

THE HIGH COURT OF TRIPURA
AGARTALA
W.P.(C) No. 123 of 2007

Petitioner :

Sri Rashamoy Namasudra, S/o. Late Subal Namasudra, Resident of Noagaon, P.S- Kamalpur, District-Dhalai, Tripura.

By Advocate :

Mr. S. Deb(Gupta), Adv.

Respondents :

1. The Accountant General (A & E), Tripura, Agartala.
2. The Comptroller and Auditor General of India, 10 Bahadur Shah Jafar Marg, New Delhi-110002.
3. The State of Tripura, Represented by the Secretary to the Government of Tripura, Public Works Department, Agartala.

By Advocates :

Mr. P. K. Biswas, Asstt. S.G.
Mr. T.D. Majumder, G.A.

B E F O R E
THE HON'BLE CHIEF JUSTICE MR. DEEPAK GUPTA
THE HON'BLE MR. JUSTICE U.B. SAHA

Date of hearing &
Judgment : **29TH August, 2013.**

Whether fit for reporting :

Yes	No
	✓

JUDGMENT & ORDER(ORAL)

(Deepak Gupta, C.J.)

By means of this writ petition, the petitioner has challenged the order dated 11.02.2005 (Annexure-3 to the writ petition) whereby it has been directed that a sum of Rs.3,91,058/- paid to the petitioner as pay and salary

during the period 01.08.1998 to 31.07.2003 be recovered from his retiral benefits.

[2] The factual background of the case is that the petitioner was admittedly employed as Helper in the Public Works Department of the Government of Tripura. His date of birth as originally entered in the Service Book was 22nd July, 1938 which would mean that he would attain the age of 60 years on 22nd July, 1998 and would stand retired w.e.f. 31st July, 1998. The petitioner filed an affidavit before the Sub-Divisional Officer, PWD, Kamalpur who on the basis of the said affidavit recorded the change in the date of birth of the petitioner in his Service Book on 12.04.1977 and the date of birth was changed from 22.07.1938 to 22.07.1948. On this basis the petitioner continued in service after 31st July, 1998 and continued to function as such till 31st July, 2003, but it was clearly stated that he stood retired w.e.f. 31st July, 1998.

[3] The petitioner did not challenge the action of the government whereby it was held that his date of birth was wrongly recorded as 1948 and therefore, this matter is not an issue before us. It is thus admitted that he was to retire in the year 1998.

[4] After the petitioner actually retired on 31.07.2003 his retiral benefits were not being paid as there was some confusion as to how this period from 01.08.1998 to 31.07.2003 was to be dealt with.

[5] The earlier writ petition being WP(C) No. 64 of 2005 was filed on 7th February, 2005. In the reply filed to the writ petition, it was stated that efforts are being made to pay off the retiral dues of the petitioner within three

months and on this basis the learned counsel for the petitioner withdrew the writ petition.

[6] In the meantime, on 11th February, 2005 the impugned order was passed which reads as follows:-

"MEMORANDUM

WHEREAS it appears that Sri Rashamoy Namasudra, Rtd. Helper, attached to Kamalpur Sub-Division, PWD, Kamalpur, Dhalai, Tripura was due to be undergone superannuation from the Govt. service on 31.07.1998(afternoon).

AND WHEREAS Sri Namasudra Rtd. Helper, remained continued in service beyond the period of superannuation w.e.f 01.08/98 to 31/07/2003 without entitlement/reappointment/prior approval for further period of service.

NOW THEREFORE, the undersigned has been directed in pursuance of the office letter No. F.6(54)-PWD(E-II)/94 (Pt-II) dt. 14/01/2005 of the Chief Engineer, PWD (R & B), Govt. of Tripura, Agartala to recover the amount of salaries paid to the incumbent concerned during the aforesated extra period of service which works out the sum of Rs.3,91,058/- (Rupees three lacs ninety one thousand fifty eight) only from the pay bills for that period and hereinafter the amount shall be recovered from any outstanding payment of pensionery benefit and subsequent pension if the Govt. dues are not realized forthwith by alternative means. The pension proposal shall be initiated accordingly.

**Executive Engineer
Ambassa Division
Ambassa"**

[7] This order was not the subject matter of the earlier writ petition and from the first reply filed by the State it is obvious that neither the petitioner nor the State brought it to the notice of the Court that such an order had been passed. The earlier order which was passed permitting the writ petition to be withdrawn with a direction that the retiral benefits be paid at the earliest were passed without making any reference to the aforesaid order. The only issue is whether this order is legal or bad.

[8] On behalf of the petitioner, Ms. S. Deb(Gupta) contends that the petitioner has actually worked for this period and even if the period be beyond his date of retirement since he has worked he must be paid the salary and wages for the said period and this amount cannot be recovered from him.

[9] On the other hand, Mr. T.D. Majumdar, learned Govt. Advocate submits that the petitioner managed to stay in service for a period of five years only on account of the false affidavit filed by him and he contends that once it has been found that the date of birth in the affidavit is false the petitioner cannot be entitled to get the benefit of pay and salary for the said period. He has placed reliance of the judgment of the Apex Court in ***Radha Kishun Vs Union of India; (1997) 9 SCC 239.***

[10] In that case, the petitioner Radha Kishun was to retire on 31.05.1991. He however managed to continue in service till 31.05.1994. Thereafter, the Union of India initiated action to recover the amount of pay and allowances paid to him after the date on which he has to retire i.e. 31.05.1991. Radha Kishun filed a petition under the Administrative Tribunal Act which was dismissed by the Central Administrative Tribunal and thereafter he filed the Special Leave Petition before the Apex Court which was disposed of in the following terms:-

"3. The learned Counsel for the petitioner contends that since the petitioner has worked during the period, he is entitled to the payment of the pay and allowances from June 1-6-1991 to 26-6-1994 and that he is also entitled to the payment of provisional pension, death-cum-retirement gratuity, leave encashment, commutation of pension amount, GPF money and the amount deposited under CGHS on the plea that he retired from service on May 31-5-1994. We are aghast to notice the boldness with which it is claimed that he is entitled to all the benefits with effect from the abovesaid date when admittedly he

was to retire on 31-5-1991. It would be an obvious case of absolute irresponsibility on the part of the officer concerned in the establishment in the section concerned for not taking any action to have the petitioner retired from service on his attaining superannuation. It is true that the petitioner worked during that period, but when he is not to continue to be in service as per law, he has no right to claim the salary etc. It is not the case that he was re-employed in the public interest, after attaining superannuation. Under these circumstances, we do not find any illegality in the action taken by the authorities in refusing to grant the benefits.

4. It is then contended that the petitioner would have conveniently secured gainful employment elsewhere and having worked, he cannot be denied of the legitimate salary to which he is entitled. Though the argument is alluring, we cannot accept the contention and given legitimacy to the illegal action taken by the authorities. If the contention is given acceptance, it would be field day for manipulation with impunity and one would get away on the plea of equity and misplaced sympathy. It cannot and should not be given countenance.

5. Under those circumstances, we dismiss the petition with a direction to Government of India to take appropriate disciplinary action against all the persons concerned for their deliberate dereliction of duty in not ensuring the petitioner's retirement on his attaining the age of superannuation."

[11] In view of the aforesaid law laid down by the Apex Court, we are of the considered view that the petitioner cannot claim that no recovery should be made of the pay and allowances actually granted to him for the period he remained in service beyond his actual date of retirement. The situation in the present case is even worse since the petitioner managed to get the date of birth changed in the service record on the basis of his affidavit which is false. We have therefore, no option but to reject the claim of the petitioner.

[12] At the same time, we are not oblivious of the fact that the State has neither taken any disciplinary action against the petitioner or against the Sub-Divisional Officer who made the change. Therefore, though we are inclined

to accept the claim of the State that the petitioner should have retired w.e.f. 31.07.1998 we are of the view that he should have been paid his pension w.e.f. 01.08.1998.

[13] Therefore, though we dismiss the writ petition and uphold the order dated 11.02.2005 the same shall be subject to the condition that the petitioner shall be granted all pensionary benefits w.e.f. 01.07.1998 to 31.07.2003. We are of the considered view that the petitioner cannot be deprived both of his pension and his pay for this period and therefore, though the recovery of pay may be made, the pension and other pensionary benefits shall be paid to the petitioner.

[14] In view of the above discussions, the writ petition is disposed of. No order as to costs.

JUDGE

CHIEF JUSTICE