(2016) 01 GAU CK 0008

GAUHATI HIGH COURT

Case No: Writ Petition (C) No.2199 of 2014.

Mrs. Mahila Majumder alias Mahela Majumder, wife of late Abdul Matin Mazumder, Lakhisahar, Hailakandi post office, Hailakandi district(Assam) - Petitioner @HASH — APPELLANT

State of Assam represented by the Commissioner and Secretary, PWD

Vs

RESPONDENT

Date of Decision: Jan. 25, 2016

Acts Referred:

- Assam Services (Pension) Rules, 1969 - Rule 21

Citation: (2016) 5 GauLJ 454 : (2016) 5 GauLR 763 : (2016) 2 NEJ 613

Hon'ble Judges: Ujjal Bhuyan, J.

Bench: Single Bench

Advocate: Mr MJ Quadir, Advocate, for the Petitioner; Ms B. Bhuyan, Advocate, for the Respondents Nos. 1 and 4 to 6; Ms. B. Tamuli, Advocate, for the Respondents Nos. 2 and 3

Final Decision: Allowed

Judgement

Mr. Ujjal Bhuyan, J. - Heard Mr. MJ Quadir, the learned counsel for the petitioner; Ms. B. Bhuyan, the learned Standing Counsel for PWD and Ms. B. Tamuli, the learned Standing Counsel for the Accountant General, Assam.

2. Petitioner is the widow of late Abdul Matin Mazumder who had retired from service as Assistant Engineer in Dokmoka Roads Division of Pubic Works Department on attaining

the age of superannuation on 31.8.2006. However, as his retirement dues were not released by the department petitioner''s husband had represented to the Government from time to time but he was still not paid his retirement dues. In the meanwhile petitioner''s husband met with a motor vehicle accident and later suffered a stroke resulting in his becoming totally immobile and even then he was not paid his retirement dues. At that stage petitioner approached this Court by filing WP(C) 4020/2013.

3. This Court by the order dated 4.9.2013 disposed of the said writ petition by directing the respondents to settle the pension case of the petitioner at the earliest but at any rate not later than 15.10.2013. It was observed that there was no excuse on the part of the respondents in not releasing the retirement dues of the petitioner''s husband.

4. At this stage it may be mentioned that the Executive Engineer, Dokmoka Division, while forwarding the service book of the petitioner''s husband to the higher authorities also submitted one recovery statement for Rs. 30,59,970/-.

5. It appears that PWD authorities had forwarded the pension/family pension proposal of the petitioner to the office of the Accountant General, Assam wherein it was mentioned that an amount of Rs. 30,59,970/- was recoverable from the petitioner. The office of the Account General issued instructions to the Treasury Officer of Hailakandi Treasury for payment of family pension of Rs. 8,240/- per month, life-time arrear of pension/family pension of Rs. 5,573/- per month and the death-cum-retirement gratuity of Rs. 3,37,442/- to the petitioner. However, it was mentioned that an amount of Rs 30,59,970/- would be adjusted from the life-time pension. Aggrieved, the present writ petition has been filed.

6. The contention of the petitioner is that no disciplinary proceeding was ever initiated against her husband during his service career. There is also no order of the disciplinary authority following any departmental proceeding for recovery of the aforesaid amount from petitioner''s husband. Therefore, such recovery is impermissible under Rule 21 of the Assam Services(Pension) Rules, 1969.

7. Respondent 1, 4 and 5 have filed a common affidavit. The stand taken by them in the affidavit is that at the relevant point of time petitioner''s husband was serving in Dokmoka Road Division. There was shortage of 542.004 matric tonne bitumen worth Rs. 29,81,032/- as per the inspection report. Petitioner''s husband was directed to come to the office of the Executive Engineer by letter dated 23.1.2010 but he did not appear. Thereafter subsequent letters had been issued to him but he continued with his non-cooperative attitude. Ultimately, Govt.-dues were worked out and forwarded to the higher authorities on 26.9.2013. The further stand taken is that the recoverable amount of Rs 30 lakh was known to the husband of petitioner as he had not submitted the bitumen statement while handing over the charge of the store. Therefore the action taken for recovery of the due amount from the retirement dues of the petitioner''s husband is justified.

8. Respondent 6 in his affidavit has stated that the petitioner never approached him for release of her pensionary dues. He has also stated that he was not authorised to effect recovery of Govt.-dues.

9. The submissions made by the learned counsel for the parties are on the pleaded lines and therefore a detailed reference to such submissions is not necessary. However, learned counsel Ms. B. Tamuli submits that the office of the AG had issued the recovery order on the basis of the requisition sent by the administrative department.

10. After hearing the submissions made by the learned counsel for the parties and on perusal of the material on record it is evident that during his service career no departmental proceeding was drawn up against the petitioner''s husband for the alleged shortage of bitumen, the value of which has been assessed at Rs. 30,59,970/- and which is sought to be recovered from the retirement dues. As a matter of fact there is no finding to that effect by any of the authorities. There is not even a formal allegation or charge against the petitioner''s husband. It further transpires that while he was in service no notice was issued to him in this regard; notices came to be issued only after his retirement from service.

11. Rule 21 of the Assam Services (Pension) Rules, 1969 empowers the State to withhold whole or a part of the pension, whether permanently or for a specified period, and also for recovery of any pecuniary loss caused to the Government from the pensioner, provided the pensioner is found guilty of grave misconduct or negligence in a departmental or judicial proceeding. Therefore, Rule 21 while empowering the State to withhold pension or to make recovery from the pension any pecuniary loss caused to the government, the condition precedent for invocation of the said provision is that there must be a departmental or judicial proceeding against the pensioner culminating in a finding of guilt of the pensioner to justify such withholding and recovery. If a departmental proceeding is not instituted while the pensioner was in service, the same cannot be instituted after his retirement without the sanction of the Governor. There is also a bar on initiation of such departmental proceeding if the allegation pertains to an event which took place more than 4 years prior to such institution.

12. On a careful reading of Rule 21 in the backdrop of the contextual facts of the present case which is noticed above this Court finds no conclusive finding of any authority following any departmental or judicial proceeding against the petitioner''s husband that he was responsible for causing pecuniary loss to the Government to the extent of Rs. 30,59,970/-. At this stage Mr Quadir intervenes and submits that even after his retirement when the petitioner''s husband received notice from the departmental authority he submitted his explanation clearly denying that he was responsible for the loss of bitumen, as alleged.

13. It further appears that no recovery was made from the salary of the petitioner''s husband while he was in service. The law on this point has been settled by the Apex

Court in **State of Punjab and others v. Rafiq Masih (White Washer) and others reported in (2015) 4 SCC 334**. After surveying the previous judgments relating to recovery from retirement dues on account of payment of excess salary etc the Apex Court summed up the legal position in the following manner.

"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, 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 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 be far outweigh the equitable balance of the employer''s right to recover".

14. Following the Apex Court judgment this Court in **Dipendra Nath Thakuria and others v. Assam State Electricity Board and others reported in 2015 (4) GLT 32** has held that recovery from retirement dues of what was construed to be the excess salary paid was not permissible.

15. Having regard to the above this Court is of the un-hesitant view that the impugned decision of the respondents is wholly unsustainable and is accordingly set aside and quashed. Consequently, respondents are directed not to make deduction of the aforesaid amount of Rs. 30,59,970/- from the retirement/terminal benefits of the petitioner''s husband. Consequently, respondent 6 shall release the retirement entitlements of the petitioner without delay. The writ petition is allowed. However, there will be no order as to cost.