GAHC010027342022

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

Case No. : WP(C)/1725/2022

ON THE DEATH OF PRASANNA CH BARMAN
HIS LEGAL HEIRS

1.1: SMTI PRAMILA BARMAN
W/O LATE PRASANNA CH. BARMAN
R/O TELIAGAON
TOWN TELIAGAON
NAGAON SADAR
ASSAM
PIN-782141

1.2: CHANDAN BARMAN
S/O LATE PRASANNA CH. BARMAN
R/O TELIAGAON
TOWN TELIAGAON
NAGAON SADAR
ASSAM
PIN-78214

VERSUS

THE ASSAM POWER DISTRIBUTION COMPANY LIMITED AND 4 ORS
A COMPANY INCORPORATED UNDER THE COMPANIES ACT HAVING ITS REGISTERED OFFICE AT BIJULEE BHAWAN, PALTANBAZAR, GUWHAATI-781001

2:DEPUTY PERSONNEL MANAGER (T)
O/O THE CGM (D)
APDCL (CAR)
BIJULE BHAWAN
PALTANBAZAR
GUWAHATI-781001

3:THE ASSISTANT GENERAL MANAGER (F AND A) AUDIT

APDCL
BIJULE BHAWAN
PALTANBAZAR
GUWAHATI-781001

4:THE ASSISTANT GENERAL MANAGER (F AND A) PENSION
AEGCL
BIJULE BHAWAN
GUWAHATI-781001

5:THE ASSISTANT GENERAL MANAGER
NAGAON ELECTRICAL DIVISION I
APDCL (CAR)
NAGAO

Advocate for the Petitioners : Mr. K. M. Mahanta, Advocate.

Advocate for the Respondents : Mr. S. P. Sharma, Advocate.

BEFORE

HONOURABLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 02.02.2023

Date of Judgment : 08.02.2023

JUDGMENT AND ORDER (CAV)

Heard Mr. K. M. Mahanta, the learned counsel for the petitioner and Mr. S. P. Sharma, the learned counsel appearing on behalf of the respondent Nos. 1 to 5.

2. The instant writ petition has been filed challenging the action on the part of the respondent authorities in deducting an amount of Rs.7,36,614/- on the ground that Late Prasanna Ch. Barman had drawn excess pay and allowances as well as for a direction upon the respondent authorities to reimburse the said amount already deducted with interest @ 12% per annum and to pay all other retirement dues as admissible under the law to the petitioners who are the legal representatives of Late Prasanna Ch. Barman.

3. The case of the petitioners herein is that they are the legal representative of Late Prasanna Ch. Barman who worked as Lineman-II in the Assam Power Distribution

Company Limited at Nagaon. The petitioner No.1 is the wife of the Late Prasanna Ch. Barman who is presently paralyzed as submitted by the learned counsel for the petitioners and the petitioner No.2 is his son. Late Prasanna Ch. Barman was born on 31.12.1952 as per his school certificate which was reflected in the Service Book. He initially joined in the post of Sahayak on 01.08.1978 on temporary basis and after completion of 8 years of service as Sahayak, he was promoted to Senior Sahayak in terms of the Board's Circular No.ASEB (IR) 26/82/276 dated 16.08.1986 in the scale of pay of Rs.495-15-645-EB-17-730/- per month and his pay was fixed as Senior Sahayak at Rs.645/-. The services of Late Prasanna Ch. Barman was confirmed in the post of Senior Sahayak vide Office Order No.92 dated 29.03.1993 with effect from 01.08.1983. During his tenure as Senior Sahayak, Late Barman was promoted to the post of Lineman-II vide CEO, NEC O.O. No.387 dated 21.12.2005 and joined as Lineman-II on 29.12.2005, in the scale of pay of Rs.3150/-, dated 20.12.2005 and his pay was fixed at Rs.6490/-, on 29.12.2005. Thereafter, Late Barman got an increment in the post of Lineman-II vide Office Order No.105 dated 25.06.2008 at Rs.6630/-. Subsequent thereto, the second stagnation increment was granted to Late Barman vide Office Order No.7 dated 12.01.2010 at Rs.6770/- and got the incremental benefit with effect from 08.12.2009 during E/L. Thereafter, the pay of Late Barman was revised from time to time and he was granted the revised scale of pay as fixed by the authorities from time to time and as on the date of expiry of Late Barman, he was drawing fixed pay of Rs.19,360/-.

4. At this stage, it is relevant to take note of that on 19.09.2014, Late Barman expired leaving behind the petitioners. The respondent authorities when informed about the death of Late Barman had advised the petitioners to submit the death certificate so that other formalities regarding pay and pension can be processed. On submission of the death certificate, a letter bearing No.APDCL/CAR/PEN/37/16/21/3 dated 31.05.2016 was issued and sent to the petitioners' house by the respondent No.2 wherein it was

mentioned that there is an outstanding liability of Rs.7,36,614/- against Late Prasanna Ch. Barman, Ex. Lineman-II being excess drawn pay and allowances and overdrawn amount with interest.

5. In view of the death of the sole bread earner of the family, the petitioners suffered from severe financial hardship and time and again visited the Office of the respondent No.5 enquiring about retirement benefits and prayed that the authorities not to levy any charges on the legitimate dues. However, the respondent authorities informed the petitioners that the money would be deducted from the retirement benefits. The petitioner No.1 thereafter suffered from severe shock and trauma leading to stroke. The petitioner No.2 remained unemployed and was compelled to do odd jobs so that he could support his mother (petitioner No.1) as well as her medicines so that she could live. The petitioners were further informed that Late Prasanna Ch. Barman ought to have been retired on 31.12.2012 but due to oversight his date of superannuation was wrongly recorded as 31.12.2015 in the Superannuation Register and the excess amount paid to Late Prasanna Ch. Barman during the period from 01.01.2013 to 19.09.2014 would be recovered. The petitioners were handed over a copy of the letter bearing No.AEGCL/ACT/FP/7054/16/176/4 dated 17.06.2016 written by the respondent No.4 to the Member & Chief Executive, ASEB Employee's Pension Fund Investment Trust, AEGCL, Bijulee Bhawan regarding the authority for payment of arrear pension in respect of Late Prasanna Ch. Barman wherefrom it transpires that the authorities had issued the direction to credit an amount of Rs.4,99,488/- only in the head of retirement/gratuity to the petitioner's bank account subject to the outstanding liability of Rs.7,36,614/-. It was further mentioned that after the deduction of Rs.4,99,488/- from the outstanding liabilities of Rs.7,36,614/-, the balance amount of Rs.2,37,126/- would be recovered against the arrear pension.

6. The petitioners, being aggrieved, have therefore approached this Court under Article 226 of the Constitution challenging the action of the respondent authorities in

realizing the amount of Rs.7,36,614/- as excess amount paid to Late Prasanna Ch. Barman.

7. At this stage, it is relevant to take note of that though the communications were issued in the year 2016, but the petitioners could not approach this Court primarily on the ground that the petitioner No.1 had disability of 80%. On the other hand, the petitioner No.2 was trying to meet both ends for himself and his mother including the expenses incurred on account of the medical treatment of his mother.

8. This Court vide an order dated 11.03.2022 had issued notice making it returnable by four weeks. It appears from the record that the respondent Nos.1 to 5 had filed an affidavit-in-opposition. In paragraph No.5 of the said affidavit-in-opposition it has been mentioned that as per Service Book, the father of the petitioner No.2 Late Prasanna Ch. Barman had to retire on 31.12.2012. However, Late Prasanna Ch. Barman in spite of having the knowledge that he has to superannuate on the aforesaid date kept on working till his time of death, i.e. till 19.09.2014 for reasons best known to him. It was mentioned that the date of superannuation was wrongly recorded in the Superannuation Register. Therefore, it cannot be a ground for the father of the petitioner No.2 to claim benefit for that period and for refund of the recovery for the excess pay. It was mentioned that upon the death of the father of the petitioner No.2, the death certificate of Late Prasanna Ch. Barman was submitted to the Office of the respondent authorities seeking pensionery benefits. The respondent authorities thereafter released an Office Order on 31.05.2016 wherein it was categorically stated that the father of the petitioner No.2 was eligible to pension of Rs.8,800/- per month with effect from 01.01.2013 to 19.09.2014 and he was also entitled to the retirement gratuity of Rs.4,99,488/- subject to adjustment of the outstanding liabilities, if any. It was further mentioned that the father of the petitioner No.2 was also eligible to draw family pension. However, the pension, gratuity and family pension were subject to adjustment of Rs.7,36,614/- as the same has been excessively paid and drawn by the father of the petitioner No.2 on account of overstay in

service. It was further mentioned that the Assistant General Manger (F&A) Pension on 17.06.2016 by the communication mentioned that an amount of Rs.7,36,614/- was due as overdrawn pay and allowances by the father of the petitioner No.2 and the same would be recovered by adjusting from the death gratuity amount of Rs.4,99,488/- and the remaining balance of Rs.2,37,126/- would be adjusted against the arrear pension. It was mentioned that the same had been duly acted upon and informed to the petitioners herein. Further to that, it has been mentioned that the order of recovery was passed in the year 2016 and the petitioners had approached the Court after six years, and therefore, on account of delay and laches, this Court ought not to exercise the jurisdiction under Article 226 of the Constitution. It was mentioned that the father of the petitioner No.2 was aware of his date of superannuation and still he kept on working without informing the authority about his date of superannuation in the Service Book of Late Prasanna Ch. Barman. It was mentioned that in the Service Book of Late Prasanna Ch. Barman, it was clearly stated that his date of superannuation was 31.12.2022 and as such the plea taken by the petitioners that because the father of the petitioner No.2 was not issued a superannuation notice cannot be a ground to set aside the recovery order.

9. On the basis of the aforesaid pleadings, let this Court take into consideration the respective submissions made by the learned counsel for the parties.

10. Mr. K. M. Mahanta, the learned counsel for the petitioners submitted that Late Prasanna Ch. Barman was a Grade-IV employee. He submitted that there was no fault on the part of the petitioners' deceased husband/father in inserting the retirement date as 31.12.2015 in the Superannuation Register as also in the fixation of his pay from time to time. He further submitted that the petitioners' deceased husband/father had no role to play with the process/principle of fixation of the pay. The superannuation/retirement date was fixed by the respondent authorities and accordingly they wrote in the Service Book of Late Prasanna Ch. Barman and as regards to the pay fixation it was done by the competent authority assigned with the said task of pay fixation. The learned counsel for

the petitioners further submitted that the petitioners' deceased husband/father was working in the rank of Grade-IV and was allowed to work until his death till 19.09.2014. He submitted that after the death of the husband/father of the petitioners, the authorities now cannot take a decision to deduct any amount from his retirement dues on the ground that the husband/father of the petitioners had overstayed. The learned counsel for the petitioners further submitted that law is well settled that since the husband/father of the petitioners had worked during the period without raising any objection from the respondents, it would not be proper to allow deduction from the retirement benefits, the amount received by him as salary after his actual date of retirement. He, therefore, referred to the judgments of the Supreme Court in the case of ***State of Bihar and Others vs. Pandey Jagadishwar Prasad***, reported in ***(2009) 3 SCC 117***; ***State of Punjab and Others vs. Refiq Masih (White Washer)***, reported in ***(2015) 4 SCC 334*** as well as the judgment of this Court in the case of ***Nilufar Islam vs. The State of Assam and Six Others***, reported in ***2022 SCC Online GAU 745***.

11. On the other hand, Mr. S. P. Sharma, the learned counsel appearing on behalf of the respondent authorities submitted that the respondents were justified in deducting the amount of Rs.7,36,614/- on the ground of overdrawn pay and allowances by the deceased husband/father of the petitioners in as much as as per his Service Book, the husband/father of the petitioners was supposed to retire on 31.12.2014. He further submitted that the husband/father of the petitioners had due knowledge of his date of superannuation. However, he kept on working till the time of his death, i.e. till 19.09.2014 and as such the said salary and other emoluments which the husband/father of the petitioners received were recoverable. The learned counsel for the respondents submitted that as per the Office Order dated 31.05.2016, the husband/father of the petitioners was eligible to pension of Rs.8,800/- per month with effect from 01.01.2013 to 19.09.2014 and he was further entitled to an amount of Rs.4,99,488/- on account of death-cum-retirement gratuity. After adjusting the amount of Rs.4,99,488/- which was

receivable by the husband/father of the petitioners, there remained a balance amount of Rs.2,37,126/- which has as of now been adjusted against the arrear pension and the petitioners at present have been receiving the family pension. The learned counsel for the respondents further drew the attention of this Court to the recent judgment of the Supreme Court in the case of ***Thomas Daniel vs. State of Kerala and Others*** reported in ***2022 SCC Online SC 536*** and referred to the paragraph No.9 of the said judgment and submitted that if the employee had knowledge that the payment received was in excess of what was due or wrongly paid or in case error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, the courts may, on the facts and circumstances of any particular case, order for recovery of amount paid in excess.

12. Upon hearing the learned counsel for the parties and upon perusal of the materials on record, three questions arise for consideration. First, whether the writ petition is maintainable on account of laches on the part of the petitioners in approaching this Court? Secondly, whether the respondent authorities were justified to recover the amount of Rs.7,36,614/- by adjusting the same from the retirement and death gratuity amount of Rs.4,99,488/- as well as from the arrear pension? Thirdly, if not what relief(s) the petitioners are entitled to?

13. Let this Court first take into consideration the first question. To appreciate the question it is relevant to take note of the pension which includes pension and the pensionery benefits is neither a bounty nor a matter of grace depending upon the sweet will of the employer, nor an ex-gratia payment. It is a payment for past service rendered. The payment of pension, the pensionery benefits etc. are social welfare measures rendering socio-economic justice to those who in the heyday of their life ceaselessly toiled for the employer on an assurance that in their old age, each of them would not be left in lurch. Pension as well as the pensionery benefits are in consonance with and furtherance of the goals of the Constitution. The most practical raison d'etre for pension

is the inability to provide for oneself and his family due to old age. It creates a vested right and is governed by statutory rules as in the instant case, the Central Civil Service Pension Rules, 1972 which are enacted in exercise of power conferred under Article 309 and 145 (5) of the Constitution. In that view of the matter, this Court is of the opinion that the right to get pension, family pension, retirement gratuity is a continuous cause of action which entitles the pensioner or upon his death, his dependants, the right to the same.

14. At this stage, this Court would also like to take note of that there is no period of limitation for exercising the discretionary jurisdiction conferred upon this Court under Article 226 of the Constitution. It is well settled that on account of laches, this Court in exercise of its discretion may not entertain the writ petition. At this stage, this Court would like to observe that 'entertainability' and 'maintainability' of a writ petition are two distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to maintainability goes to the root of the matter and if such objections are found to be of substance, the courts would be rendered incapable of receiving the writ petition for adjudication. However, the question of entertainability is entirely within the realm of discretion of this Court. Delay/laches therefore relates to the question of entertainability and therefore this Court has the discretion to entertain or not depending on the facts of each case.

15. In the instant case, it would be seen that the petitioner No.1, who is the wife of Late Prasanna Chandra Barman, had suffered stroke which had resulted in 80% of disability. This aspect of the matter would be evident from the Identity Card issued on 28.12.2015 by the Government of Assam to the petitioner No.1 showing that the degree of the disability of the petitioner No.1 is 80%. This Court also would like to take note of that the petitioner No.2 is unemployed and whatever amount he could gather out of his odd job much of them is spent on the medicines of the petitioner No.1. It is also seen that the petitioners have approached the respondent authorities time and again and the

respondents, however, have turned a deaf ear towards the grievances of the petitioners. Moreover, as stated above, the right to receive pension/pensionery benefits is a continuous cause of action for the pensioner or in his absence, his family members. Under such circumstances, this Court is of the opinion that it is not a case where this Court ought not to exercise its jurisdiction under Article 226 of the Constitution in as much as the facts as well as on equity, this Court is of the opinion that the exercise of jurisdiction under Article 226 of the Constitution is called for.

16. Coming to the second question it would be seen that the husband/father of the petitioners was a Grade-IV employee. The Service Book of Late Prasanna Chandra Barman was not written by him. In fact it was written by the concerned respondent authorities. Superannuation Register is also written by the respondent authorities. Both the Service Book as well as the Superannuation Register is maintained and kept in the custody of the respondent authority.

17. At this stage, this Court finds it relevant to refer to a judgment of the Supreme Court of India rendered in the case of the ***State of Bihar and Others Vs. Pandey Jagdishwar Prasad***, reported in ***(2009) 3 SCC 117*** wherein the issue was that in the Service Book of the employee which was opened on 14.08.1973, two dates of birth were recorded, one was 11.02.1944 and other was 11.02.1946. The respondent State authorities therein did not correct or delete any of the dates mentioned for the entire period the employee was in employment with the State Authorities. The employee retired on 29.02.2004 on the basis of the later date entered in the Service Book. Thereupon by an order dated 04.12.2004, the State Authorities directed recovery of the excess amount drawn by the employee. Being aggrieved, the employee approached the Patna High Court. The learned Single Judge of the Patna High Court dismissed the said writ petition. On appeal, the learned Division Bench of the Patna High Court interfered with the order of recovery sought to be made by the State Authorities and directed refund of the amount already recovered with interest @ 6% per annum. The matter reached the Supreme Court. The Supreme

Court while upholding the judgment of the learned Division Bench of the Patna High Court held that as the employee was allowed to work beyond his due date of superannuation without raising any objection and in absence of misrepresentation and fraud to be attributed to the employee, the Division Bench of the Patna High Court was justified in setting aside the recovery of the excess amount on account of overstay. Paragraph Nos. 12 to 29 of the said judgment, being relevant for the purpose of the instant dispute, is quoted herein below:

> "*12. We have heard the learned counsel appearing on behalf of the parties and perused the materials on record as well as the impugned judgment. It appears that the department raised a controversy in regard to the date of birth after about 31 years of service of the respondent. It is an admitted position now that the amount directed to be recovered, has already been recovered from the retiral dues of the respondent which has been ordered by the Division Bench to be refunded to the respondent with interest @ 6%.*
>
> *13. It is true that the date of birth mentioned in the matriculation certificate should be treated as the date of birth of the respondent. But it would be open to the employee to place documents before the authorities that the date of birth shown in the service book taken from the matriculation certificate was incorrect. There has been no such document placed on record to corroborate the same except an affidavit sworn by the respondent which is on record. Therefore, the respondent ought to have retired on 28-2-2002, on the basis of his matriculation certificate which shows his date of birth as 11-2-1944 as recorded in his service book.*
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> *14. The learned counsel appearing on behalf of the appellant argued that since the service book of the respondent was in custody in which one of the date was mentioned as 11-2-1944, he ought to have retired on 28-2-2002, and therefore, he had fraudulently continued to serve the appellant till 29-2-2004 thereby receiving undue payment of salary and other allowances. We find no merit in this argument.*
>
> *15. It is to be noted that there was no question of fraud committed by the respondent before the learned Single Judge or even before the Division Bench of the High Court. The Division Bench, in the impugned judgment, had on this account subsequently mentioned thus, which is quoted as under:*
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> > "*In the present case, there was no dispute about the fact that there is no allegation of misrepresentation or fraud purported to have been perpetrated by the appellant-original writ petitioner.*"
> >
> > *(emphasis supplied)*
>
> *Such being the position and in the absence of any allegation of misrepresentation or fraud made by the appellant, the appellant cannot be permitted to raise the allegation of misrepresentation or fraud for the first time in this Court.*
>
> *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 the affidavit, some other date of birth was also evident.

17. In view of the aforesaid circumstances, the appellant ought to have deleted the date of birth entered in the service book of the respondent on the basis of his affidavit as the appellant had already accepted the date of birth of the respondent on the basis of his matriculation certificate which was also produced by the respondent.

18. The appellant alleged that the respondent had entered a second date of birth in his service book at a later period of time. The respondent vehemently negated this contention stating that two dates of birth were entered simultaneously in his service book by the department officials.

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 Kailash Singh v. State of Bihar held that recovery sought to be made from the salary of the employees on the ground of alleged overstay in service on the basis of age assessed or considered, despite the fact that the employee has worked during the period of alleged overstay could not be made.

21. In Sahib Ram v. State of Haryana 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.

22. As noted hereinearlier, in the service book of the respondent, two dates of birth have been mentioned, which is not permissible. It cannot be conceived of that the authorities could not examine the possibility of two dates of birth to be entered in the service book of the respondent. They ought to have deleted the initial date of birth based on the matriculation certificate if the appellants were of the view that the affidavit sworn by the respondent was correct and the date of birth appearing in the matriculation certificate must be found to be incorrect, it is needless to say that the affidavit sworn by the respondent must be on the basis of documents produced by the respondent to show that the date of birth entered in the service book initially was incorrect. Instead, the appellant had not issued any notice of retirement of the respondent on 28-2- 2002, which was the date for retirement of the respondent on his attaining superannuation i.e. on the basis of the date of birth shown in the matriculation certificate. On the other hand, the appellant allowed the respondent to work and got works from him and paid salary. Only for the first time, the appellant took note of two dates of birth after he had completed two years from the date of his actual date of retirement.

23. 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.

24. 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 v. State of Bihar 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 v. State of Bihar 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.

27. A further argument was advanced by the learned counsel for the parties before the High Court as well as before us on the applicability of Rule 96 of the Bihar Finance Rules for settlement of dispute regarding the date of birth. In view of our discussions made hereinabove and in view of the fact that we have accepted the observations of the Division Bench of the High Court that since the appellant had allowed the respondent to work beyond his due date of superannuation without raising any objection and in the absence of misrepresentation and fraud to be attributed to the respondent, it is not necessary for us in the peculiar facts and circumstances of the case to go into the question of interpretation of Rule 96 of the Bihar Finance Rules which is kept open for decision in an appropriate case.

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 v. Union of India. 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 Radha Kishun 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 the 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 the 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 mala fide intentions to continue his service, beyond his date of retirement, we are of the view that the decision in Radha Kishun v. Union of India would not be applicable in the facts of the present case."

18. In the instant case, the allegation of misrepresentation does not arise taking into account that the respondent authorities were in possession of the Service Book as well as

the Superannuation Register. It would also be seen from the Annexure-11 wherein it has been recorded that due to oversight, the date of Superannuation of Late Prasanna Ch. Barman was recorded in the Superannuation Register as 31.12.2015 for which the Superannuation Notice was not issued to Late Prasanna Ch. Barman. Relevant portion of Annexure 11, being pertinent, is quoted herein below:-

Recorded

> "*As per Service Book records incumbent should retire on 31.12.2012 (AN), but due to oversight his date of superannuation was recorded in the Superannuation Register as 31.12.2015 for which superannuation notice was not issued to the incumbent.*"

19. This Court further at this stage would also take note of the paragraph No.24 of the judgment of the Supreme Court in the case of ***Pandey Jagadishwar Prasad*** (supra) which has already been quoted herein above wherein the Supreme Court had observed that since the incumbent therein was allowed to work and was paid salary for his work during the period of 2 years after his actual date of retirement without raising any objection whatsoever, no deduction could be made for that period from the retirement dues of the respondents therein. This aspect of the matter squarely covers the issue involved in the instant proceedings.

20. Be that as it may, this Court further would like to refer to the judgment of the Supreme Court rendered in the case of ***State of Punjab and Others Vs. Rafiq Masih (White Washer) and Others***, reported in ***(2015) 4 SCC 334***. In the said judgment, the question before the Supreme Court related to as to whether the monetary benefits which accrued upon the employees upon a mistake committed by the Competent Authority in determining the emoluments payable could be recovered. It was observed that when the excess unauthorized payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. It was further observed that interference because of an action is iniquitous, must really be perceived as,

interference because the action is arbitrary. While the Supreme Court in paragraph No. 13 of the said judgment observed that if a mistake of making a wrongful payment is detected within 5 years, it would be open to the employer to recover the same in the case of an employee being in service, but in respect to employees who are about to retire or have retired, it was observed in paragraph No. 16 that a retired employee or an employee about to retire is a class apart from those who have sufficient service to their credit, before their retirement inasmuch as at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger and despite that, the employee's earnings have substantially dwindled (or would substantially be reduced on his retirement). With that perspective, the Supreme Court observed that the recovery would be iniquitous and arbitrary if it is sought to be made after the date of retirement, or soon before retirement. The Supreme Court further observed that the period within one year from the date of superannuation, in the considered view of the Supreme Court, should be accepted as the period during which the recovery should be treated as iniquitous, and therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the order is sought to be made after the employee's retirement, or within one year from the date of his retirement on superannuation. This aspect of the matter was further clarified in paragraph No. 18 wherein the Supreme Court as a ready reference summarized the following situations where recovery by employers, would be impermissible in law. Paragraph No. 18, being relevant, is quoted herein below:

> "*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 hereinabove, we may, as a ready reference, summarise 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 far outweigh the equitable balance of the employer's right to recover."

21. For the purpose of the instant case we are concerned with sub-para (ii) of Paragraph No.18 which stipulates that recovery from the retired employees, or employees who are due to retire within one year, of the order of recovery would be impermissible in law. In the instant case, the respondents have resorted to recover and recovered after the death of the husband/father of the petitioners which is a circumstance in the opinion of this Court is far more iniquitous than the circumstances referred to in paragraph No.18 of the above quoted judgment.

22. At this stage, this Court would like to deal with the judgment referred to by the learned counsel appearing on behalf of the respondents in the case of ***Thomas Daniel*** (supra) wherein reference was made to paragraph No.9. The reference made to paragraph No.9 of the said judgment is reproduced herein below:-

"*9. This Court in a catena of decisions has consistently held that if the excess amount was not paid on account of any misrepresentation or fraud of the employee or if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order which is subsequently found to be erroneous, such excess payment of emoluments or allowances are not recoverable. This relief against the recovery is granted not because of any right of the employees but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be caused if the recovery is ordered. This Court has further held that if in a given case, it is proved that an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, the courts may on the facts and circumstances of any particular case order for recovery of amount paid in excess."*

23. The above quoted paragraph is in similar terms to the judgment of the Supreme Court in the case of ***Rafiq Masih (White Washer)*** (supra). It further shows that there is a judicial discretion whereby the courts may, on the facts and circumstances of a particular

case, order for recovery of an amount paid in excess. It may however be relevant to take note of that the Supreme Court in the said judgment, i.e. in the case of ***Thomas Daniel*** (supra) while dealing with the facts had observed that as there was no contention that on account of misrepresentation or fraud played by the appellant therein, the excess amount has been paid and the appellant had retired on 31.10.1999. The Supreme Court held that the recovery which was sought to be done was illegal and accordingly had set aside. Paragraph Nos.14, 15 & 16 of the said judgment being relevant are quoted herein below:-

> "*14. Coming to the facts of the present case, it is not contended before us that on account of the misrepresentation or fraud played by the appellant, the excess amounts have been paid. The appellant has retired on 31.03.1999. In fact, the case of the respondents is that excess payment was made due to a mistake in interpreting Kerala Service Rules which was subsequently pointed out by the Accountant General.*
>
> *15. Having regard to the above, we are of the view that an attempt to recover the said increments after passage of ten years of his retirement is unjustified.*
>
> *16. In the result, the appeal succeeds and is accordingly allowed. The Judgment and order of the Division Bench dated 02.03.2009 and also of the learned Single Judge of the High Court dated 05.01.2006 impugned herein, and the order dated 26.06.2000 passed by the Public Redressal Complaint Cell of the Chief Minister of Kerala and the recovery Notice dated 09.10.1997 are hereby set aside. There shall be no order as to costs."*

24. In the instant case as would be seen from Annexure-11, the portion which has already been quoted herein above it has been admitted that it was on account of oversight that the date of superannuation was recorded in the Superannuation Register as 31.12.2015 for which the Superannuation Notice was not issued to the husband/father of the petitioners. The said clearly shows that it was the obligation of the respondent authorities to issue the Superannuation Notice. The learned counsel for the respondents also failed to show that it was the duty of the husband/father of the petitioners to bring to the notice of the authorities that he should retire. Under such circumstances, no case of fraud or misrepresentation can be attributed to the husband/father of the petitioners. On the other hand, the respondent authorities allowed the husband/father of the petitioners to work and took his service for this period and now by their impugned actions have

recovered the amount paid to the husband/father of the petitioners for the said period. This is clearly arbitrary, unreasonable as well as irrational. Accordingly, even applying the ration in the case of ***Thomas Daniel*** (supra) this Court is of the opinion that the action on the part of the respondents to recover the amount of Rs.7,36,614/- by adjusting the same from the retirement and death gratuity amount of Rs.4,99,488/- as well as from the arrear pension is illegal, arbitrary and iniquitous and also violates the law as laid down by the Apex Court in the above judgments.

25. Accordingly, this Court interferes with the order dated 31.05.2016 in so far as the direction issued to adjust the liabilities of Rs.7,36,614/- from the pension and the retirement gratuity which was payable to the petitioners.

26. The third question which arises for consideration is as to what relief(s) the petitioners are entitled to. Taking into account that the order dated 31.05.2016 as already held herein above is illegal, arbitrary, iniquitous and violates the law laid down by the Supreme Court in the above noted judgments, this Court holds that the recovery made by the respondents of an amount of Rs.7,36,614/- by deducting from the retirement and death gratuity of Rs.4,99,488/- as well as from the arrear pension is bad in law for which the respondent authorities are directed to reimburse the said amount to the petitioners within a period of 30 (thirty) days from the date of the instant judgment.

27. Taking into account that the petitioners have approached this Court after a period of 6 years, this Court in the peculiar facts of the instant case would not like to impose interest if the amount of Rs.7,36,614/- is paid within a period of 30 (thirty) days from the date of the instant judgment. However, in the circumstance that the respondents failed to pay the said amount within the period of 30 (thirty) days from the date of the instant judgment, in that case, the respondents would be further liable to pay interest at the rate of 8% per annum effect from 17.06.2016 till such date the payment is duly made.

28. Further taking into consideration that it is on account of the respondents' actions,

the petitioners have been compelled to approach this Court, this Court further imposes a cost of Rs.10,000/- (Rupees ten thousand) only as the cost of the proceedings which shall also be paid by the respondents within a period of 30 (thirty) days from the date of the instant judgment.

29. With the above observations and directions, the instant writ petition stands disposed of.

JUDGE

Comparing Assistant