(2012) 06 CAL CK 0012

Calcutta High Court

Case No: Writ Petition No. 9114 (W) of 2008

Smt. Chhabi Goswami		APPELLANT
	Vs	
State of West Bengal and Others		RESPONDENT

Date of Decision: June 11, 2012

Acts Referred:

- Contract Act, 1872 - Section 72

Citation: (2012) 3 CALLT 372 : (2013) 1 CHN 151

Hon'ble Judges: Aniruddha Bose, J

Bench: Single Bench

Advocate: Usha Maity, for the Appellant; M.M. Das and Mr. Goutam Som for the State, for the Respondent

Judgement

Aniruddha Bose, J.

In this writ petition, the petitioner questions the legality of the action of the education department of the Government of West Bengal directing recovery of a sum of Rs. 71,801/- (rupees seventy one thousand eight hundred one only) from her dues as excess sum drawn. Such direction was issued at the time of processing of her pension papers. Other prayers of the petitioner include direction for refund of Rs. 1391/- which the petitioner claims was wrongfully realized from her again as overdrawn amount which she claims is her legitimate entitlement on account of completion of 18 years and 20 years of service. Further refund of Rs. 1980/- has been prayed for, which was realised from her as the government''s contribution towards contributory provident fund, along with interest. The petitioner had joined Belpahari Girls Junior High School as an assistant teacher on 1 March 1968. Between 25 June 1979 and 21 May 1982, the petitioner could not attend her regular duties on account of illness. For the period between 25 June 1979 and 24 December 1980 the petitioner was granted special leave with full pay by the administrator of the school. For the period between 25 December 1980 and 21 May 1982 the petitioner was granted extraordinary leave without pay, covering a period of one year four months

and twenty days. The petitioner claims to have submitted her option form under the West Bengal Services (Revision of Pay & Allowance) Rules, 1981 (ROPA Rules) on the date of her resumption of duty only, on 22 May 1982, and she wanted her option to be effective from 1 April 1981. The ROPA Rules, 1981 had come into effect during the period the petitioner was on leave.

2. The petitioner submitted her option form for fixation of initial pay in the revised scale as per the G.O. No. 372/EDN (B) dated 31 July 1981 with effect from 1 April 1981. The petitioner has reached her superannuation age on 30 June 2008. This writ petition was filed on 9 May 2008, with specific complaint against stoppage of payment of salary from the month of March 2008. It appears that the authorities had curtailed one increment, and the petitioner had been informed that due to wrong fixation of pay, there was overdrawal in respect of her salary to the extent of Rs. 71,801/-. The school authorities were informed by the office of the District Inspector of Schools (SE), (DIS), Paschim Medinipur that pay of the petitioner as per ROPA 1981 had been provisionally fixed with effect from 22 May 1982. Thereafter, the same authority i.e. the DIS, by another memorandum dated 28 January 1988 refixed the scale of pay provisionally in the next higher scale on completion of 18 years of continuous service with effect from 1 March 1986. This was done computing 18 years from her date of joining the service on 1 March 1968, and included the period she was under leave for such computation.

3. The petitioner also had obtained the benefit of enhancing her qualification as she got her Master''s degree in Islamic history and she was granted scale of pay in the scale of Rs. 550/-Rs. 1470/-with effect from 6 April 1986, this being the M.A. scale of pay. On the basis of the last pay certificate issued by the authorities of Belpahari school, the petitioner claims to have drawn her substantive pay of Rs. 575/- and dearness pay of Rs. 155/- per month along with other admissible allowance.

4. She joined Aliganj Rishi Rajnarayan Balika Vidyalaya (Aliganj Vidyalaya) where she served till she reached her age of superannuation, in the capacity of assistant teacher only, with pay of Rs. 575/- with usual allowance. Her appointment to this institution was approved in a vacancy created on retirement of one Nilima Sen, who also had the qualification of M.A. and B.T. It is the contention of the petitioner that the fact that she was entitled to get the post graduate scale of pay was endorsed by the DIS in his communications to the secretary of Aliganj Vidyalaya. Copies of these communications have been made Annexures "P-10", "P10(1)" and "P10(2)" to the writ petition. There was further refixation of her scale of pay under ROPA - 1990 and the petitioner exercised her option for remaining in the existing scale of pay of Rs. 550/-- 1470/- at that point of time till 1 April 1986 and thereafter to come under the revised scale of pay of Rs. 1780-3780/-, as per memorandum of the educational authorities bearing No. 33/EDN (B) dated 3 March 1990. The petitioner had also exercised her option under the ROPA Rules. 1998 on 29 July 1999 by indicating that she was inclined to continue in her then prevailing existing scale of pay of Rs. 1780 -

3780/- in the substantive post of assistant teacher and thereafter to shift to the revised scale of pay of Rs. 6000/- and Rs. 1200/- with effect from 1 April 1996. The petitioner also submitted a form for fixing her initial pay in revised scale under memorandum No. 25-SE (B) dated 12 February 1999 and her pay was fixed by the DIS on 23 September 1999 at Rs. 8300/-.

5. Her entitlement in the manner fixed earlier was objected to by the DIS at the time of finalization of her retiral benefits and a memorandum bearing No. 487/S2 dated 25 March 2008 was communicated to the headmistress of the school by the said authority, the copy of which has been made Annexure "P22" to the writ petition. It has been indicated in this memorandum that objection had been raised by the Deputy Director. Accounts in respect of pension of the petitioner. It was stipulated in this memorandum:-

In the I.P.F. of ROPA ''81 in case of leave (Leave without pay) the pay should be fixed within stipulated period from the date of resumption and as such as she was on leave without pay from 25.12.80 to 21.5.82 her pay should be fixed not before 22.5.82 on the basic of the option therefore should be exercised with effect from the same date. Thus her pay on 22.5.82, is to be fixed as Rs. 460/- and getting yearly normal increments her pay on 6.4.86 as she opted ROPA ''90 is to be fixed first at Rs. 1555/- in the scale of pay Rs. 1420/- to 3130/- including experience benefit of 10 years service and at Rs. 1780/- on the same date in the scale of pay Rs. 1780-Rs. 3780/-.

In terms of para 6e(2) Note 2 of G.O. No. 33-Edn (B) dated 07.3.90 her pay ought to be fixed first in the lower scale as she is eligible to get higher scale on a day after 01.4.86.

The pay in the ROPA ''90 should be fixed on the resultant pay with yearly increment and all other benefits as per ROPA ''90 on the date she opted for 01.04.96 at Rs. 8050/-.

The statement of excess drawal is enclosed herewith as she requested for.

This should be treated as extremely urgent since during her service period it should be adjusted to avoid further litigation.

To this memorandum, a statement had been annexed showing the sum month by month alleged to have been overdrawn by the petitioner from 1 April 1983 till 31 March 2008.

6. In their affidavit-in-opposition, case made out by the state respondents is that for computing 18 years of service to determine the petitioner''s eligibility to enjoy the career advancement benefit the period between 25 December 1980 and 21 May 1982 ought to have been excluded. According to the respondents, the period for service benefit for completion of 18 and 20 years of service ought to be deferred from 1 March 1986 and 1 March 1988 on the ground that she enjoyed benefit of

extra-ordinary leave for 512 days. Objection has also been taken on petitioner''s drawing post-graduate scale of pay. According to the respondents, since the petitioner joined at graduate scale of pay, she was entitled to draw postgraduate scale of pay with effect from 4 February 1988, but she drew such pay from 6 April 1988. It is also contended that the pay of the petitioner as per ROPA 1990 was wrongly fixed at Rs. 1845/- instead of Rs. 1780/-. The petitioner being appointed as a graduate teacher was entitled to get 10 years benefit first, and thereafter her pay was required to be refixed. A further defect was pointed out over her eligibility to get increment under the ROPA 81. On this issue, the respondents'' case is that such increment should have been granted on completion of one year from 25 May 1982, being the date on which she resumed her duty and not from any earlier date.

7. To justify their action in effecting recovery at a time close to the date of retirement of the petitioner, the respondents have referred to a declaration made by the petitioner on 29 July 1999, by which she undertook to refund to the Government any excess payment received by her as soon as such fact comes to the notice. Such declaration was made by the petitioner in her option form under ROPA 98. It has also been contended on behalf of the state respondents that there was significant delay on the part of the school authorities in sending service related records of the petitioner for computation of her post-retiral benefits, and for this reason the computation could not be made earlier.

8. On behalf of the petitioner. Ms. Maity has argued that deduction of any money from an employee on the verge of her retirement cannot be made on the allegation of overdrawal in the past unless it is shown that such overdrawal was on account of any misrepresentation or false statement made on the part of such employee. In this regard, a judgment of an Hon''ble Single Judge of this Court in the case of Jayanti Sengupta v. State of West Bengal & Ors. reported in (2009)1 CHN 551 has been relied upon by her.

9. The other judgments relied on by Ms. Maity are decisions of this Court in Kamala Kant Jha Vs. State of West Bengal and Others, , Kalyan Kr. Chattopadhyay v. The State of West Bengal & Ors, (2006) 1 WBLR (Cal) 591 and Sk. Md. Jakeria v. The State of West Bengal & Ors. (2008) 1 CLJ (Cal) 1901 In the case of Kamala Kant Jha v. State of West Bengal & Ors. reported in (2005)1 CHN 54, it has been held:-

12. In such view of the matter, even if it is found that such pay fixation was made erroneously by the authorities concerned and any overdrawal was made by the petitioner on account of such erroneous pay fixation, such overdrawal cannot be adjusted and/or realized from the retiral benefits of the petitioner by the respondents in view of the decision of the Hon''ble Supreme Court in the case of Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, .

13. That apart, when such refixation was not made in terms of the interim order of this Court, the submission made by Mr. Bhattacharya to the effect that the

petitioner cannot be allowed to enjoy the benefit of the interim order after dismissal of the writ petition on default, does not commence to this Court at all.

14. I, however, find substance in the submissions of the learned Advocate for the petitioner and I hold the petitioner is entitled to get the benefit of pay fixation as contained in Annexure ''P-3'' to this petition. By following the decision of the Hon''ble Apex Court in the case of Shyam Babu Verma (supra), I further hold that even if any excess payment was found to have been made to the petitioner while he was in service, such excess payment cannot be realised and/or adjusted from the retiral benefits of the petitioner after his retirement, particularly when it is found that the petitioner had no hand either in the process of such refixation of pay or in the process of such alleged overpayment.

10. On merit, Ms. Maity has sought to justify the legality of fixation of pay made in the case of the petitioner, arguing that the period the petitioner spent on extraordinary leave without pay ought to be computed for determining the length of her qualifying service. On this point, she has relied on paragraph 7(f) of the West Bengal Recongised Non-Government Educational Institution Employees (Death-cum-Retirement Benefit) Scheme, 1981, which provides that extraordinary leave granted on medical certificate shall qualify for being added to the period of qualifying service for pension.

11. She has also relied on a memorandum bearing No. 739/DPPG dated 19 July 2010 issued by the Directorate of Pension. Provident Fund and Group Insurance of the Finance Department, Government of West Bengal, to resist recovery of overdrawn amount at such a late stage of her career. In this memorandum, issued to the DIS, Paschim Medinipur, it has been stipulated:-

With reference to captioned subject it is to state that Chief Secretary Govt. of West Bengal vide his order dated 24.02.10 communicated vide memo. No. 171-t/JD/L/2S-301/09, dated 08.03.10 of Judicial Department, instructed DPPG and his subordinate officers. ".....to ensure that henceforth no recovery from the pensionary benefit of teaching or non-teaching staff be made except in the cases of the and the constitutions as mentioned by the Hon''ble Supreme Court. I understand that an order to that effect has already been issued by the Secretary, School Education Department." The relevant portion of the order of Hon''ble Supreme Court states "This Court, in a Catena of decision, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee and (b) if such excess payment was made by the employee by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretations of rule/order, which is subsequently found to be erroneous. The relief against recovery is granted by court not because of any right in the employees, but in equity, exercising Judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But if in a given case, it is

proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or increase where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of Judicial discretion, Court may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess."

Persuing the aforesaid facts and records, it transpires that if (1) overdrawal/excess amount was not paid on account of any misrepresentation or fraud on the part of the employee

Or (2) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowances or on the basis of a particular interpretation of rule/order which is subsequently found to be erroneous

Or (3) the employee had no knowledge that the payment received was in excess of what was due or wrongly paid

Or (4) the error leading to such wrong calculation was not detected or corrected within a short time of wrong payment, no overdrawal/excess payment is to be deducted from his post retiral benefit.

As Pension Sanctioning Authority, he has to send the pension case either recovering overdrawal mentioning one/more grounds of the above four or without deducting overdrawal in the light of four aforementioned grounds.

In case, the overdrawal does not match any of the four grounds, same is to be adjusted/recovered in his service period or before retirement as such recovery can''t be made after retirement.

So henceforth pension cases from his end must be forwarded with certificate mentioning ground/grounds from the four stated reasons specified by Hon''ble Supreme Court.

12. The state respondents have been represented in this matter by Mr. M.M. Das, learned counsel. He has argued that any amount paid on erroneous understanding of Government Order has to be recovered, even if wrong fixation has been made by the authorities. He has relied on a Division Bench judgment of the Madras High Court in the case of R. Premakumari v. State of Tamil Nadu reported in (2008) 1 LLN 298. In this judgment, it has been observed:-

7. Sri M.C. Swamy, learned counsel appearing for the appellant stated that in terms of the judgment of the Division Bench of this Court reported in [(2008)1 LLN 314] P. Arumugam v. Registrar, Tamil University, Thanjavur, even if the amount is paid erroneously, the same cannot be recovered. In that case, this Court has held that since, the respondent-University was responsible for wrong fixation of pay the employee cannot be blamed on that score. Therefore, having regard to the various factors, the respondent-University was retrained from attempting to reverse the

whole process of pay fixation and the liability has to be borne for the wrong fixation by the University itself.

8. We, do not think that such a judgment lays down any principle of law for all time to come. In the case, the pension amount was sought to be deducted on the plea that the earlier pay fixation was wrong after retirement. We do not think that the said decision will have any application to the facts of the present case.

9. The second ground of attack by the learned counsel appearing for the appellant is that the finding of the learned Judge found in para 9 is erroneous that even if it is a case of wrong fixation, the employee is entitled for notice and, therefore, this Court must follow the decision of the Supreme Court reported in Sahib Ram Vs. State of Haryana and Others, . In that decision, it is clearly stated by the Supreme Court, that even if wrong fixation has been made the authorities, when recovery of the sum is made, minimum principle of natural justice has to be followed and, therefore, the employee is entitled for notice. We are bound to follow the said binding.....Therefore, the order of the learned Judge found in Para 9 of the order to the extent is legal and proper.

13. Mr. Das has also referred to the declaration made by the petitioner while exercising option under the 1998 Control Order, which was in a standard printed format in the option form itself. This declaration was to the following effect:-

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 my 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.

14. Further submission of Mr. Das is that earlier fixation of pay scale was provisional and in any event the state had fixed her pay at Rs. 460/- per month with effect from 22 May only and the petitioner could not have raised the dispute after 28 years on this count. He has argued that the employer is entitled to recover overdrawn amount, and in support of his submissions he has also relied on a judgment of the Supreme Court in the case of Union of India and Others Vs. Smt. Sujatha Vedachalam and Another,]. He has argued that the fact of overdrawal had been brought to the notice of the petitioner before her retirement and the recovery process also started while she was in service, and hence the ratio of the decisions of this Court relied on by Ms. Maity did not apply as in the case of the petitioner, recovery was not sought to be made from her retiral dues, but the process started while she was in service.

15. In this matter, basic contention of the respondents is that it was not permissible to treat entitlement of the petitioner her salary as per revised scale of the ROPA 1981 with effect from 1 March 1986. Such effect should have been given from 22 May 1982. Case of the respondents is that in the "IPF" (initial pay fixation) of ROPA 1981, in case of leave without pay, revised scale of pay ought to be fixed from the

date of resumption of duty by an incumbent. The heads under which recovery is being made are treated as excess, which occurred as part of a chain reaction from this anomaly. The entitlement to her increments as well as experience benefit is also sought to be deferred on that basis. Similarly, according to the respondents, under the memorandum dated 25 March 2008, pay in ROPA 1990 ought to have been fixed on the revised scale with yearly increment arriving at the sum on the basis of her actual computation of revised scale of pay under the ROPA 1981, with effect from 22 may 1982. On the other hand, contention of the petitioner is that in case of extraordinary leave, the period spent under such leave ought to be computed as regular service in terms of the provisions of 1971 of the West Bengal recognised non-government educational institutions employees for death-cum-retirement scheme 1981. The ratio of two decisions of the Supreme Court in the cases of Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, and Sahib Ram Vs. State of Haryana and Others, has been relied on by Ms. Maity in support of her contention that in any event, such recovery cannot be made on the verge of her retirement.

16. Authorities are uniform on the point that in the event an employee due to no fault or misrepresentation on her part receives payment in excess of what such employee would have been entitled to in accordance with law, on equitable ground it would be impermissible to recover the overdrawn amount from the employee after a long period of time. In the case of Sahib Ram v. State of Haryana (supra) which has been relied upon by the Division Bench of the High Court of Madras in the case of R. Premakumari (supra) it has been held:-

5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation the appellant had been paid his salary on the revised scale. However, 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. Under the circumstances the amount paid till date may not be recovered from the appellant....

17. This judgment in substance reiterated the principle applied by the Supreme Court in the case of Shyam Babu Verma v. Union of India (supra). In this judgment, it was held:-

11. Although we have held that the petitioners were entitled only to the pay scale of Rs. 330-480 In terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs. 330-560 but as they have received the scale of Rs. 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps

should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same.

18. What has been argued in this matter on behalf of the respondents is that fixation of pay in revised scale as per ROPA 1981 was made in case of the petitioner from 22 May 1982 only. In the memorandum bearing No. 929-S/2 dated 16 May 1984, a copy of which has been made Annexure "P5" to the petition, the DIS had fixed provisionally the pay of the petitioner at Rs. 460 per month with effect from 22 May 1982 only. It appears that in spite of such provisional measure, the petitioner was given certain treating her to be in the revised scale from 1 march 1986. Such benefit was in the form of the next higher scale of pay after 18 years of satisfactory service with effect from 1 March 1986. This appears from a memorandum issued by the same authority on 26 January 1988, a copy of which has been made annexure P6 to the writ petition though this memorandum also stipulates that this was being done provisionally. It was also specified by the DIS on 28 January 1988 under memorandum No. 84-S/2 dated 26 January 1988 (Annexure "P7" to the writ petition) that the petitioner is entitled to draw M.A. scale of pay of" Rs. 550-470 with effect from 6 April 1986. When the petitioner joined the Aligang Vidyalaya, from where she superannuated, the DIS under memorandum 928-S dated 1 March 1988 (Annexure "P9" to the writ petition), had indicated that the petitioner was entitled to get benefit of the scale of pay meant for graduate teachers. But this was followed by another memorandum bearing No. 2112-S dated 30 June 1989 (Annexure "P10" to the writ petition), again emanating from the DIS in which it was stated that the petitioner was entitled to get postgraduate scale from 4 February 1988, from her date of appointment in the school, as per her last pay certificate of previous school. The memorandum dated 30 June 1989 also specified that the date of increment mentioned in the last pay certificate was to remain unchanged. By another memorandum bearing No. 498-S(2) dated 5 February 1992 (Annexure "P9"), her entitlement to draw salary In M.A. scale of pay in conformity with the last pay certificate was specified and it was stipulated that she was also entitled to draw M.A. scale of pay. This memorandum originated again from the DIS. There was further confirmation of her entitlement on this basis by a memorandum bearing No. 3994-S dated 30 July 1993, a copy of which has been made Annexure "P10(2)" to the writ petition. It is apparent from these memorandums that the educational authorities had scrutinized her entitlement on various dates and it was not a case where an inadvertent error had crept in the calculation and went unnoticed altogether. Rather, there was conscious decision on the part of the DIS, application of mind, in taking decision in that regard.

19. In support of the case of the petitioner, Ms. Maity had relied on four decisions of this Court in the cases of (i) Jayanti Sengupta v. State of West Bengal reported in (2009)1 CHN 551, (ii) Kamala Kant Jha Vs. State of West Bengal and Others, (iii) Kalyan Kr. Chattopadhyay v. The State of West Bengal & Ors. reported in (2006) 1

WBLR (Cal) 591, and (iv) Sk. Md. Jakeria v. The State of West Bengal & Ors. reported in (2008)1 CLJ (Cal) 190, in all these cases, such delayed recovery has been held to be impermissible from the retiral dues of the petitioners therein.

20. One factual element which distinguishes the petitioner''s case from these four authorities is that in those four cases, recovery process was sought to be made from retiral dues of the concerned employee but in this case, the petitioner was asked to refund the said amount while she was in service, and the recovery process started also while she was in service. But will this change in the factual context be of material significance while applying the principle which forms the basis of the two authorities of the Supreme Court in the cases of Sahib Singh (supra) and Shyam Babu Verma (supra)? I do not accept the contention of the respondents that the petitioner knew of her position in the year 1984 only that she was being given benefits accruing from such revision with effect from 22 May 1982 and she cannot revive that issue after so many years. The fact here is that the petitioner has been given such benefits from the year 1986 only and this position continued till her service books were sent for finalisation of her retrial dues. To the memorandum directing recovery, a statement has been annexed showing the manner in which such recovery was contemplated. From this statement, I find that excess overdrawal has been computed on monthly basis from 1 April 1983 uptil 31 March 2008. Though recovery is sought to be made on a month by month basis, the root of such exercise dates back to the years 1981 and 1986. According to the respondents all calculations pertaining to her benefits ought to have been computed on the basis of revision of her pay-scale from 22 May 1982, but such benefits were accorded on a mistaken calculation from an earlier date.

21. No case has been made out that the petitioner had made any misrepresentation or submitted false particulars as regards her entitlement. It is apparent from these facts that such fixation was made due to mistake on the part of the respondents, if there was such mistake in computing her benefits.

22. The employer is entitled to make recovery of overdrawn amount on the basis of principle of payment made under mistake, as enshrined in section 72 of the Contract Act, 1872. Such recovery is permissible on equitable ground, and while directing such recovery, the Court has to consider competing equities. This principle has been explained by an Hon''ble single Judge of this Court in the case of Kalyan Kr. Chattopadhyay (supra) in which justification of recovery on the part of the respondents under this principle was rejected by this Court relying on a decision of the Supreme Court in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, . The two decisions relied by Mr. Das do not lay down the ratio that such delayed recovery of overdrawal is permissible irrespective of the time gap between the date on such mistake was committed and the date on which such recovery process is initiated. This aspect of the controversy was not considered by the Supreme Court in the case of Union of India v. Sujata Vedachalam (supra), and

this decisions not a binding authority on this issue. The judgment of the High Court of Madras in the case of R. Premakumari also does not lay down any ratio, but was delivered in the factual context of that case.

23. The four decisions of this Court relate to cases where recovery was sought to be made from retiral dues of the employees, who had applied before this Court seeking restraint order on such recovery. But this distinction in my opinion ought not to expose the petitioner to recovery proceeding from her monthly salary and emoluments on the verge of retirement, nor should such sum shall be permitted to be recovered from her retiral dues. In the decisions of Shyam Babu Verma (supra) and Sahib Ram (supra) what has been decided is that sum paid in excess of actual entitlement ought not to be recovered from an employee after a long period of time, if the employee is not responsible for extracting any undeserved benefit. Whether steps are taken to effect such recovery while an employee is in service or after his retirement is not of much relevance. What is impermissible on equitable ground is realization of excess payment made under mistake of the employer himself after lapse of a long period of time. Neither of these two authorities lay down a principle that recovery within the service period even after a long period of time from the date mistake was committed would be permissible. The petitioner has been able to establish in this proceeding that she could not be held responsible for getting any benefit or extra gain at the cost of the exchequer by any fraudulent means. Mistake, if any, was obviously made in this case by the office of the DIS or other authorities dealing with disbursement of salary to teaching staff of schools at the district level. The complicity of the petitioner in that process has not been alleged. In the light of these facts, I hold that the sum sought to be realized from the petitioner as overdrawn amount shall not be permitted.

24. On behalf of the respondents, it was also submitted that the petitioner while in service had given a declaration to the effect that she will refund the sum if found in excess. That aspect of the matter has also been considered in the case of Kalyan Kumar Chattopadhyay v. State of West Bengal (supra) albeit at post retirement stage. In this judgment, it has been held:-

38. Let me now consider the effect of giving the declaration by the petitioner at the time of submission of his application for grant of pension.

39. On examination of the extant Scheme, it appears to this Court that no such application is contemplated under the said Scheme for grant of pension to the retired person. Even the grant of such declaration is not provided under the said scheme.

40. The retired persons always show their eagerness to get their retiral dues settled at an early date. With the usual anxieties and worries, the retired persons often give such undertaking and/or declaration in expectation of early settlement of their retiral dues.

41. The State should not however take advantage of such undertaking and/or declaration given by such retired persons when the respondent''s right to recover such overdrawal amount which was paid to the petitioner on account of mistake on the part of the respondent, has not been recognised by the Hon''ble Supreme Court in the aforesaid decisions cited by Mr. Bhattacharya.

42. This Court also holds that when the petitioner was allowed to draw such excess amount due to no fault on the part of the petitioner, equity demands that such excess amount should not be allowed to be adjusted against the retiral dues of the petitioner.

43. This Court further holds that since the declaration was taken from the petitioner by the concerned respondent in excess of the statutory requirement, even such declaration cannot improve the defence of the respondents. As such, non-discloser of such a declaration also cannot be fatal to the interest of the writ petitioner.

44. That apart, when the right to recover of the excess amount from the retired persons out of the retiral dues has not been recognised by the Hon''ble Supreme Court in the aforesaid citations, even the grant of such declaration cannot improve the defence of the respondents.

45. It is not out of place to mention here that even no opportunity of hearing was given to the petitioner before taking the decision for deduction the said overdrawal amount from the retiral dues to the petitioner. This Court also cannot support the decision of the concerned respondent for readjustment of the excess payment against the retrial dues of the petitioner inasmuch as such decision was taken in violation of the principles of natural justice.

25. Though in the case of the petitioner such declaration was made while she was in service, at the time of exercising her option under ROPA 1998, the underlying reasoning of the decision in the case of Kalyan Kumar Chattopadhyay in my opinion applies to this case also. Contention of the petitioner that no such declaration was required while exercising option under the earlier ROPA Rules has not been disputed by the respondents. The declaration under ROPA 1998 is in general in nature, and such declaration cannot revive a claim against the declarant which might have otherwise gone stale. It would have been a different case if such declaration was made in specific reference to the dues sought to be recovered from the petitioner. Moreover, the declaration could apply, if at all, for excess payment made specifically under the ROPA 1998. But in this case, the respondents are not seeking to recover any excess payment made on account of any misconstruction of the ROPA Rules 1988. The root of the recovery process lies in fixing the date for getting revised scale of pay under ROPA 1981. So far as ROPA 1998 is concerned, excess payment made, if any, is a consequence of such fixing of date under ROPA 1981, which spills into the period covered by ROPA 1998, having a carry forward effect. Such declaration does not constitute admission of dues after the claim

becomes barred by limitation, which would revive right to sue.

26. On the question of determination of quantum of pension, however, in my opinion the petitioner should be permitted to receive what she is actually entitled to get. In this proceeding I have not adjudicated on merit as to whether fixing of pay scale of the petitioner and release of other benefits were made to the petitioner in accordance with applicable regulations or not. For the sole reason of exceptional delay in realization of their alleged mistake and initiation of recovery proceeding by the educational authorities, I have held that the overdrawal amount, if any, should not be recovered from the petitioner. To decide the actual entitlement of the petitioner strictly In accordance with the applicable regulations, an enquiry in detail is necessary, which would require calculation on a month wise manner the entitlement of the petitioner for over two and half decades and I do not think the Writ Court ought to enter into such an exercise. For the purpose of determination of pension amount, I am of the view that the matter should be determined by the Director of Schools upon giving the petitioner opportunity of hearing. The Director of School Education shall consider the initial pay fixation rules as well as the relevant leave rules, and on that basis decide whether the relevant date for obtaining revised scale of pay would be 22 May 1982 or any date earlier. In terms of such computation the Director of Schools shall determine the actual entitlement of the petitioner, on correction of any mistake, if committed, in fixing her pay and consequential benefits, and the pension of the petitioner shall be quantified on that basis. The petitioner should not be permitted to draw pension for a sum exceeding her actual entitlement, if it is found by the Director of School Education that excess payment was made to the petitioner on account of mistake on the part of the educational authorities. That would lead to unjust enrichment. This computation shall be made, however, only for the purpose of determining the quantum of pension, and not for making any recovery from the sum already paid to the petitioners.

27. There is also dispute on the question as to whether the petitioner has been made to deposit Government contribution towards provident fund upon her migration into the pension regime, in excess of what is due from her. Contention of the petitioner is that she was compelled to pay Rs. 1980/-beyond what she was required to deposit on that count. She has also complained that a sum of Rs. 1391/- has been illegally realized from her on the ground of excess amount drawn by the petitioner for the period between 1 March 1986 and 5 April 1986 and between March 1988 and 4 October 1988. The Director of School Education shall determine this question also upon giving the petitioner opportunity of hearing. Though the District Inspector of Schools is the appropriate authority for deciding entitlement of the petitioner, in my opinion, having regard to the complications involved in the subject-controversy, the Director of School Education should adjudicate on these issues. For proper adjudication of the disputes, the district educational authorities as well as those in charge of accounts in the office of the state respondents and the school authorities shall assist the Director of School Education. The Director of

School Education shall take decision within a period of ten weeks from the date of communication of this order. Pension of the petitioner shall be realised within a period of two weeks from the date the Director of School Education determines the pensionary dues of the petitioner. If for any reason the Director of School Education is unable to decide the matter within the prescribed timeframe of ten weeks, pension shall be quantified and released to the petitioner on the basis of her last pay certificate, subject to future adjustment upon quantification of the same by the Director of School Education. The writ petition stands disposed of in the above terms. There shall however be no order as to costs.

Urgent Photostat certified copy of this judgment if applied for be supplied to the learned Advocates for the parties with necessary formalities as expeditiously as possible.