(2018) 06 GAU CK 0094

In the Gauhati High Court

Case No : Writ Petition (C) No. 282 of 2017

Kolen Chandra Basumatary, Kholen Basumatary — APPELLANT

Vs

State Of Assam And Ors. — RESPONDENT

Date of Decision : 18-06-2018

Acts Referred:

Citation : (2018) 06 GAU CK 0094

Hon'ble Judges : MANASH RANJAN PATHAK, J

Bench : Single Bench

Advocate : K R Patgiri, A Deka, D Das??Barman, B Gogoi, A Chetri

Final Decision : Allowed

Judgement

(1)Heard Mr. K R Patgiri, learned counsel for the petitioner.Â Also heard Mr. A Deka, learned Standing Counsel, Education Department, for

respondent Nos.1 & 4, Ms. D Das Barman, learned Govt. Advocate, for respondent No.2, Mr. B Gogoi,Â Â Â Â Â learned Standing Counsel,

Finance Department, for respondent Nos.3 & 9, Mr. A Chetri, learned Standing Counsel, Pension Department, for respondent No.5 and Mrs. R B

Bora, learned Standing Counsel BTC, for Respondent Nos.6 to 8.

(2) The petitioner herein, a graduate, was appointed in July 1974 as an Assistant Teacher in Tukrajhar ME School in its Bodo medium section during

its venture stage. The petitioner accordingly joined his said service in that school on 01.08.1974.Â Later, said M E School was provincialised w.e.f.

01.10.1977 and petitioner being under the control of the Directorate of Elementary Education received intermediate scale of pay. Subsequently, said

Tukrajhar M E School was amalgamated with Tukrajhar Higher Secondary School w.e.f. 19.05.1986 and since then, due to said amalgamation, all the teaching and non-teaching staff of said ME School became the employees of said Tukrajhar HS School and their services came under the Directorate

of Secondary Education.Â Â Â

(3) After such amalgamation and in terms of letter No. KDC/Apptt/56/90/ 241-44 dated 31.07.1990 of his office, the Inspector of Schools, Kokrajhar

District Circle, Kokrajhar vide order under Memo No. KDC/Pay/EB/37/90/3822 dated 23.08.1990 upgraded the service of the petitioner from

Intermediate Scale of Pay to the Graduate Scale of Pay and accordingly, fixed his pay at Rs. 775/- per month on 01.08.1990 in the Scale of Pay of

Rs.620/- Rs.1315/- per month, observing that his next Annual Increment will be on 01.08.1991.Â

(4) The Service Book of the petitioner reflects that as per the order of the Inspector of Schools, Kokrajhar District Circle, Kokrajhar under Memo No.

KDC/Extd./90/229-33 dated 31.07.1990, the petitioner was given extended Scale of Pay of Rs. 675/- - Rs.975/- per month and his pay as on

01.08.1989 was fixed at Rs.735/- where his annual increment date would remain as annual and accordingly fixed his pay at Rs.775/- on 01.08.1990

and it was duly signed by the Principal of the School on 06.08.1990.

(5) However, since the petitioner was upgraded to the Graduate Scale of Pay as per the order of the Inspector of Schools, Kokrajhar District Circle,

Kokrajhar under memo No. KDC/Apptt/56/90/241-44 dated 31.07.1990, after revision of pay, the Scale of pay of the petitioner was fixed at Rs.1885/-

per month as on 01.08.1990 in the Graduate Scale of Pay of Rs.1375/- - Rs.3375/- per month, which was duly signed by the Principal of the

concerned HS School as well as the Inspector of Schools, Kokrajhar.Â

(6) The petitioner retired from service on 31.03.2013 after attaining the age of superannuation and during his said service period he was allowed to

draw graduate scale of pay since 01.08.1990 and all along the service book of the petitioner was duly countersigned by the Principal of Tukrajhar HS

School, Inspector of Schools, Kokrajhar and the Inspector of Schools, Chirang District Circle, Kajolgaon, Chirang. It is to be noted herein that said

Tukrajhar HS School, Tukrajhar came under the jurisdiction of Inspector of Schools, Chirang District Circle, Kajolgaon, Chirang after bifurcation of

Kokrajhar district.

(7) After his retirement from service, the Inspector of Schools, Chirang District

Circle, Kajolgaon by his order dated 20.05.2013 granted the petitioner

provisional pension of Rs.9,800/- per month with other consequential benefits like 72% of Dearness Allowances of the said amount and fixed Medical

Allowances and also paid an amount of Rs.5,24,976/towards provisional DCRG (Death cum Retirement Gratuity).

(8) When the pension papers of the petitioner was processed by the Inspector of Schools, Chirang District Circle, Kajolgaon, the Directorate of

Pension, Assam while issuing the final Pension Pay Order (PPO) vide No.Pen ADP/ PPO/GPO/2013-14/023149 on 04.01.2016 determined

Rs.10,460/- as monthly pension of the petitioner w.e.f. 01.04.2013 and DCRG amount at Rs.6,21,027/-and accordingly, directed the Treasury Officer,

Bongaigaon to pay the relevant amount to the petitioner after deducting Rs. 5,24,976/- already paid to him towards provisional DCRG and overpay

allowance of Rs. 1,05,149/-.Â

(9) The Treasury Officer, Bongaigaon accordingly paid the pension amount to the petitioner after deducting the overpay allowance of Rs. 1,05,149/-

from his pensionery benefits, which the petitioner received under compulsion.

(10) Hence this writ petition by the petitioner praying for issuance of an appropriate Writ or direction to the respondents herein, more particularly, the

respondent No. 5, the Director of pension to rectify the Pension Pay Order No. Pen ADP/PPO/GPO/2013-14/023149 of the petitioner, so as to pay

him admissible amount of monthly superannuation pension and further prayed to release the amount of Rs.1,05,149/- which have been recovered by

the Treasury Officer, Bongaigaon, as Overpay Allowance from his pensionery benefits in terms of the communication No.Pen ADP/PPO/GPO/2013-

14/023149 dated 04.01.2016 of the Directorate of Pension, Assam.

(11) It is contended by the petitioner that his monthly salary was fixed by the respondents and the respondents in the Education Department upgraded

him to the graduate scale of pay and accordingly, granted and allowed him to draw graduate scale of pay since w.e.f. 01.08.1990 till his retirement

from service on 31.03.2013. It is also submitted by the petitioner that all along his service book was countersigned by the Principal of the Tukrajhar

HS School, Tukrajhar where he served and the concerned Inspector of Schools, Chirang District Circle, Kajolgaon and that he did not draw any

amount in excess towards his pay fraudulently during his said service life.

(12) Notice in this case was issued on 20.01.2017. But the respondents did not file any affidavits in the matter.

(13) In the case of Col. B.J. Akkara (Retd.) -Vs- Govt. of India,Â reported in (2006) 11 SCC

709, the Honâ??ble Supreme Court have held that â?

Relief against recovery of excess wrong payments of emoluments/ allowances from an employee can be granted on fulfillment of conditions that â?

(a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee and (b) Such excess payment was

made by the employer by applying a wrong principle for calculating the pay/ allowance or on the basis of a particular interpretation of rule/order, which

is subsequently found to be erroneous.

Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of

judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in

the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long

period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue

hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or

wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The

matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against

recovery.

On the same principle, pensioners can also seek a direction that wrong payments should not be recovered, as pensioners are in a more

disadvantageous position when compared to inservice employees. Any attempt to recover excess wrong payment would cause undue hardship to them

(pensioners).

(14) The Honâ??ble Supreme Court in the case of Shyam Babu Verma -Vs- Union of India, reported in (1994) 2 SCC 521 have held that â?" it shall

only be just and proper not to recover any excess amount which has already been paid to the petitioners due to the fault of the respondents, where the

petitioners being in no way responsible for the same.

(15) Referring its various decisions, including Col. B.J. Akkara (supra) and Shyam Babu

Verma (supra), the Honâ??ble Supreme Court in the case of State of Punjab and others -VsRafiq Masih (White Washer), reported in (2015) 4 SCC

334 have laid down that â?"Â

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,

summaries 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 Cand Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within oneyear, of the order of recovery.

(iii) Recovery from the employees, when the excess payment has been made for a period inexcess of five years, before the order of recovery is

issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge dutiesof 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 fromthe employee, would be iniquitous or harsh or arbitrary to

such an extent, as would far outweigh the equitable balance of the employerâ??s right to recover.

(16) In the case of Rafiq Masih (supra) the Honâ??ble Apex Court have also held that â?

Premised on the legal proposition considered above, namely, whether on the touchstone of equity and arbitrariness, the extract of the judgment

reproduced above, culls out yet another consideration, which would make the process of recovery iniquitous and arbitrary. It is apparent from the

conclusions drawn in Syed Abdul Qadir case [(2009) 3 SCC 475] that recovery of excess payments, made from the employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer. It cannot be

forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their

retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was

younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid

circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or soon

before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which

the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an

employee, as arbitrary, if the recovery is sought to be made after the employeeâ??s retirement, or within one year from the date of his retirement on

superannuation.

(17) The petitioner is a graduate and it is seen that during his service life as an Assistant Teacher in Tukrajhar HS School, Tukrajhar, he was paid

graduate scale of pay w.e.f. 01.08.1990 in terms of an order under memo No. KDC/Apptt/56/90/241-44 dated 31.07.1990 of the Inspector of Schools,

Kokrajhar District Circle, Kokrajhar as reflected from his service book, that too after said Tukrajhar ME School, Tukrajhar was amalgamated with the

Tukrajhar HS School, Tukrajhar on 19.05.1986, where the services of all the teaching and non-teaching staff of said ME School, including the

petitioner, were brought under the control of the Secondary Education Department after such amalgamation.Â It is also seen that the service book of

the petitioner was all along countersigned by the authority concerned since 01.09.1974 till his retirement on 31.03.2013.

(18) The respondents herein never objected the said order dated 31.07.1990 of the Inspector of Schools, Kokrajhar District Circle, Kokrajhar by which

the petitioner was granted graduate scale of pay. It is not the case of the respondents that on account of any misrepresentation or fraud made by the

petitioner during his service tenure he had drawn the said excess amount of Rs.1,05,149/-. It is also not the case of the respondents that graduate pay scale was given to the petitioner due to wrong fixation of his salary by the authorities in the Secondary Education Department.Â

(19) Moreover, it is not the case of the respondents that said order dated 31.07.1990 of the Inspector of Schools, Kokrajhar granting graduate scale of

pay to the petitioner w.e.f. 01.08.1990 was illegal or bad in law and that order was neither, withdrawn, cancelled, set aside or quashed by the authority

concerned debarring the petitioner from receiving graduate scale of pay during his service period. Since 01.08.1990 till his retirement from service on

31.03.2013, for 22 years 8 months, the petitioner was allowed to draw graduate scale of pay pursuant to the said order dated 31.07.1990 and the said

order dated 31.07.1990 is still in force.Â But, after more than two years nine months of his retirement from service on 31.03.2013, the respondent

Pension department by its order No. Pen.ADP/PPO/GPO/201314/023149 dated 04.01.2016 through the respondent Treasury Officer, Bongaigaon,

recovered the said Overpay Allowance of Rs.1,05,149/- allegedly paid to the petitioner, which itself is in violation of the law laid down by the

Honâ??ble Apex Court as noted above.

(20) From the above, it is seen that the balance of convenience and the prima facie case is also in favour of the petitioner and by such deduction from

the petitionerâ??s pensionery benefit out of the total amount of pension payable to him, he suffered irreparable loss and injury, where after

retirement, the pensionary benefit is the only amount available towards the livelihood for a retired employee of the Government. The said deduction

made by the respondents from the petitionerâ??s pensionery benefit is illegal and bad in law.

(21) For the reasons above, the said part of the order of recovery of Overpay Allowance of Rs.1,05,149/- from the pensionery benefit payable to the

petitioner in terms of the communication No.Pen.ADP/PPO/GPO/2013-14/023149 dated 04.01.2016 of the respondent Director of Pension to the

respondent Treasury Officer, Bongaigaon, is hereby set aside and quashed.Â

(22) Accordingly, it is directed that the respondents of this case including the respondents in the Finance Department; Treasury Officer, Bongaigaon

and others shall now release the said amount Rs. 1,05,149/- to the petitioner within a period of 2 (two) months from the date of receipt of a certified

copy of this order to be submitted by the petitioner to the Treasury Officer, Bongaigaon, which was already deducted from his pensionery benefit in

terms of said communication dated 04.01.2016 of the Director of Pension.

(23) Considering the fact that the Inspector of Schools, Kokrajhar District Circle, Kokrajhar by his order under memo No. KDC/Apptt/56/90/241-44

dated 31.07.1990 granted graduate scale of pay to the petitioner, an Assistant Teacher of Tukrajhar Higher Secondary School, Tukrajhar w.e.f.

01.08.1990 and that the petitioner has retired from service on 31.03.2013, the respondent Directorate of Pension, Assam shall now reassess the

pension amount of the petitioner without any deduction and shall rectify the PPO No. Pen.ADP/PPO/GPO/ 201314/023149 of the petitioner and

thereafter shall pay the admissible amount of monthly superannuation pension to the petitioner within a period of 2 (two) months from the date of

receipt of certified copy of this order to be furnished by the petitioner.

(24) Needless to say that the respondents herein, the Principal of Tukrajhar Higher

Secondary School, Tukrajhar; the Inspector of Schools, Chirang District Circle, Kajolgaon Chirang; the Director of Education, Bodoland Territorial

Council, Kokrajhar; the other concerned authorities of the BTC and the Treasury Officer, Bongaigaon shall do all the needful so that petitioner gets his

admissible amount of monthly superannuation pension after reassessment of the petitionerâ??s pension.Â

(25) Till such reassessment of monthly superannuation pension payable to the petitioner, as directed above, is made, the petitioner shall be paid his

monthly pension as already assessed in terms of the PPO Pen ADP/PPO/ GPO/2013-14/023149 issued on 04.01.2016.Â Â Â Â Â

(26) With the above observation and direction, this writ petition stands allowed.

