



GAHC010113572019

Page No.# 1/16



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3402/2019

JAGADISH KUMAR DEKA
S/O- LT KANAK CH. DEKA, R/O- VILL- PATHSALA (WARD NO.3), P.O.
PATHSALA, PIN- 781325, DIST- BARPETA, ASSAM

VERSUS

THE STATE OF ASSAM AND 10 ORS.
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM,, HOME AND
POLITICAL DEPTT., DISPUR, GHY-6

2:THE ACCOUNTANT GENERAL OF ASSAM
MAIDAMGAON
BELTOLA
GHY- 29

3:THE COMM. AND SECY. TO THE GOVT. OF ASSAM
FINANCE DEPTT.
DISPUR
GHY-6

4:THE COMM. AND SECY. TO THE GOVT. OF ASSAM
PENSION AND PUBLIC GRIEVANCES DEPTT.
DISPUR
GHY-6

5:THE ADDL. DIRECTOR GENERAL OF POLICE (COMM.)
ASSAM
ULUABRI
GHY-7

6:THE ADDL. DIRCETOR GENERAL OF POLICE (M AND L)
ASSAM



ASSAM POLICE HEADQUARTERS
ULUBARI
GHY-7

7:THE DIRECTOR OF POLICE (COMM)
ASSAM
ULUABRI
GHY-7

8:THE SUPERINTENDENT OF POLICE (COMM)
HQ-I/III
ASSAM
ULUBARI
GHY-7

9:THE SUPERINTENDENT OF POLICE (COMM)
ASSAM
ULUBARI
GHY-7

10:THE DY. SUPERINTENDENT OF POLICE (COMM)
HQ
GHY

11:THE TREASURY OFFICER
KAMRUP
GHY-

Advocate for the Petitioner : MR H SARMA

Advocate for the Respondent : GA, ASSAM

Linked Case : WP(C)/3423/2019

MANABENDRA SARMA
S/O- LATE KAMINI KANTA SARMA
R/O- BIRUBARI
P.O- GOPINATH NAGAR
RUPKONWAR PATH
P.S- PALTAN BAZAR
PIN- 781016
DIST- KAMRUP(M)
ASSAM



VERSUS

THE STATE OF ASSAM AND 10 ORS
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT OF ASSAM
HOME AND POLITICAL DEPTT
DISPUR
GUWAHATI- 06

2:THE ACCOUNTANT GENERAL OF ASSAM
MAIDAMGAON
BELTOLA
GUWAHATI- 29

3:THE COMMISSIONER AND SECRETARY
TO THE GOVT OF ASSAM
FINANCE DEPTT
DISPUR
GUWAHATI- 06

4:THE COMMISSIONER AND SECRETARY
TO THE GOVT OF ASSAM
PENSION AND PUBLIC GRIEVANCES DEPTT
DISPUR
GUWAHATI- 06

5:THE ADDITIONAL DIRECTOR GENERAL OF POLICE (COMM)
ASSAM
ULUBARI
GUWAHATI- 7

6:THE ADDITIONAL DIRECTOR GENERAL OF POLICE (M AND L)
ASSAM POLICE HQ
ULUBARI
GHY- 7

7:THE DIRECTOR OF POLICE(COMM)
ASSAM
ULUBARI
GHY-7

8:THE SUPERINTENDENT OF POLICE (COMM) HQ I/II
ASSAM
ULUBARI
GHY- 7

9:THE SUPERINTENDENT OF POLICE (COMM)
ASSAM
ULUBARI
GHY- 7

10:THE DEPUTY SUPERINTENDENT OF POLICE (COMM) HQ
GHY
GUWAHATI

11:THE TREASURY OFFICER
KAMRUP
GUWAHATI- 1



Advocate for : MR H SARMA
Advocate for : GA
ASSAM appearing for THE STATE OF ASSAM AND 10 ORS

Linked Case : WP(C)/3422/2019

IMRAN HUSSAIN BORAH
S/O LT. SAFIQR RAHMAN BORAH
R/O VILL. NAGAON
P.O. BAIHATI CHARIALI
PIN-781381
DIST. KAMRUP (R)
ASSAM

VERSUS

THE STATE OF ASSAM AND 10 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HOME AND POLITICAL DEPTT. DISPUR
GUWAHATI-6

2:THE ACCOUNTANT GENERAL OF ASSAM
MAIDAMGAON
BELTOLA
GUWAHATI-29

3:THE COMMISSIONER AND SECRETARY
TO THE GOVT. OF ASSAM
FINANCE DEPTT. DISPUR
GUWAHATI-6

4:THE COMMISSIONER AND SECRETARY
TO THE GOVT. OF ASSAM
PENSION AND PUBLIC GRIEVANCES DEPTT. DISPUR
GUWAHATI-6

5:THE ADDITIONAL DIRECTOR GENERAL OF POLICE (COMMN)
ASSAM
ULUBARI
GUWAHATI-7

6:THE ADDITIONAL DIRECTOR GENERAL OF POLICE (M AND L)
ASSAM
ASSAM POLICE HEADQUARTERS
ULUBARI
GUWAHATI-7

7:THE DIRECTOR OF POLICE (COMMN)
ASSAM



ULUBARI
GUWAHATI-7
8:THE SUPERINTENDENT OF POLICE (COMMN)
HQ-I/III
ASSAM
ULUBARI
GUWAHATI-7
9:THE SUPERINTENDENT OF POLICE (COMMN)
ASSAM
ULUBARI
GUWAHATI-7
10:THE DEPUTY SUPERINTENDENT OF POLICE (COMMN)
HQ
GUWAHATI
11:THE TREASURY OFFICER
KAMRUP
GUWAHATI-1

Advocate for : MR H SARMA
Advocate for : GA
ASSAM appearing for THE STATE OF ASSAM AND 10 ORS.

Linked Case : WP(C)/4475/2019

SARAT HAZARIKA
S/O LT. RAJAT KALITA
R/O VILL. GAONBURAH PARA
WARD NO. 10
P.S. AND P.O. MANOLDOI
DIST. DARRAN
ASSAM

VERSUS

THE STATE OF ASSAM AND 10 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT. OF ASSAM
HOME AND POLITICAL DEPTT. DISPUR
GUWAHATI-6

2:THE ACCOUNTANT GENERAL OF ASSAM
MAIDAMGAON
BELTOLA
GUWAHATI-29
3:THE COMMISSIONER AND SECRETRY
TO THE GOVT. OF ASSAM



FINANCE DEPTT. DISPUR
GUWAHATI-6
4:THE COMMISSIONER AND SECRETARY
TO THE GOVT. OF ASSAM
PENSION AND PUBLIC GRIEVANCES DEPTT. DISPUR
GUWAHATI-6
5:THE ADDITIONAL DIRECTOR GENERAL OF POLICE (COMMN)
ASSAM
ULUBARI
GUWAHATI-7
6:THE ADDITIONAL DIRECTOR GENERAL OF POLICE (M AND L)
ASSAM
ASSAM POLICE HEADQUARTERS
ULUBARI
GUWAHATI-7
7:THE DIRECTOR OF POLICE (COMMN)
ASSAM
ULUBARI
ULUBARI
GUWAHATI-7
8:THE SUPERINTENDENT OF POLICE (COMMN)
HQ-I/III
ASSAM
ULUBARI
GUWAHATI-7
9:THE SUPERINTENDENT OF POLICE (COMMN)
ASSAM
ULUBARI
GUWAHATI-7
10:THE DEPUTY SUPERINTENDENT OF POLICE (COMMN)
HQ
GUWAHATI
11:THE TREASURY OFFICER
KAMRUP
GUWAHATI-1

Advocate for : MR H SARMA

Advocate for : GA

ASSAM appearing for THE STATE OF ASSAM AND 10 ORS.

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

Date of hearing : **25.08.2021**

Date of Judgment : **01.09.2021**

JUDGMENT & ORDER (ORAL)

An identical issue being involved in all the four writ petitions, the same are taken up for consideration together and disposed of by this common order.

2. The issue involved in brief pertains to the action of the respondent authorities in purporting to make certain recoveries of the salaries of the petitioner on the ground of overstay in their services. At the outset, it may be noted that such overstay is on the principal ground of wrong calculation of the date of birth of the petitioners while entering the same in the Service Book of the petitioners at the time of their recruitment.

3. To consider and decide the aforesaid issue, it would be convenient if the facts are placed on records. The petitioners in WP (C) No. 3402/2019, WP (C) No. 3422/2019, WP (C) No. 4475/2019 namely, Shri Jagadish Kumar Deka, Shri Imran Hussain Borah and Shri Sarat Hazarika, at the time of filing of writ petitions were Assistant Sub-Inspector of Police in the Assam Police Radio Organization (hereinafter, APRO) whereas the petitioner in WP (C) No. 3423/2019 Shri Manabendra Sarma was an Inspector in the said Organization. The petitioners have reached the aforesaid ranks by virtue of being promoted from time to time. It is the cases of the petitioners that at the time of entering into the services their dates of birth were recorded in the Service Book from the HSLC examination certificate submitted by the petitioners. It may be mentioned that at those times, such certificates did not contain the date of birth but the age of the candidates were written as on 1st of March of the concerned year from which the date of birth was deducible.

4. To actually understand the dispute, the particulars of the each of the candidates is given hereinbelow-

(i) WP (C) No. 3402/2019, Shri Jagadish Kumar Deka :

14 years and 8 months as on 1st of March, 1973.

Date of birth recorded in the Service Book: 01.09.1959

Correct date of birth should have been 01.07.1958

(ii) WP (C) No. 3422/2019, Shri Imran Hussain Borah :

16 years and 8 months as on 1st of March, 1975.

Date of birth recorded in the Service Book: 01.05.1959

Correct date of birth should have been 02.07.1958.

(iii) WP (C) No. 3423/2019, Manabendra Sarma :

16 years and 4 months as on 1st of March, 1975.

Date of birth recorded in the Service Book: 01.11.1960

Correct date of birth should have been 01.11.1958.

(iv) WP (C) No. 4475/2019, Shri Sarat Hazarika

17 years and 2 months as on 1st of March, 1974.

Date of birth recorded in the Service Book: 01.08.1959

Correct date of birth should have been 01.01.1957.

5. It is the case of the petitioners that while serving in their respective posts, the respondent authorities informed them that their dates of birth were recalculated and were accordingly asked to go on retirement. So far as the petitioner in WP (C) No. 3402/2019 is concerned he was informed that his actual date of birth being 01.07.1958 and not 01.09.1959 which was recorded in the Service Book, he should have been retired from service on 30.06.2018 itself and accordingly he was directed to go on retirement immediately w.e.f., 31.12.2019. Thereafter, the petitioner had received the order dated 08.01.2019 issued by the Superintendent of Police (Communication), Assam whereby he was informed that there was a proposal to deduct salary drawn by the petitioner for the period of overstay from 30.06.2018 to 31.12.2018 from the DCRG and other benefits.

6. Similarly, So far as the petitioner in WP (C) No. 3422/2019 is concerned he was informed that his actual date of birth being 02.07.1958 and not 01.05.1959 which was recorded in the Service Book, he should have been retired from service on 31.07.2018 itself

and accordingly he was directed to go on retirement immediately w.e.f., 31.01.2019. Thereafter, the petitioner had received the order dated 07.02.2019 issued by the Superintendent of Police (Communication), Assam whereby he was informed that there was a proposal to deduct salary drawn by the petitioner for the period of overstay from 31.07.2018 to 31.01.2019 from the DCRG and other benefits.

7. Similarly, So far as the petitioner in WP (C) No. 3423/2019 is concerned he was informed that his actual date of birth being 01.11.1958 and not 01.11.1960 which was recorded in the Service Book, he should have been retired from service on 31.10.2018 itself and accordingly he was directed to go on retirement immediately w.e.f., 29.12.2018. Thereafter, the petitioner had received the order dated 27.12.2018 issued by the Additional Director General of Police (Communication), Assam whereby he was informed that there was a proposal to deduct salary drawn by the petitioner for the period of overstay from 31.10.2018 to 29.12.2018 from the DCRG and other benefits.

8. Similarly, So far as the petitioner in WP (C) No. 4475/2019 is concerned he was informed that his actual date of birth being 01.01.1957 and not 01.08.1959 which was recorded in the Service Book, he should have been retired from service on 31.12.2016 itself and accordingly he was directed to go on retirement immediately w.e.f., 31.01.2019. Thereafter, the petitioner No.2 had received the order dated 25.12.2019 issued by the Superintendent of Police (Communication), Assam whereby he was informed that there was a proposal to deduct salary drawn by the petitioner for the period of overstay from 01.01.2017 to 31.01.2019 from the DCRG and other benefits.

9. The legality and validity of the orders by which the salaries for the period of overstay has been purported to be deducted is the issue which has been raised by the writ petitioners to be decided by this Court. It may be mentioned that when the writ petitions were taken up for consideration, there are separate orders by which they move to make deduction has been stayed and the said orders were continued from time to time.

10. I have heard Shri H. Sarma, learned counsel for the petitioners in all the cases. Whereas Shri T.C. Chutia, learned Additional Senior Government Advocate, Assam has represented the respondent authorities. Shri R. Borpujari, learned Standing Counsel has

represented the Finance Department and the Accountant General, Assam is represented by Shri R. Ahmed, Shri R. Dhar, Shri S.K. Medhi and Shri A. Hassan respectively in all the four writ petitions.

11. Shri H. Sarma, the learned counsel for the petitioner submits that the impugned action in purporting to recover the salaries for the period of overstay is absolutely unreasonable and arbitrary. It is submitted that error had crept in while calculating/ deducing the date of birth of the respective petitioners at the time of entry into the services under the APRO. As demonstrated the source of the date of birth is the matriculation certificate issued by the competent authority namely, the Board of Secondary Education, Assam in which at the relevant time instead of the date of birth, the age as on 1st of March of the relevant year was given. The date of birth was accordingly calculated by the authorities wherein certain mistakes were apparently committed as a consequence of which, the petitioners had overstayed in their post for the periods indicated above. In absence of any allegation of collusion or fraud on the part of the petitioners in manipulating the date of birth, it would be wholly unjustified to penalize the petitioners for no wrong committed by them. That apart, Shri Sarma has submitted that it is an admitted fact that in the period of overstay, the petitioners had rendered their services. It is further submitted that all the petitioners were promoted to higher post from time to time on which occasion, the Service Books were thoroughly scrutinized by the authorities in which no anomalies were detected regarding their dates of birth.

12. In support of his submission, the learned counsel for the petitioners has placed reliance upon the case of ***State of Bihar & Ors. Vs. Pandey Jagdishwar Prasad***, reported in ***(2009) 3 SCC 117***. In the said case, the Hon'ble Supreme Court had held that under similar circumstances, the action for recovery from the salaries has been held to be unjustified. The Hon'ble Court also distinguished the earlier decision rendered in the case of ***Radha Krishna Vs. Union of India***, reported in ***(1997) 9 SCC 239*** by holding that in absence of any proof that the employee had manipulated his date of birth or that there was some *mala fide* intention to continue in service beyond the date of retirement, the decision in Radha Krishna (Supra) would not apply.

13. Reliance has also been made upon a case of this Court reported in **2008 (3) GLT 97 (Manohari Das Vs. State of Assam & ors.)** wherein it has been held that the following decisions of the Hon'ble Supreme Court, it would be wholly unjustified to deprive the employee from the salaries for the period of overstay in which he had actually worked.

14. Opposing the case projected by the writ petitioners, the State respondents represented by Shri T.C. Chutia, the learned Additional Senior Government Advocate, Assam has submitted that the State respondents have filed affidavit-in-opposition in each of the cases. By referring to the affidavit-in-opposition filed on 15.12.2020 in WP (C) No. 4475/2019, more specifically paragraph 6 thereof, it has been contended that the petitioner had initially given a false certificate and had later given a duplicate certificate regarding the date of birth. However, the statement has been verified to be true to the knowledge of the deponent who is the Superintendent of Police (Communication) at the time of filing of the affidavit and whereas the petitioner had entered into the services in the year 1974. Though, a further attempt has been made to contend that knowing fully well regarding the incorrect date of birth recorded in the Service Book, the petitioners kept silent and therefore, they cannot be given the benefit for the illegal overstay in service.

15. Shri R. Borpujari, learned Standing Counsel, Finance Department submits that as per the Office Memorandum dated 01.02.1992, no proposal for regularization for the period of overstay shall be entertained. It is further submitted that a duty was cast upon the petitioner to inform the authorities regarding the incorrect date of birth which the petitioners had failed to discharge. Shri Borpujari however fairly submits that there was no dispute to the fact that the petitioners had rendered their services in the aforesaid period of overstay.

16. Shri S.K. Medhi, Shri R. Dhar, Shri R. Ahmed and Shri A. Hassan appeared for the Accountant General, Assam and have jointly submitted that pension is not the subject matter of dispute in the present cases and in one of the cases namely, WP (C) No. 3423/2019 the pension has already been settled. However, in the rest of the cases, the pension papers are yet to be received.

17. In his reply, Shri Sarma, the learned counsel for the petitioner has submitted that the defence put forward on behalf of the respondents do not deserve any consideration as the

submissions are not based on any legal footing and rather a mechanical approach appears to have been taken. As regards the Office Memorandum dated 01.02.1992 relied upon by the respondents, it is submitted that the said notification has to be read in consonance with the law laid down by the Hon'ble Supreme Court on the subject whereby broad guidelines have been laid down.

18. The rival submissions of the learned counsel for the parties have been duly considered and the materials before this Court carefully examined. From the pleadings and the deliberations, the following undisputed facts emerge.

- i. The matriculation certificate issued by the SEBA admittedly did not contain the date of birth but the age of the incumbent as on 1st of March of the relevant year.
- ii. The date of birth of the petitioners were calculated/ deduced by the authorities from their matriculation certificate at the time of entering into their services.
- iii. The petitioners were promoted from to time and on each occasion the Service Book was thoroughly scrutinized by the respondent authorities and no anomaly was deducted or reported.
- iv. There is no specific allegation of fraud or manipulating the date of birth in the Service Books by the petitioners.
- v. The petitioners had actually rendered their service in the period of overstay.
- vi. The petitioners did not play any role in the process of their overstay in their services.

19. At the stage, it would be apposite to refer to the case of Pandey Jagdishwar Prasad (Supra). In the said case, the incumbents date of birth was as per his matriculation certificate and was recorded in the Service Book, however there was another date of birth in the Service Book which was made on the basis of an affidavit furnished by the incumbent but the earlier date of birth was not deleted from the Service Book. The incumbent was accordingly charged with overstay. As mentioned above, the Hon'ble Supreme Court had interfered with the said decision. The relevant part of the Judgment is extracted hereinbelow-

"16. Moreover, for the sake of argument, even if we consider that the respondent had fraudulently entered another date of birth in his service book, as had been alleged, it should have come to the notice of the authorities during his course of service, and not after he had attained the age of superannuation after the expiry of the date mentioned in the service book which was based on the affidavit of the respondent. To the contrary, none of the officials responsible had noticed this during his service period, even during his time of promotions when the service book was required to be inspected by the officials. Therefore, it clearly points out to the gross negligence and lapses on the part of the authorities concerned and in our view, the respondent cannot be held responsible to work beyond his date of birth as mentioned in the matriculation certificate when admittedly in the service book after affidavit, some other date of birth was also evident.

19. It is not needed for this Court to verify the veracity of the statements made by the parties. If at all the respondent entered the second date of birth at a subsequent period of time, the authorities concerned should have detected it and there should have been a detailed enquiry to determine whether the respondent was responsible for the same. It has been held in a catena of judicial pronouncements that even if by mistake, higher pay scale was given to the employee, without there being misrepresentation or fraud, no recovery can be effected from the retiral dues in the monetary benefit available to the employee.

20. This Court in the case of Kailash Singh vs. The State of Bihar and Ors., [2004 (1) PLJR 289 (SC)], held that recovery sought to be made from the salary of the employees on the ground of alleged over stay in service on the basis of age assessed or considered, despite the fact that the employee has worked during the period of alleged over stay could not be made.

21. In Sahib Ram vs. State of Haryana & Ors., [1995 Supp. (1) SCC 18], this Court has held that even if by mistake, higher pay scale was given to the employee, without there being misrepresentation or fraud, no recovery can be effected from the retiral dues in the monetary benefit available to the employee.

24. Without going into the question whether the appellant was justified after completion

of two years from the actual date of retirement to deduct two years' salary and other emoluments paid to the respondent, we may say that since the respondent had worked during that period without raising any objection from the side of the appellant and the appellant had got works done by the respondent, we do not think that it was proper at this stage to allow deduction from his retiral benefits, the amount received by him as salary, after his actual date of retirement. Considering the fact that there was no allegation of misrepresentation or fraud, which could be attributed to the respondent and considering the fact that the appellant had allowed the respondent to work and got works done by him and paid salary, it would be unfair at this stage to deduct the said amount of salary paid to him. Accordingly, we are in agreement with the Division Bench decision that since the respondent was allowed to work and was paid salary for his work during the period of two years after his actual date of retirement without raising any objection whatsoever, no deduction could be made for that period from the retiral dues of the respondent.

25. In Kailash Singh vs. State of Bihar & Ors. [2005 (13) SCC 576], this Court observed that the employer-State would not be entitled to recover the salary paid in excess after the due date of superannuation. In our view, this decision was practically based on the concession made by the State before this Court.

26. Again in Hari Singh vs. State of Bihar & Ors. [2000 (10) SCC 284], this Court held that since the Government had never put the employee on notice to indicate that the date of birth as entered in the service book was incorrect though it could have done so and since no notice had been given to the employee concerned for accepting a date of birth other than the one entered in the service book, the order of retirement could not be sustained. From the aforesaid decision, it is evident that it was the duty of the State to put the employee on notice about his date of retirement and not having done so, the appellant was not entitled to recover the excess amount paid to the respondent.

28. Before parting with this order, we may refer to a decision of this Court strongly relied on by the learned counsel for the appellant, namely, Radha Kishun vs. Union of India and Ors., [(1997) 9 SCC 239]. Learned counsel for the appellant relying on this decision sought to argue that even if the respondent had worked after his due date of

superannuation without having any objection from the appellant, the appellant was entitled to deduct the amount already received by the respondent from his retiral benefits. This case, in our view, is clearly distinguishable from the present case. In the above-mentioned case, there was no dispute as to the date of retirement of the appellant in that appeal, as there was no controversy in the date of birth of that appellant. There was only one date of birth mentioned, and he had not retired on the basis of his date of birth so entered. Therefore, he had wrongly extended his service beyond the date of his superannuation. But in the present case, there were two dates of birth recorded in the service book of the respondent. Therefore, there was a clear confusion in the mind of the respondent as to whether the appellant had accepted his corrected date of birth as entered in his service book when admittedly authorities concerned did not serve any notice of retirement on the basis of the initial entry of date of birth in his service book.

29. It should also be kept in mind that the respondent might have expected that second date of birth shown in the service book was accepted by the authorities for that reason he was allowed to continue in his service and was paid salary. In the absence of any proof that the respondent had manipulated his date of birth by entering a second date at a later stage, and that he had any malafide intentions to continue his service, beyond his date of his retirement, we are of the view that the decision in the case of Radha Kishun vs. Union of India and Ors. (Supra), would not be applicable in the facts of the present case."

20. Thus, considering the facts and circumstances and the law laid down by the Hon'ble Supreme Court, this Court is of the opinion that the petitioners cannot be faulted with in the chain of event which laid their overstay in service for the reasons cited in paragraph 18 above. As a consequence thereof, the impugned action in purporting to recover the salaries for the period of overstay, the details of which is already recorded in the Judgment is interfered with and accordingly set aside. As regards the claim for pension, by following the guidelines of the Hon'ble Supreme Court in the case of Pandey Jagdishwar Prasad (Supra) the petitioners would be entitled to fixation of retiral benefits as on the date of their correct dates of birth with a further clause that for the period of overstay, only the notional benefit would



be entitled to as the petitioners' entitlement for salaries for the said period has been upheld.

21. Writ petitions are accordingly disposed of.

22. No order as to cost.

JUDGE

Comparing Assistant