physical Education, Work Education and Social Service Group, the minimum academic qualification may be relaxed with the approval of the Director of Public Instruction. Such relaxation should, as far as possible, be granted only in case of teachers already in position. One of the teachers under this group should have recognized degree, diploma or certificate in Physical Education and one should have recognized degree, diploma or certificate in Art and Craft.

*In the language group the maximum number of posts for which Honours or Master Degree may be admitted, should be limited to 50% of the number of posts required for teaching 1st and 2nd languages. In the Science and Mathematics group, the maximum number of posts so admissible for teachers with Honours or Master Degree should be limited to 66% of the total posts sanctioned for that particular group. Teachers already in position who have been allowed higher scale of pay in conformity with the principle laid down in the G.O. No. 60-Edn(s) dated 15th January, 1972 should continue to draw pay in that scales. They should be gradually fitted into the new pattern.

Staffing pattern herein prescribed should apply also to the Higher Secondary Schools with suitable adjustment. With the abolition of Class XI, the teachers in position should be fitted into the new pattern keeping in view the declared policy of Government about absorption of teachers.

Sd/-

B.N. Chatterjee,

Joint Secretary.

5. A bare perusal of the aforesaid government order would show that provisions were made for an appointment to the post of an Assistant Teacher for the subject of Physical Education for those holding a recognized degree, diploma or certificate in Physical Education. Significantly, the appointment letter dated

October 28, 1981 issued to the writ petitioner by the Secretary of the said school bears an intimation to the effect that the appointment of the petitioner was made to take the subject of physical education for classes IX and X. The source of all confusion lies in the fact that additional charge to take the subjects 'Elements of Economics' and 'Civics' for the classes IX and X was given to the petitioner, owing to his Masters in Political Science.

6. Prima facie, the case of the writ petitioner is that prior to his appointment to the post of Assistant Teacher, the petitioner had already obtained post-graduate qualification in Political Science and therefore, he has been rightfully allowed higher scale of pay on the basis of his qualification since the time of his entry into service. This, the petitioner claims, was allowed in terms of a Government Order being No. 372 - Edn(B) dated July 31, 1981 which was introduced after examining the structure of emoluments and the conditions of service of teachers under the pay of the government. On its face, the aforesaid government order was brought into effect from April 1st, 1981 and therefore, it seems to apply upon the case of the petitioner who joined service after the said date. To this extent of the matter, there is no dispute among the parties herein.

7. This Government Order dated July 31, 1981 came in the backdrop of the recommendation of the pay commission set-up by the Government to examine the structure of emoluments and the conditions of service of, inter alia, teachers and non-teaching staff of State Government sponsored or aided educational institutions. The said Government Order came to be issued with the concurrence of the Finance Department, Government of West Bengal. Paragraphs 2 and 3 of the aforesaid Government Order assume specific relevance so far as the case of the writ petitioner is concerned. It is therefore deemed convenient and necessary to extract the aforesaid paragraphs for understanding its nature, extent and import. These are laid down as follows:

GOVERNMENT OF WEST BENGAL

Education Department, Budget Branch

No. 372-Edn.(B) Dated: Calcutta, the 31st July, 1981

In Finance Department Resolution No. 9716F, dated 16th November, 1977 Government set-up a Pay Commission with the terms of reference which included that the Commission will also examine the structure of emoluments and the conditions of service of the-

.....

2. After careful considerations of the recommendations, the Governor is pleased to direct that in the Sponsored and aided recognized Educational Institutions including Libraries and Day Students Home, all whole-time occupants of the posts on the existing scale of pay as described in columns (2) and (3) respectively of Annexure-I shall with effect from 1st April, 1981 be entitled to draw pay in the revised scales of pay as shown against each of the post in

column (4) of the said annexure. The detailed break up of the revised pay scales shown under column (4) of Annexure I are given in Annexure II.

3. A separate order regarding fixation of pay in the revised scales of pay on the analogy of the State Govt. Rules will be issued later on.

8. In pursuance of paragraph 3 of the Government Order dated July 31, 1981, the Government of West Bengal, Education Department, Budget Branch issued another government order being No. 492(6)-Edn.(B) dated October 26, 1981 by which it sought to provide the manner in which the pay of the teaching and the non-teaching staff of the Non-Govt./ Sponsored Aided Educational Institutions and other organizations is to be fixed in the revised scale of pay as sanctioned by the G.O. dated July 31, 1981. I have extracted the relevant paragraphs of the G.O. dated October 26, 1981 as they apply to the case of the writ petitioner and extracted them as follows:

GOVERNMENT OF WEST BENGAL

Education Department, Budget Branch

No. 492(6)-Edn.(B) Dated: Calcutta, the
October 26, 1981

1. Definitions : In this order unless there is anything repugnant to the subject or context-

.....

(d) "Existing scale of pay" means the scale of pay of an employee of the Non-Govt./ Sponsored, aided educational institutions and other organisations in respect of the post which the incumbent belonged to or is held by him/her in a substantive, officiating or temporary in capacity immediately before the date on which he/she becomes liable to draw pay in revised scale of pay.

2. Application of the revised scale of pay : An occupant of every post specified in column (2) of Annexure - I of the Govt. Order No 372-Edn. (B) dated 31st July, 1981 shall be entitled to draw pay in the revised scale of pay with effect from:

(a) the 1st April, 1981, or

(b) If he/she was in service on 31st March 1981, under Govt. aided institution at his/her option, from any date up to 1st April, 1982, or

(c) If he/she enters service on or after the 1st April, 1981 from the date of appointment.

Note : Service rendered by an employee on appointment or re-appointment after 31st March, 1981, on a substantive, officiating or temporary basis to a post on the same or identical time scale as the existing scale of pay of the post to which he/she belonged or which he/she held on 31st March, 1981, shall be deemed to be service rendered in the post, held by him on the 31st March, 1981.

9. On a plain reading of the aforesaid paragraphs, it becomes clear that the revised pay scale as sanctioned under the Government Order dated July 31, 1981 October 1981, in terms of paragraph 2 of the Government Order dated October 26, 1981 read with the note thereto, would be applicable from the date of appointment for those who entered service on or after April 1st, 1981. The writ petitioner before this Court was appointed on November 3, 1981 and thus he falls within the aforesaid category.

10. However, an interesting change was brought subsequently by a Government Order being No. 400-Edn(B) dated September 10, 1991 which was issued in partial modification of the Government Order dated July 31, 1981. To understand the proper connotation as well as the application of the aforesaid order, it is considered necessary to set it out herein below:

GOVERNMENT OF WEST BENGAL

Department of School Education, Secondary Branch

Calcutta, the 10th September, 1991.

No.400-Edn.(B)

IM-45/91

MEMORANDUM

The Governor is pleased to make, with effect from the first day of April, 1981, the following amendment in the Annexure I (hereinafter) referred to as said Annexure to this Department Memo No 372-Edn. (B) dated 31st July,

1981 (hereinafter referred to as the said Memorandum):

AMENDMENT

In the said Annexure to the said memorandum, for sub- paragraph (b) of the paragraph (2) under "N.B. viz" (b) All existing Secondary Schools teachers who have improved their qualifications not relevant to their teaching subjects will be allowed the higher scale on qualifications basis after five years' teaching counting from the date on which higher qualification was obtained. "the following shall be substituted :

**** ' (b) all existing Secondary Schools Teachers who were appointed with higher qualifications in subjects not relevant to their teaching or who improved their qualifications subsequent to their appointment in subjects not relevant to their teaching will be allowed the higher scale on qualifications basis with effect from the 1st April 1981 or after five years teaching counting from the date on which higher qualification was obtained whichever is later."** By order of the Governor,

Sd/- U.K. Roy, Secretary to the Government of West Bengal.

11. The effect of the substituting paragraph upon the writ petitioner could be

simply understood in this manner. Since the writ petitioner obtained higher qualification even before joining the service, the date from which the revised pay scale would be deemed to apply upon him would be the date on which the writ petitioner would complete five years of his appointment to the post of an assistant teacher. The service book of the writ petitioner shows that he was appointed on a temporary basis by a letter dated October 28, 1981 and such appointment was later approved by the District Inspector of Schools on a substantive basis with effect from November 3, 1983. Since the writ petitioner obtained the said higher qualification prior to his entry into the service, the question of allowing higher scale of pay to him would be applicable in this case upon the completion of five years of his teaching experience starting from the date of his appointment i.e. November 3, 1981.

12. Strictly speaking, the said memoranda as in paragraphs 7 and 8 do not apply to the writ petitioner. This is because he was appointed on a temporary basis, after April 1, 1981 but with a master's degree in a subject other than that required in the group to which he was appointed, So he did not even hold a temporary post on March 31, 1981 for which the deeming provision of the Note to the memorandum as in paragraph 8 would operate. Yet, he was appointed after April 1, 1981 and though he has been teaching for more than five years since then, his appointment as a permanent teacher was only approved with effect from November 3, 1983. So, at best he would have been entitled to the said benefit of higher scale only with effect from November 5, 1988. Because of the continuing confusion, by a Memo No.86-Edn(B)/IM-49/91 dated March 6, 1992 the benefit was made applicable to all employees who were falling in this category as on December 31, 1985.

13. The plight of such teachers was soon identified by the state. Despite being appointed to a teaching group not relevant in terms of their higher qualification, such teachers continued to make the best use of their qualifications by discharging additional responsibilities commensurate with to their qualifications in serving the best interests of the respective schools they were associated with. In a pragmatic step, to recompense the expertise of such teachers in subject outside their relevant teaching group, a measure was taken by the state government to allow higher scale of pay to teachers holding higher qualification even in a non-relevant subject. This finally addressed by the Government Order being No. 57-SE(S) dated January 27, 1995.

14. By the said Memo dated January 27, 1995, the following was provided: -

"Sub: Granting of pay according to qualification to the Assistant Teachers of Non-Government Secondary Schools.

The undersigned is directed to say that the question of granting scales of pay according to qualification to the Assistant Teachers of Non-Government Jr. High Schools/Jr. High Madrasahs and High Schools/High Madrasahs (including Higher Secondary Schools/Higher Secondary Madrasahs) in this State who have

obtained higher qualification in subjects not relevant to their respective subject or group in which they were appointed in schools, but relevant to their teaching subjects had been under consideration of the State Government for sometime past. Such a situation exists in some secondary schools wherein the academic interest of the students, the authorities of the schools have allotted classes on particular subjects to some approved teachers of the schools who were respectively appointed for a different subject/group as per available vacancies. The Education Department also is not in a position to sanction the required number of additional posts to the schools owing to financial stringencies.

Considering the prevailing situation in the Secondary Schools in this State as mentioned above, the State Government in the Education Department has decided as follows to cope with the said situation and in the academic interest of the schools:

(i) Approved Assistant Teachers in non-Government Secondary Schools and Madrasahs who will take classes in subjects relevant to their respective higher qualification, though appointed/approved respectively in different groups/subject other than the aforesaid teaching subject shall, henceforth, be allowed to draw pay according to their respective higher qualification, as prescribed by the State Government. Provided such Assistant Teachers take individually at least six such periods per week as officially allotted by the authorities of the respective schools to such Assistant Teachers within the normal work-load upon the written consent of the concerned teacher and with the prior permission of the concerned District Inspector of Schools and strictly according to the actual academic need of the individual school. If there be more than one Assistant Teacher in a school with relevant higher qualification agreeable to this arrangement, preference shall be in order of seniority. If any school has already effected such an arrangement in its academic interest, the same has to be get approved by the concerned D.I. Schools, subject to eligibility, for the purpose of drawal of qualification of pay the concerned teachers."

15. Sub-paragraph (i), as laid down above, of the Government order dated January 27, 1995 finally clears the air as far as the question

of allowing the revised scale of pay is concerned. It calls for allowing higher scale of pay to such Assistant Teachers in non-Government Secondary Schools and Madrasahs who were taking classes in subjects relevant to their respective higher qualification, though at the time of their appointment was made in a different groups or subject other than the aforesaid teaching subject. The aforesaid government order was made applicable from the date on which such government order was issued.

Strangely, however, if this government order is made to apply to the case of the writ petitioner, the revised scale of pay as admitted to the writ petitioner would be allowed from January 27, 1995. On the other hand, the government order dated September 10, 1991 allows the writ petitioner such revised scale of pay

upon completion of 5 years of his teaching services. This memorandum, also earlier in date to the government order dated January 27, 1995 allows revised scale of pay to the writ petitioner from November 3, 1986 or November 3, 1988 depending upon the date of appointment on a temporary basis and the date of approval of the appointment permanently, respectively. An equitable construction of both these government documents compels me to allow such revised scale of pay to the writ petitioner from November 3, 1986 i.e. five years from the date of his initial appointment to the post of assistant teacher.

16. However, there is another crucial aspect to the matter that the writ petitioner has tried to argue before this court. It is the submission of the writ petitioner that the intimation/show-cause notice by which the pension sanctioning authorities sought clarification regarding the pay fixation and incremental benefits of the writ petitioner was sent to the petitioner less than a week before the petitioner was due to retire and was actually received by the petitioner post his retirement. He even contends that the pay fixation was done duly and in accordance with the government circular being No. 372-Edn(B) dated July 31, 1981, with no fault on the part of the petitioner so far as misrepresentation or suppression of any material fact is concerned. Finally, it is submitted that any reduction from the post-retiral benefits of the petitioner would be unduly harsh and unjust.

17. I must emphasize here, that the writ petitioner has been drawing the scale of pay of post-graduate Assistant Teacher from November 1, 1981 itself, and this was a decision of the statutory authorities and the school authorities and not a result of fraud or misrepresentation by him and he submits that he is entitled to it and so the government orders cannot now be used to allege over-drawal so as to deduct any amount from his pension or other retirement benefits.

18. In support of the aforesaid submissions, the petitioner has cited before this Court a number of judicial pronouncements of both the Hon'ble Supreme Court of India as well as of this court.

19. A bench-strength 3 decision of the Hon'ble Supreme Court is the first. This was on a reference answered in *State of Punjab-v-Rafiq Masih* reported in (2014) 8 SCC 883. Here the Hon'ble Supreme Court was called upon to decide whether the decision in *Chandi Prasad Uniyal and Others-v-State of Uttarakhand & Others* reported in (2012) 8 SCC 417 and the case of *Shyam Babu Verma-v-Union of India* reported in (1994) 2 SCC 521. There the question was whether grant of a higher pay-scale than which the petitioners were entitled could be adjusted by recovery by the employer, where the grant of the higher scale and payment of the higher amount were not due to any fault of the petitioners.

20. While in *Shyam Babu Verma* (supra) it was held to be not recoverable, as

"it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him, but by wrong construction made by the Principal for which the appellant cannot be held to be at fault", and "it shall be only just and proper not to recover any excess amount which has

already been paid to them",

in Chandi Prasad Uniyal (supra) the Hon'ble Supreme Court held that the case involved public money, the tax-payers' money which belongs neither to the officers who effected over-payment nor to the recipients. Thus, the Hon'ble Supreme Court was pleased to hold that it failed to see why the concept of fraud or misrepresentation was being brought in these situations. The question to be asked is whether excess money has been paid or not, may be due to bona fide mistake. Possibly, effecting excess payment of public money by the government officers may be due to various reasons like negligence, carelessness, collusion, favouritism, etc. because money in such a situation does not belong to the payer or the payee. Situations may arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment".

The Hon'ble Supreme Court was pleased to hold that the law laid down in the case of Chandi Prasad Uniyal (supra) in no way contradicted the observations made by the court in two other cases, since the case of Chandi Prasad Uniyal (supra) laid down the law after entertaining a matter under Article 136 of the Constitution of India and was a declaration of the law under Article 141 of the Constitution of India, whereas observations and directions made in the earlier cases were directions made by the Hon'ble Supreme Court to do complete justice to the parties and do not constitute a binding precedent.

Holding the reference unnecessary, their Lordships remitted the matters to the Division Bench of the Hon'ble Supreme Court for their appropriate disposal.

21. This led to a Division Bench decision of the Supreme Court of India in State of Punjab-v-Rafiq Masih reported in (2015) 4 SCC 334 one of the cases where the reference had been made. In its judgment, the Hon'ble Supreme Court of India reviewed its prior decisions wherein the benefit of non-recovery was extended to employees and the recovery of the excess payment was disallowed on grounds that such recovery would be iniquitous and arbitrary for an employer to require an employee to refund the wages even if the employee was allowed such wages on the basis of irregular pay-fixation or miscalculation. The Hon'ble Supreme Court categorically held at paragraph 7 of the report, that

"we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made."

Reviewing the authorities before it, the Supreme Court held the following:

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

(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.

22. Reliance was also laid upon a subsequent judgment of the Hon'ble Apex Court in High Court of Punjab & Haryana & Others- v-Jagdev Singh reported in 2016 SCC OnLine SC 748. In this case, the petitioner relied upon the proposition (ii) laid down in the decision in Rafiq Masih (Supra). A Division Bench of the Hon'ble Supreme Court, after going through the decision in Rafiq Masih

(Supra) denied the claim of the petitioner therein after making the following observation:

11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.[emphasis supplied by me]

23. The facts in Jagdev Singh (Supra) can be equated to the one this Court is dealing with at present. The petitioner before this court has time and again in the Option form of ROPA 1998 as well as ROPA 2009 undertaken to refund to the government any amount which may be drawn by him in excess of what is admissible to him on account of erroneous fixation of pay in the revised scale of pay as soon as the fact of such excess drawal comes to his notice or is brought to his notice. I have no doubt that the writ petitioner is bound by such

undertaking.

24. As against the aforesaid, the writ petitioner has also relied upon a judgment of a coordinate bench of this court passed in *Rajkumar Jana-v-The State of West Bengal* [W.P. No. 21935 (w) of 2017] decided on December 7, 2017. The factual matrix attached to the aforesaid decision as well as the circumstances governing the case of the petitioner before this Court are almost identical. However, the learned coordinate bench in the aforesaid matter made the following observations while allowing the said writ petition:

"The mere fact of the petitioner having put his signature on the pro forma and thereby agreeing to abide by the undertaking to refund does not warrant that a deduction shall be made on account of alleged overdrawal spanning over a period of more than three decades. The undertaking executed pertains to refund of an amount drawn "in excess of what is admissible". In the instant case the petitioner's pay was fixed on the basis of the approval memo dated 27th September, 1989 issued by the respondent no.7. The said approval memo having not been altered, rectified or withdrawn by the competent authority, it cannot be said that the fixation of pay as per the ROPA Rules and the consequential benefits were not admissible to the petitioner. Admittedly steps were taken by the respondents towards recovery after the petitioner's retirement. Once the petitioner retired, the master and servant relationship ceased and the relationship existed only for the purpose of payment of terminal benefits to the petitioner on the basis of the situation existing on the date of his retirement. The contractual relationship between the parties terminated with the situations that existed on the date of retirement and hence the respondents were no longer empowered to change the concluded terms of contract unilaterally and without any sanction of law.

10. The pension sanctioning authority cannot withhold the disbursement of the petitioner's pensionary benefits on the basis of tentative audit observations. Such observations cannot be construed to be sacrosanct and merely on the basis of the same the pension sanction authority cannot revise the pay fixation to the detriment of the petitioner after his retirement. The scale in terms of the ROPA Rules was fixed by the authorities concerned on their own and there was no any participation of the petitioner in the process of such re-fixation. It is also not a case that the pay fixation was compulsive in nature having been made in terms of any interim order of this Court."

25. It has to be noted that the ratio laid down in *Jagdev Singh* (Supra) by the Hon'ble Supreme Court of India, though noted by the coordinate bench in the case of *Rajkumar Jana* (supra), was found inapplicable by the learned coordinate bench as the factual circumstances attached to both the cases were distinguishable from one another.

26. It is the opinion of this court that the ratio laid down by the Hon'ble Supreme Court in *Rafiq Masih II* (Supra) of 2015 when read along with the decision in

Jagdev Singh (Supra), lays down a very clear proposition of law. This proposition is that recovery of amount drawn in excess of what was admissible to the employee cannot be made from retired employees, or employees who are due to retire within one year, of the order of recovery unless such employees are bound by any undertaking on their part to return over-drawal or excess payments. Any qualification if attached to the aforesaid principle on account of any factual dissimilarity would only result into diluting the effect of law laid down by the Hon'ble Supreme Court.

27. Unless, therefore, a case has been made out that the petitioner was allowed to enjoy the higher scale of pay consistently, for over thirty years of his service (almost thirty six years) through more than one statutory revisions of pay, and there was no whisper of any mistake or excess payment was made to him before his retirement, it would be difficult for me to hold in favour of the petitioner. Only if such case is established, would I be forced to consider this an exception within the meaning of Rafiq Masih II of 2015 (supra) and an exception to Jagdev Singh (supra) following the coordinate bench judgment in the case of Rajkumar Jana (supra).

28. In the instant case, as I have demonstrated, the case made out by the writ petitioner on the face of the records, shows that he has signed, not once, but several options throughout the years when revision of pay and allowances rules were brought into force and he has obtained the benefit of each such revision.

29. In such Option Form, from 1996 onwards, the writ petitioner has made the following declaration under his signature: -

"Declaration: I hereby undertake to refund to the government any amount which may be drawn by me in excess of what is admissible to me on account of erroneous fixation of the pay in the revised scale of pay as soon as the fact of such excess drawal comes to my notice or is brought to my notice."

30. Had the writ petitioner challenged any of the government orders which entitled him to a higher scale of pay later than the time from when he was getting it, I could have understood. However, the petitioner has not challenged them, or even the memorandum No. 400-Edn(B) dated September 10, 1991. He has not even alleged that it is not applicable to him in his pleadings. Accordingly, on the own showing of the petitioner he can at best be entitled to draw the post-graduate scale of pay for an assistant teacher from November 3, 1988, when he completed five years of teaching from his substantive appointment in a permanent post as approved. Therefore, if he has drawn a higher scale of pay from November 3, 1981, he has been paid more money from the public exchequer, being the tax-payers' money, than he was entitled to under statutory rules and that which had the flavour of law. He cannot therefore resist its recovery merely because it was not his fault or it was continued for a long time. The writ petitioner has not made out a case of undue hardship if recovery was to be effected of the amount he has over-drawn. Instead, the writ petition is replete

with his claim that this higher scale of pay was his statutory right and that he is entitled to it because he had enjoyed it uninterruptedly and the objections raised by the respondent no. 5 were irrelevant. Since such allegation of undue hardship is alien to the writ petition I cannot read them into it to give relief to the writ petitioner by carving an exception to the law laid down by the Hon'ble Supreme Court.

31. Accordingly in light of the aforesaid, I dispose of the writ petition, by directing the respondents No.5 and 3 to treat the writ petitioner as being entitled to the post-graduate scale of an Assistant Teacher from November 3, 1988 on the basis of the government orders and respective Revision Of Pay and Allowances Rules referred to above, and to calculate the amount of money he was entitled to get and the amount of money that he actually got, and fix his pension and other retirement benefits on that basis in the light of the aforesaid, and remit the amount to him after recovery of the excess payment. I expect that the entire exercise shall be completed expeditiously, but no later than 2 months from the date of communication of this order.

32. The writ petition is disposed of as above, but there shall be no order as to costs.