



GAHC010240982022

Page No.# 1/25



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

Case No. : WP(C)/7563/2022

SMT. SHARMILA ROY DAS
W/O MR. BENUDHAR DAS, R/O HOUSE NO. 46, NAWJAN ROAD, UZAN
BAZAR, GUWAHATI, DIST- KAMRUP (M), ASSAM, PIN-781001

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM, EDUCATION DEPARTMENT (HIGHER), DISPUR,
ASSAM, PIN-781006

2:THE DIRECTOR OF HIGHER EDUCATION
ASSAM
KAHILIPARA
GUWAHATI-781019

3:THE PRINCIPAL
CHHAYGAON COLLEGE
CHHAYGAON
P.O.-CHHAYGAON
DIST-KAMRUP
ASSAM
PIN-781124

4:THE PRINCIPAL GENERAL ACCOUNTANT (A AND E)
MAIDAMGAON
BELTOLA
GUWAHATI
ASSAM
PIN-781019

5:THE TREASURY OFFICER



AMINGAON TREASURY KAMRU

Advocate for the Petitioner : MRS R DEKA

Advocate for the Respondent : SC, HIGHER EDU

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER(ORAL)

Date : 02-05-2023

Heard Mr. B.D. Das, the learned Senior Counsel assisted by Mrs.R. Deka, the learned counsel for the petitioner, Mr. K.Gogoi and Mr. D Upamanyu, the learned counsels appearing on behalf of the Higher Secondary Department, Mr. R.K. Talukdar, the learned counsel appearing on behalf of the Accountant General (A & E) and Mr. R. Borpujari, Advocate appearing for the Treasury Officer. None appears on behalf of the respondent No. 3 although service has been duly meted upon the said respondent.

2. The issue involved in the instant writ petition is as to whether the respondents in the Higher Education Department can recover from the retiral benefits of the petitioner, the salary for the period from 1/11/2021 to 31/10/2022 on the basis of a communication dated 14/11/2021 issued by the Senior Accounts Officer of the Office of the Principal Accountant



General (A & E).

3. The brief facts of the instant case is that the petitioner herein was appointed as an Assistant Professor in the Department of English by an order dated 26/12/1988 on the basis of the selection made by the authorities pursuant to an advertisement. At the time of joining the petitioner submitted her Admit Card issued by the Board of Secretary, Education, Assam showing her date of birth as on 1/3/1978 as 16 years 4 months 27 days.

4. During the course of hearing the original service book was produced by the counsel for the Higher Education Department. The said Admit Card forms a part of the said Service Book as the same has been pasted in the penultimate page of the service book. It further appears that in the Service Book of the petitioner, more particularly in column No. 7 "**date of birth by Christian era as nearly as can be ascertained**" the date of birth was recorded as 4th of October, 1962. It further appears from the Service Book that there were various attestation made by the Secretary, Chhaygaon College from time to time. It is also relevant to take note of that in the penultimate page of the first Service Book, the Admit Card of the petitioner was also attested by the Principal of the Chhaygaon College with a date 20/7/2006. It further appears that on 29/9/2010, the second Service Book was prepared wherein also the date of



birth was recorded as 4th of October 1962 in column No. 7. Taking into account the said date of birth as 4th of October, 1962, the petitioner superannuated on 31/10/2022 as has also been recorded in the Service Book.

5. Prior to the retirement of the petitioner, the respondent No. 3 sent the pensionary benefit proposal as well as for final withdrawal of the GPF to the respondent No. 4 vide a communication dated 28/9/2022. Upon the said communication being sent, the Senior Accounts Officer of the Office of the Accountant General (A& E) had issued a communication on 14/11/2022 to the respondent No. 3 pointing out a deficiency as regards the proposal amongst others to the effect that as per the Admit Card, the date of birth of the petitioner falls on 4/10/1961 and accordingly the date of retirement of the petitioner should be on 31st of October, 2021. However, the petitioner was allowed to retire from service on 31/10/2022 and resultantly there was an excess drawal of pay of 1 year and the same needs to be corrected with due attestation and a fresh ROP, Rules, 2017 and NPC to that effect should also be furnished alongwith due and drawn statement for recovery of the overpayment of pay and allowance w.e.f. 1/11/2021 to 31/10/2022. It is on account of the said deficiency, the proposal for pension as well as the other pensionary benefits was returned by the Office of the Principal Accountant General (A & E).



6. The petitioner on coming to learn about the said communication issued a communication to the Office of the Principal Accountant General (A & E) as well as also to the respondent No. 3 dated 15/11/2022 requesting not to recover any amount from the salary of the petitioner and to release her pension alongwith GPF, leave encashment, gratuity and other benefits at the earliest. However, nothing was done in that regard for which the instant writ petition was filed on 23rd of November, 2022.

7. It appears on record that on 25/11/2022 this Court had issued Rule making it returnable by 8 weeks and in the interim directed that the Accountant General (A & E), the Principal of Chhaygaon College and the respondents in the Higher Education Department not to recover the alleged excess payment made to the petitioner towards her salary for the period from 1/11/2021 to 31/10/2022 until further orders. It was also made clear that pendency of the writ petition shall not bar the Higher Education Department as well as the Principal Accountant General (A & E) to pay the provisional pension as well as the final pension and other retiral benefits to the petitioner as per her entitlement following the due procedure and in accordance with law.

8. It further appears on record that the respondent No. 2 had filed an affidavit-in-opposition on 30th of March, 2023. In the said affidavit in opposition,



it was mentioned that the petitioner was appointed and she joined on 26/12/1988 as Lecturer in the Department of English in Chaygaon College as per the DPI's approval letter dated 26/12/1988. It was further mentioned that the petitioner mentioned her date of birth in all her documents like Passport, Pan Card, Voters List and Aadhar Card including her service book as on 4/10/1962 whereas as per the HSLC Admit Card, her age on 1st of March, 1978 was 16 years 4 months 27 days and correspondingly, as per the Admit Card, her date of birth falls on 4/10/1961. It was further mentioned that in the provincialised college, the Principal/Secretary/the DDO of the respective colleges is the head of the office and the recording authority to maintain the Service Book of the employees of the respective colleges. It was further mentioned that as per the Government's notification dated 11/11/2021 and the office letter dated 22/11/2021, Principals of all provincialised colleges of Assam have been allowed to submit the pension papers and final withdrawal of GPF proposal etc directly to the Accountant General for necessary action. It was further stated that as per the report of the Principal, Chhaygaon College, vide letter dated 28/1/2023 the proposal of pensionary benefits in respect to the petitioner was sent to the Office of the Principal Accountant General (A & E) on 28/9/2022 vide letter No.CC/361. The proposal was returned back by the Accountant General (A & E) vide letter dated 14/11/2022 on the ground that the petitioner drew one



year excess payment i.e. w.e.f. 1/11/2021 to 31/10/2022 as per the records maintained in the service book of the incumbent wherein the date of birth was put by the incumbent herself. It was also mentioned that the GPF bill was submitted to the concerned Treasury Officer of Amingaon, Kamrup on 11/1/2023 as per the order dated 1/11/2022 which was also rejected by the said Treasury on 12/1/2023. It was further submitted that no case has been made out by the petitioner for interference under Article 226 of the Constitution as the actions on the part of the respondent authorities are not discriminatory, unfair, injudicious, arbitrary and unreasonable.

9. It further appears that on 28/2/2023, the Senior Deputy Accountant General (A & E) had also filed an affidavit-in-opposition. It was mentioned that in terms with the date of birth reflected in the Admit Card, the date of retirement of the petitioner ought to have been on 31/10/2021 instead of 31/10/2022. Further, it was found in the Service Book that the pay of the petitioner for the period from 1/4/2016 to 1/7/2018 was not found recorded in the Service Book. As a result, the Office of the Principal Accountant General (A & E) returned the pension papers in original of the petitioner to the respondent No. 3 i.e. the Principal, Chhaygaon College by letter dated 14/11/2022. In the said affidavit, reference was also made to Rule 95 of the Assam Service (Pension) Rules, 1969 to the effect that the Government employee must know



his/her date of superannuation according to the age proof document. It was further mentioned that if any intimation is not issued to the State Government regarding date of superannuation, that shall not in any way change his/her date of retirement and shall not confer on the Government employee any right to remain in service beyond the date on which he/she is required to retire.

10. Further to that, drawing reference to a Office Memorandum dated 1/2/1992, it was mentioned that if no intimation is given to an officer about his/her date of superannuation, it shall not confer on him/her any right to remain in service. However, if any officer is found to overstay in service beyond the date of his/her superannuation, no proposal for regularisation of the overstay period shall be entertained and amount drawn during such overstay shall be recovered from the DCRG of the said officer. Further to that, in paragraph 10 of the said affidavit-in-opposition, it was mentioned that whenever any excess payment is made on account of fraud, misrepresentation, collusion, favoritism, negligence or carelessness etc role of those responsible for overpayment in such cases and the employee who benefited from such action should be identified and departmental/criminal action should be considered in appropriate cases.

11. It was further mentioned that the Office of the Principal Accountant

General could not act upon the petitioner's representation dated 16/11/2022 as the Finance Department's Notification dated 27/1/2022 has not empowered the said office for waiver of their recovery for overpayment of pay and allowance and recovery of excess payment can only be waived by the PPG Department, Finance Department and by the Director of Pension, Government of Assam only. It was further mentioned that the GPF final amount authority which was issued from the Office of the Principal Accountant General (A & E) dated 17/11/2022 have been recalled from the respondent No. 3 and other stake holders vide office letter dated 13/1/2023 for issuance of a fresh authority on available balance. Further in respect to leave encashment benefit of provincialised college teachers, the Office of the Principal Accountant General (A & E) has no role to play.

12. It further appears from the records that there is an additional affidavit filed on 12th of April, 2023 by the petitioner to bring on record the sanction of the provisional pension along with other allowances as admissible under the Rules w.e.f. 1/11/2022 issued by the respondent No. 2 vide Office Memorandum dated 15/3/2023 and also the fact that the GPF bill pertaining to the petitioner was submitted by the respondent No. 2 to the concerned Treasury Officer at Amingaon on 11/1/2023, which was rejected by the Treasury Officer on



12/1/2023.

13. At this stage, it may be also pertinent to mention that the petitioner pursuant to the rejection by the Treasury Officer, Amingaon to pay the GPF as well the provisional pension had filed an Interlocutory Application being I.A. (C) No.1048/2023 for impleading the Treasury Officer, Amingaon. This Court vide an order dated 21/4/2023 allowed the said Interlocutory Application and the Treasury Officer, Amingaon was arrayed as the respondent No. 5 to the instant proceedings.

14. I have heard the learned counsels for the parties and perused the materials on record.

15. From a perusal of the Service Books in original which were produced by the learned Standing Counsel appearing on behalf of the Higher Secondary Department, it is apparent that the petitioner had duly submitted the Admit Card before the concerned authorities and the Admit Card was attested on 20/7/2006 by the Principal, Chhaygaon College. This clearly shows that it was in the knowledge of the respondent authorities and more particularly the respondent No. 3 of the details in the Admit Card as well as the date of birth so recorded in the Admit Card. In column No. 7 of the Service Book No. 1 as well as also in the Service Book No. 2 which was reconstructed upon the approval

given by the DHE's letter dated 16/12/2009, it clearly shows that the date of birth of the petitioner was recorded as 4th of October, 1962. It further appears from the said Service Book No. 1, as already mentioned hereinabove, that the photocopy of the Admit Card was pasted to the penultimate page of the Service Book No. 1 which was duly attested on 20/7/2006 by the respondent No. 3. In the Admit Card, the date of birth was recorded as on 1st of March 1978 to be 16 years 4 months 27 days.

16. At this stage, this Court finds it relevant to take note of SR 8 of the FR and SR as applicable to the State of Assam. SR 8 (c) and the Note appended thereto being relevant is quoted herein below :-

“SR 8(c) : Commissioner and Heads of Departments may alter the recorded date of birth in the case of non-Gazetted servants ; provided they are satisfied after enquiry that the previous date was incorrect.

Note. (Non-Gazetted Government Servant) *The Head of the office should record the date of birth in the Service Book of a non-Gazetted Government servant on his initial appointment with reference to the Matriculation or equivalent certificate and shall also record a remark to this effect in the Service Book. In cases where these are not available, the Head Office should verify the date with reference to the birth certificate to be produced by the Government servant and record a note to that effect in the Service Book.*

(Gazetted Government Servant) *In the case of Gazetted Government servant, the verification should be made according to the above procedure on his initial appointment by the Administrative Department concerned. They should intimate the date of birth of the officer as verified to the Accountant General for incorporation of*

the same in the History of Services of the Gazetted Governments servants.

(Alteration) No alteration in the date of birth of a Government servant should be allowed except in very rare cases where a manifest mistake has been made. Such mistake should be rectified at the earliest opportunity in the course of :

(1) periodical re-attestation of the entries in the first page of service book, and

(2) preparation of the annual detailed statement of a permanent establishment (Financial Rule Form No. 11) in which is noted the date of incumbent's birth. In no case request for change in the date of birth of a Government servant made on a date within three years of the date of his actual superannuation should be entertained.”

17. It would be seen that in respect to non-Gazetted Government servant, it is the head of the office who should record the date of birth in the Service Book of a non-Gazetted Government servant on his initial appointment with reference to the matriculation or equivalent certificate and shall also record a remark to this effect in the Service Book. It is also relevant to take into consideration SR 8(c) which empowers the Commissioner and the Heads of the Departments to alter the recorded date of birth in case of a non-Gazetted Government servant provided they are satisfied after enquiry that the previous date was incorrect.

18. Further in the Note to SR 8, it is further mentioned as to when an alteration to the date of birth is permissible. It has been mentioned that no alteration of a date of birth of a Government servant should be allowed except in very rare cases where a manifest mistake has been made and such mistake should be rectified at the earliest opportunity in course of periodical re-attestation of the entries in the first page of the Service Book and preparation



of the annual detailed statement of permanent establishment in which the date of birth of the incumbent's is noted.

19. In the backdrop of the above, if this Court takes into consideration the Admit Card of the petitioner and the communication dated 14/11/2022 issued by the Office of the Principal Accountant General (A & E), it would be apparent that the date of birth of the petitioner is 4/10/1961. However the Authority responsible to insert the date of birth of the petitioner in the Service Book in spite of the Admit Card forming a part of the Service Book seems to have wrongly calculated the date of birth to be 4th of October, 1962 instead of 4th of October, 1961. This mistake could have happened taking into consideration the manner in which the date of birth was recorded in the Admit Card as 16 years 4 months 27 days as on 1/3/1978. But even during periodical attestations so made as could be seen from the Service Books and when details as regards approval seeking the reconstruction of the Service Book No. 2 was sought from the Higher Secondary Department, it never came into the light of either the petitioner or even the authorities concerned about the mistake committed in entering the date of birth. It would also be relevant to note that admittedly, in all documents viz. Passport, Pan Card, Voter List and Aadhar Card, the date of birth has been mentioned as 4/10/1962 which is a pointer that the petitioner's



bonafide belief that her date of birth to be 4/10/1962. Under such circumstances, the petitioner was allowed without any objection to continue to render service till 31/10/2022.

20. Now the question therefore arises is as to whether in the said facts, the respondent authorities ought to be allowed to recover the salary which the petitioner received for the period from 1/11/2021 to 31/10/2022 from the pensionary benefits on account of excess drawal due to overstay. For the purpose of deciding the said aspect, this Court finds it relevant to refer to the judgment of the Supreme Court rendered in the case of **State of Bihar & Others Vs. Pandey Jagadishwar Prasad** reported (2009) 3 SCC 117 wherein the issue was that in the Service Book of the employee which was opened on 14/8/1973, two dates of birth were recorded. One was 11/2/1944 and other was 11/2/1946. The respondent State therein did not correct or delete any of the dates mentioned for the entire period the employee continued to render service with the State authorities. The employee retired on 29/2/2004 on the basis of the later date entered in the Service Book. Thereupon vide an order dated 4/12/2004, 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 respondent authorities therein and directed refund of the amount already recovered with interest @6% per annum. This matter was carried on appeal to the Supreme Court. The Supreme Court while upholding the judgment of the learned Division Bench of the Patna High Court held that 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 excess amount on account of overstay.

21. In paragraph No. 16 of the said judgment in **Pandey Jagadishwar Prasad(supra)**, the Supreme Court observed that even if it is taken into consideration that the respondent therein had fraudulently entered another date of birth in his Service Book, as has been alleged, it should have come to the notice of the authorities during the course of his service and not after the expiry of the date mentioned in the Service Book which was based on the affidavit of the respondent therein. On the contrary, it was further observed by the Supreme Court that none of the officials responsible had noticed this aspect during his service period, even during the time of promotion when the Service Book which was required to be inspected by the officials. It was observed that it was a clear case of gross negligence and lapses on the part of the authorities

and as such respondent/employee could not 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 evident. In paragraph No. 22 of the said judgment, it was further observed that in the Service Book of the respondent therein, two dates of birth were mentioned which was not permissible. It was observed that it could not have been 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 therein. The authorities ought to have deleted the initial date of birth based on matriculation certificate if the appellants therein were of the view that the affidavit sworn by the respondent therein was correct and the date of the birth appearing in the matriculation must be found to be incorrect.

22. The above aspects of the matter are a clear pointer to the effect, in the opinion of this Court, that it was the duty of the respondent authorities more particularly the respondent No. 3 to have correctly recorded the date of birth inasmuch as the Admit Card of the petitioner was available with the said authorities. This aspect of the matter can also be seen from the Note to SR 8 as quoted in the previous segments of the instant judgment. This Court further finds it relevant to take note of that the said Service Book was again reconstructed on the basis of the orders passed by the Office of the Director of

Higher Education and in the reconstructed Service Book, the date of birth was again written as 4/10/1962. None of the authorities observed that there was any mistake in the recording of the date of birth then also.

23. If this Court further takes into account the judgment of the Supreme Court in the case of **Pandey Jagadishwar Prasad (supra)**, it would be seen that the Supreme Court further observed at paragraph No. 24 that as there was no allegation of misrepresentation or fraud which could be attributed to the respondent therein and considering the fact that the appellants therein had allowed the respondent therein to work and got the 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 approving the judgment of the learned Division Bench of the Patna High Court, the Supreme Court further observed 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 any raising any objection whatsoever, no deduction could be made for the period from the retirement dues of the respondent. Paragraphs 16, 22 to 26 of the said judgment of the Supreme Court being pertinent to the instant case are reproduced as hereinunder:

“**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.

22. As noted hereinafter, 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.”

24. This Court further deems it proper to take note of another judgment of the Supreme Court in the case of **State of Punjab & Ors. Vs. Rafiq Masih (White Washer) and Ors.** reported in **(2015) 4 SCC 334**. The Supreme Court after taking into consideration various factors was of the opinion that the recovery would be iniquitous or arbitrary if sought to be made after the date of retirement or soon before retirement. In paragraph No. 18 of the said judgment, the Supreme Court clarified as a ready reference the various situation where recoveries from employees would be impermissible in law. Paragraph 18 of the said judgment being relevant is quoted hereinbelow :-

“**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."

25. For the purpose of the instant case sub-para (ii) of paragraph 18 which stipulates that recovery from retired employees or employees who are due to retire within one year of the order of recovery would be impermissible in law would be applicable. In the instant case the respondents herein have resorted to take steps for recovery after the petitioner had retired. This Court is of the opinion that the case of the petitioner herein is squarely covered under paragraph 18(ii) of the judgment in the case of **Rafiq Masih (White Washer)** (**supra**).

26. This Court further deems it relevant to deal with another aspect of the matter which is an allegation of fraud or misrepresentation as stated in the affidavit filed by the respondent Nos. 2 & 4 wherein there is an allegation of

fraud or misrepresentation by the petitioner. This Court finds it difficult to appreciate the allegation of fraud and misrepresentation against the petitioner inasmuch as in the Admit Card wherein the date of birth of the petitioner was recorded was before the authorities concerned and it was the duty of the authorities concerned more particularly the respondent No. 3 to have inserted the correct date of birth. Had it been the case that the Admit Card or the document(s) evidencing the date of birth was not placed before the authorities, it would have been a different case. But as the Admit Card was a part of the Service Book which was attested by the Respondent No. 3 on 20/7/2006, the question of fraud or suppression or misrepresentation in the opinion of this Court do not arise.

27. Considering the above, this Court is therefore of the opinion that as the respondent authorities permitted the petitioner to work and paid her the salary, that too without any objection or notice being put to the petitioner, it would be unreasonable, iniquitous and accordingly impermissible on the part of the respondent authorities to recover from the petitioner the salary for the period from 1/11/2021 to 31/10/2022 from the retiral benefits of the petitioner.

28. This Court however finds it relevant to take note of another aspect of the matter more particularly paragraph No. 30 of the judgment of the Supreme

Court in the case of **Pandey Jagadishwar Prasad(supra)** wherein the Supreme Court held that the pension as well as the pensioner benefits of the respondent therein had to be taken into account on the basis of the correct date of birth. Paragraph No. 30 of the judgment of the Supreme Court in the case of **Pandey Jagadishwar Prasad(supra)** being relevant is extracted hereinbelow.

“**30.** There is another aspect in this matter. Although we have directed that the excess amount paid for two years to the respondent as salary cannot be recovered from the respondent, but we make it clear that for fixing the retiral benefits, the period of two years in respect of which salary was received by the respondent cannot be taken into consideration and the respondent would be entitled to fixation of retiral benefits as on the date of his superannuation i.e. 28-2-2002.”

29. In view of the above, the instant writ petition stands disposed off with the following observations and directions –

(i) The communication dated 14/11/2022 issued by the Office of the Principal General Accountant (A & E) stands set aside and quashed insofar as the recovery of the excess amount for the period from 1/11/2021 to 31/10/2022 on account of overstay is concerned.

(ii) The respondents authorities are directed not to make any recovery from the petitioner in any mode including from the retirement dues of the petitioner on account of excess payment due to overstay for the period from 1/11/2021 to 31/10/2022.



(iii) The respondent authorities including the respondent No. 3 and the Office of the Principal Accountant General (A & E) are directed to immediately process the pension of the petitioner so that the petitioner receives her arrear pension as well as other pensionary benefits at the earliest.

(iv) The said exercise be completed within a period of 4(four) months from the date of a certified copy of the instant judgment is served upon the Principal, Chhaygaon College as well the Senior Accounts Officer of the Office of the Principal Accountant General (A & E).

(v) This Court further directs the Treasury Officer, Amingaon to do the needful so that the petitioner receives her arrear, regular pension and other pensioner benefits to which the petitioner is entitled under law.

(vi) The pension of the petitioner has to be computed by taking into account the petitioner's actual date of birth i.e. 4/10/1961 which is as per the Admit Card.

(vii) This Court deems it relevant to clarify that an additional affidavit was filed by the petitioner wherein it has been mentioned that Sharmila Roy and Sharmila Roy Das is one and the same person. On the basis thereof, the respondent authorities shall take due note of the same and do the needful.

30. Before parting with the records, this Court finds it relevant to observe that

it has become a recurrent phenomenon as can be noticed on every other day relating to litigations filed challenging recovery or proposed recovery on account of overstay in service. These notices for recovery or recovery so made by the concerned Department wherein the employee had worked come to light at a very late stage after the actual date of superannuation. Either it comes to light at the behest of the employee or a vigilant official of the Department and mostly when the Director of Pension or the Office of the Principal Accountant General (A&E) points out the deficiency as regards the date of birth which have resulted in overstay. It can also be seen that when such deficiency is pointed out, the concerned Department issues notice for recovery to the employee or recovers from the employee. The law laid down in **Pandey Jagdishwar Prasad (supra)** and **Rafiq Masih (White Washer) (supra)** being well settled, it is not known why the concerned Departments or for that matter the officials responsible for issuing superannuation notices are not vigilant. This Court further fails to understand that in the present age where so much impetus is given to digitalization, how the issue as regards the date of birth and date of superannuation can still continue to remain an issue on the ground that the Service Book was not available. It is also relevant to observe that what is normally seen is that the concerned Department when it realizes that there is overstay by an employee, steps are taken to recover from the employee who



has retired but no action is taken on the erring officials for whose lack of diligence for not recording the date of birth or issuing the superannuation notice is time, the steps for recovery or notice of recovery is/are issued. If the State Government is serious to root out the problem of overstay, the State Government is required to take appropriate steps by not only holding the retiring employee accountable (if there is a case of fraud or misrepresentation) but also steps are required to be taken against such erring official for whose lack of diligence and vigilance it had led to overstay. This Court also feels that steps are also required to be taken to digitalize the service records of the employees so that not only the official who is required to issue the superannuation notice can do so without any hindrance but the senior officials of the Department can also keep a tab as to whether the official required to take steps for issuance of superannuation notice is doing so. This Court hopes and expects that the Government of Assam in its own wisdom shall take appropriate steps so that malady of the present kind do not continue.

31. Pending applications, if any, stands disposed of.

JUDGE

Comparing Assistant