

(2015) 12 CAL CK 0059
In the Calcutta High Court
Case No : WP 4821 (W) of 2015

Sudarsan Dasadhikary

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 18-12-2015

Acts Referred:

Constitution of India, 1950 — Article 300A

Citation : (2015) 12 CAL CK 0059

Hon'ble Judges : Samapti Chatterjee, J.

Bench : Single Bench

Advocate : Sakti Pada Jana, Learned Advocate, for the Appellant; Ashim Kumar Ganguly and Aparna Ghosh, Learned Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Samapti Chatterjee, J.—The petitioner has filed the present writ petition for direction upon the District Inspector of School (S.E) Purba Midnapur to sanction the pension and gratuity of the petitioner in connection with his service as an Assistant Teacher of Gopalganj Priyanath Bani Bhawan, Dist-Purba Midnapur on the basis of the last basic pay fixed as per ROPA 2009 as the petitioner retired on 31st March, 2015. The petitioner also prayed for cancellation of the Memo No. 356-S/Pen dated 10th October, 2014.

2. The petitioner's case in brief is as follows:--

"The petitioner passed B.A. (three years course) with honours in Sanskrit obtained from the University of Calcutta in the year 1975. He also obtained training qualification viz. Bachelor of Education from the said University in the year 1983."

It is submitted further that the petitioner having qualification of B.A. (Hons) in Sanskrit with B.Ed. was appointed for the post of Assistant Teacher in Sanskrit in Gopalganj Priyanath Bani Bhawan, Dist-Purba Midnapur on 23rd August, 1989. His appointment was duly approved by the District Inspector of Schools (S.E)

Purba Midnapur vide Memo No. 6835-S dated 18.09.1989. Since the said post of Assistant Teacher in Sanskrit was an additional post, his approval was subsequently retained and approved permanently as per sanctioned order of the Director of School Education vide No. 2055-GA dated 19th December, 1986. His appointment was duly approved permanently by the Additional District Inspector of Schools (SE) Tamluk vide Memo No. 762-S dated 25th July, 1991.

It is submitted also that the petitioner's scale of pay was fixed at initial stage i.e. at the time of joining the service at Rs. 440/- in the scale of Rs. 440-1170/-. After enactment of ROPA Rules, 1990, teachers of secondary schools who have improved/will improve their qualifications or who were appointed with higher qualification in the subject or group relevant to their teaching/appointment shall get higher scale of pay appropriate to their qualifications with effect from 1st January, 1986 or the date of improving qualification whichever is later. As per said ROPA Rules, 1990, scale of pay of the petitioner was revised at Rs. 1640/- in the scale of pay Rs. 1640-3635/- which was prescribed as honours scale in terms of the said ROPA Rules, 1990.

It is further submitted that fixation of pay scale of the petitioner was approved by the D.I. of Schools (SE) Purba Midnapur which was done by the authority of the said school as per ROPA Rules, 1990. The said District Inspector of Schools (SE) Purba Midnapur has granted such higher scale of pay in favour of the petitioner allowing him to draw salary in the scale of pay at Rs. 1640-3635/- in terms of G.O No. 33-Edn(B) dated 7th March, 1990 (ROPA 1990) which has communicated to the Secretary of the said school vide Memo No. 573-S dated 14th September, 1992.

It is submitted that after enactment of ROPA Rules, 1998 the pay scale of the petitioner was revised in the scale of pay of Rs. 5500-11325/- which was prescribed as honours scale of pay and the same was also approved by the said D.I of Schools (SE) Purba Midnapur. Similarly, as per ROPA Rules, 2009, the petitioner's scale of pay was also revised and the same was duly approved by the D.I of Schools (SE) Purba Midnapur.

It is also submitted that the petitioner will retire from service on 31st March, 2015 on attaining the age of superannuation. As per Government Memorandum vide No. 88-SE (B) dated 26th May, 1998, the Pension Papers including Service Book and Pension Booklet prepared by the Headmaster of the said school has been submitted to the D.I of Schools (SE) Purba Midnapur on 17th January, 2014.

It is further submitted that the D.I of Schools (SE) Purba Midnapur has communicated a letter to the Headmaster of the said school vide Memo No. 356-S/Pen dated 10th October, 2014 with an observation that higher scale of pay (Hons) in Sanskrit with effect from 23rd August, 1989 appears to be not in order as per G.O No. 772-Edn(S) dated 8th July, 1974.

It is further submitted that in reply to the said communication dated 10th October, 2014, the teacher-in-charge of the said school has clarified the

objection as per audit observation and explaining thereto that the pay scale of the petitioner was allowed as higher scale of pay as per ROPA Rules, 1990 and the same was sanctioned by the D.I of Schools (SE) Purba Midnapur.

It is further submitted that it appears from the communication dated 10th October, 2014 that as per audit observation dated 3rd July, 2014 it has been indicated that the petitioner was allowed to draw higher scale of pay (Hons. In Sanskrit) with effect from 23rd August, 1989 which appears to be not in order as per G.O. No. 772-Edn (S) dated 8th July, 1974. As per G.O No. 772-Ed(S) dated 8th July, 1974, the School Education Department has sanctioned the staff pattern of Secondary School having classes 5 to 10 wherein four posts were sanctioned in the language group viz 1st, 2nd and 3rd in language. The petitioner was appointed having honours qualification in Sanskrit i.e. the 3rd language as prescribed in the said Government order dated 8th July, 1974 but there is no whisper regarding fixation of pay scale of a teacher either in pass graduate scale or in honours/post graduate scale.

3. Mr. Sakti Pada Jana, learned Advocate appearing for the petitioner contended that after enactment of ROPA 1990 the petitioner's scale of pay was revised with honours scale as prescribed therein irrespective of staff pattern and the same was sanctioned by the D.I of Schools (SE) Purba Midnapur vide Memo No. 573-S dated 14th September, 1992. As such, the respondent concerned cannot raise any objection against the fixation of pay scale which was done as per relevant ROPA Rules, 1990 and as per approval of the D.I of Schools (SE) Purba Midnapur.

4. Mr. Jana further submitted that it has also been stated in the said communication dated 10th October, 2014 that the drawal of higher scale of pay of the petitioner was allowed with effect from 22nd November, 1993. As per Government Order No. 796-Edn (S) dated 22nd November, 1993, all teachers of Secondary Schools and junior higher schools including Madras has of various types with higher qualification of post graduate degree or the equivalent in the relevant subject will get higher scale of pay in relaxation of the above noted staff pattern.

5. Mr. Jana further contended that the concerned authorities have raised the dispute regarding fixation of pay scale of the petitioner after a lapse of about 25 years of service which is not excepted from the statutory authority, when admittedly pay scale of the petitioner was approved by the appropriate authorities. At the time of retirement, such objection regarding fixation of pay scale cannot be sustained in law.

6. Mr. Jana also contended that the petitioner was drawing his pay scale fixed as per relevant ROPA Rules, having qualification of B.A. (Hons) in Sanskrit which is his relevant teaching subject and the same was subsequently approved by the concerned D.I of Schools (SE), Purba Midnapur. As such, there is no fault and/or any misrepresentation and/or fraud on the part of the petitioner for fixation of such pay scale as sanctioned by the concerned authorities. As per fixation of pay

scale in terms of ROPA Rules, 2009 the petitioner's basic pay is fixed at Rs. 28,440/- as on 31st March, 2015. As such, pension and gratuity of the petitioner should be fixed on the basis of such last basic pay.

7. Mr. Jana further submitted that it is evident that to the Hon'ble Courts order petitioner received the Pension Payment Order vide Memo No. K/S/07207/2015 dated 3rd September, 2015 wherefrom it appears that the petitioner's last basic pay is shown as Rs. 25,480/- thus illegally, arbitrarily reducing the same as Rs. 28,440/-.

8. Mr. Jana also contended that the order of the District Inspector of Schools (SE) Purba Midnapur dated 10th October, 2014 is bad in law in view of the fact that the concerned District Inspector of Schools has time to time passed the order thus allowing the petitioner to draw higher scale of pay till date.

9. Mr. Jana further vehemently urged that no steps has been taken by the concerned District Inspector of Schools to modify and/or cancel the order relating to grant of higher scale of pay before the date of the superannuation of the petitioner.

10. Mr. Jana also contended that this act on the part of the respondent authorities is illegal, arbitrary, unfair, unjust and very much against the principle of natural justice and also contrary to Article 300A of the Constitution of India.

11. Mr. Jana further contended that it is a settled position of law as laid down by the Hon'ble Supreme Court in catena of decisions which have been time to time followed by the Hon'ble Division Bench as well as the Learned Single Bench of this Hon'ble Court in several decisions. In support of his contention, Mr. Jana, appearing for the petitioner relied on the decisions reported in Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, and Syed Abdul Qadir and Others Vs. State of Bihar and Others, . Learned Counsel also relied on the latest Supreme Court decision reported in State of Punjab Vs. Rafiq Masih, of the aforesaid decision which is quoted below:--

"Para-12-It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payment have mistakenly been made by the employer, in excess of their entitlement. Be that 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."

Mr. Jana appearing for the petitioner also relied on an unreported decision of the Hon'ble Division Bench passed on 9th September, 2013 in W.P.S.T. No. 216 of 2013 (State of West Bengal & Ors. v. Asis Das Gupta).

12. Per contra, Mr. Ashim Kumar Ganguly, learned Advocate appearing for the respondent submitted that the petitioner's pay scale has been wrongly/inadvertently affixed by the authority by ROPA 1990 therefore Auditing Officer raised objection by the impugned order dated 10th October, 2014 regarding withdrawal of honours scale of pay.

13. Mr. Ganguly further contended that honours graduate scale was allowed to the petitioner by the school authority since the date of his joining as Assistant Teacher with effect from 23rd August, 1998 though the same was approved by the State authority.

14. Mr. Ganguly further vehemently urged that staff pattern has been relaxed in terms of G.O No. 796/Edn(S) dated 22nd November, 1993, so in terms of that circular that the petitioner is entitled to get honours scale of pay with effect from 22nd November, 1993 instead of 23rd August, 1989.

15. Mr. Ganguly further submitted that by virtue of the order dated 6th March, 2013 issued by Director of Pension, Provident Fund and Group Insurance, West Bengal the authority is entitled to deduct overdrawal amount from the gratuity amount of the incumbent.

16. Mr. Ganguly also vehemently urged that the authority has right to deduct the overdrawal amount from the gratuity amount as and when it is detected.

17. Mr. Ganguly also contended that mistake can be rectified by the authority when it is detected. In support of his contention Mr. Ganguly relied on an Apex Court decision reported in Union of India (UOI) Vs. S.R. Dhingra and Others, which are quoted below:--

"Para-19-Learned Additional Solicitor General submitted that while fixing the pension notionally, due to a clerical mistake it has been fixed at much higher amount, and this error, when discovered, was later rectified and the pension of the respondents was correctly revised w.e.f. 1.1.1986.

Para-23- We are of the opinion that the clarification of the Railway Board issued dated 29.12.1999 clarifying that the running allowance which was already taken into account for pension and other benefits at the time of retirement is not to be

added to the pay of pre-1986 retirees revised on notional basis as on 1.1.1986 is valid. It appears that due to a clerical error the notional benefits of the respondents w.e.f. 1.1.1986 was wrongly fixed and such retired employees are getting excess pension. It is well-settled that a mistake does not confer any right to any party, and can be corrected."

Mr. Ganguly also relied on a Supreme Court decision reported in Union of India (UOI) and Another Vs. Narendra Singh, which is quoted below:--

"Para-28- It is true that the mistake was of the Department and the respondent was promoted though he was not eligible and qualified. But, we cannot countenance the submission of the respondent that the mistake cannot be corrected. Mistakes are mistakes and they can always be corrected by following due process of law. In I.C.A.R. and another Vs. T.K. Suryanarayan and others, , it was held that if erroneous promotion is given by wrongly interpreting the rules, the employer cannot be prevented from applying the rules rightly and in correcting the mistake. It may cause hardship to the employees but a court of law cannot ignore Statutory Rules."

18. Considering the submissions advanced by the learned Advocates appearing for the respective parties and after perusing the records I find it is revealed from the record that the petitioner was appointed as an Assistant Teacher on 23rd August, 1989 in Gopalganj Priyanath Bani Bhawan District-Purba Midnapur and his appointment was duly approved by the concerned authority. From the date of his joining petitioner has been allowed to enjoy Honour"" scale of pay by the authority which was time to time revised by the authority as per ROPA, therefore just five months before superannuation of the petitioner the impugned notice of deduction was issued on 10th October, 2014 which is patently bad and illegal as per

"(i) Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, ;

(ii) Syed Abdul Qadir and Others Vs. State of Bihar and Others, ; and

(iii) State of Punjab and Ors v. Rafiq Masih, unreported decision of the Supreme Court (Civil Appeal No. 11527 of 2014)

(iv) Further the judgment delivered in Civil Appeal No. 13407 of 2015 (B. Radhakrishnan v. The State of Tamil Nadu & Ors) in paragraph 18 same point has been considered. Paragraph 18 is quoted below:--

"In the light of these reasons and further keeping in view the short controversy involved in the case which is somewhat akin to the case of Shyam Banu (supra) we are of the view that similar directions, which were given in the case of Shyam Babu, can also be given in these appeals against the respondents. In other words, it shall only be just and proper not to recover any excess amount from the appellants, which has been paid to them on the basis of stepping up of their pay scale. It is much more so when as mentioned, the appellants have given up their challenge to the respondent's main action taken against the appellants

objecting for the grant of benefit of stepping up of their pay and confined their attack to the issue of recovery of excess amount from them".

(Emphasis supplied)

19. In the present case, undisputedly the respondent authority has sanctioned honours scale of pay to the petitioner with effect from his joining on 23rd August, 1989. Now issuing the impugned notice on 10th October, 2014 before five months from the date of superannuation which was due on 31st March, 2015 the respondent authority is informing the petitioner to that effect that the petitioner has been wrongly granted honours scale of pay with effect from 23rd August, 1989. But actually the petitioner is entitled to enjoy honours graduate scale of pay with effect from 22nd November, 1983 when staff pattern was relaxed not on 23rd August 1989 which is totally contrary to the specific direction of the Hon'ble Supreme Court in the case of State of Punjab & Ors (supra) where it is clearly held that no recovery can be made from a retired employee who is due to retire within one year from the date of retirement. Furthermore, recovery from the petitioner also is not permissible since the excessive amount had been made for a period in excess of five years before the issuance of the year of recovery.

20. It is evident from supplementary affidavit that on 3rd September, 2015 the pension payment order was issued by the Director of Pension, Provident Fund and Group Insurance after deducting Rs. 6,20,064/- towards overdrawal which is not permissible as per specific direction of the Hon'ble Supreme Court mentioned in the judgment of State of Punjab and Others v. Rafiq Masih (supra) and judgment delivered in B. Radhakrishnan v. The State of Tamil Nadu & Ors (supra) I have no hesitation to hold that the respondent No. 3 the District Inspector of School (SE) Purba Midnapur had no authority to issue the impugned order dated 10th October, 2014 whereby holding that drawal of higher scale of pay (Honours in Sanskrit) with effect from 23rd August, 1989 appears to be not in order is wholly misconceive and also bad in law.

21. Therefore, pension payment order subsequently issued on 3rd September, 2015 by the Treasury Officer thus deducting Rs. 6,20,064/- by recovering the said amount from the gratuity of the said petitioner on the basis of the so called modified fixation order passed five months before the date of retirement of the petitioner on attending the age of superannuation is also illegal pursuant to the specific direction of the Hon'ble Supreme Court in case of Punjab and Others (supra).

22. For the aforesaid reasons I quashed the decision of the respondent No. 3 dated 10.10.2014 regarding overdrawal and the actual recovery of Rs. 6,20,064/- from the gratuity amount of the petitioner vide the pension payment order dated 3rd September, 2015 issued by the respondent No. 4 is also hereby set aside and quashed.

23. Since a considerable time has already been elapsed I therefore, direct the respondent authorities to refund the amount of Rs. 6,20,064/- already recovered

from the petitioner's gratuity amount without any further delay but positively within a period of six weeks from the date of communication of this order and to refix the pension of the petitioner accordingly.

24. This writ petition is disposed of without any order as to costs.

25. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties after fulfilling all the formalities.