

**HIGH COURT OF TRIPURA
AGARTALA**

W.P.(C) No.245 of 2018

Md. Sirajul Islam Choudhury,
son of late Musaddar Ali Choudhury,
resident of village: Kanakpur, P.O. Noor pur,
District: Unakoti Tripura, PIN: 799 277

-----Petitioner(s)

Versus

- 1. The State of Tripura,**
represented by the Secretary,
Secondary Education Department,
Government of Tripura,
Agartala, Gurkhabasti,
P.O. Kunjaban, P.S. East Agartala,
District: West Tripura
- 2. The Secretary to the Government of Tripura,**
Finance Department, Civil Secretariat,
P.O. Kunjaban, P.S. New Capital Complex,
District: West Tripura
- 3. The Secretary to the Government of Tripura,**
Secondary Education Department,
Civil Secretariat, P.O. Kunjaban,
P.S. New Capital Complex,
District: West Tripura
- 4. Director, Secondary Education Department,**
Government of Tripura, Agartala,
P.O. Agartala, P.S. West Agartala,
District: West Tripura
- 5. Accountant General, Tripura,**
Malancha Nibash, P.O. Kunjaban,
P.S. East Agartala,
District: West Tripura
- 6. Head Master,**
Tila Bazar H.S. School,
Kailashahar, P.O. & P.S. Kailashahar,
District: Unakoti

----- Respondents

For Petitioner(s)	:	Mr. R. Datta, Adv.
For Respondent(s)	:	Mr. M. Debbarma, Addl. G.A. Mr. H. Deb, ASGI.
Whether fit for Reporting	:	YES

HON'BLE MR. JUSTICE S. TALAPATRA

Judgment & Order (Oral)

29.06.2019

By means of this writ petition, the petitioner who was initially appointed as Under Graduate Classical Teacher (Arabic) on 24.03.1976 has challenged the action of the respondents denying him the 3rd ACP [Assured Career Progression] by the memorandum No.Pen-1/PR No.28/2017-18/SKC/0212/623-24 dated 03.08.2017 issued by the respondent No.3, the Secretary to the Government of Tripura, Secondary Education Department [Annexure-2 to the writ petition]. The petitioner has also challenged the memorandum No.F.6(1)-FIN(PC)/98 dated 17.02.2005 issued by the Under Secretary to the Government of Tripura, Finance Department [Annexure-4 to the writ petition] on the ground of unreasonableness and absence of intelligible differentia. Further, the petitioner has urged this court for directing the respondents to grant him the ACP with effect from 31.12.2015 and to fix his pay in the upgraded scale. It has been further urged that the respondents shall be prohibited from recovering any money from the petitioner on account of excess payment.

02. The facts are mostly admitted. On 24.03.1976, the petitioner was appointed as Under Graduate Classical Teacher (Arabic). Subsequently by his own effort the petitioner acquired the graduation (BA in Arabic) on 18.08.1982 and the

post graduate degree (MA in Arabic) from Gauhati University. The petitioner has asserted that by the memorandum No.F.4(62)FIN(PC)/92 dated 07.12.1992 the state retrospectively operated a scheme to grant benefit of higher pay scale corresponding to the appropriate grade for acquiring higher qualification in the respective trade/subject to the Assistant Teacher and some other categories of teachers under Education Department. Since the petitioner acquired the higher education he was entitled to get the benefits in terms of the following passage of the memorandum dated 07.12.1992:

"F. FOR the SCHOOL TEACHERS AND SIMILAR OTHER EMPLOYEE (SUCH AS PHYSICAL INSTRUCTOR, LIBRARIAN, COACH, CLASSICAL TEACHER, HINDI TEACHER, VERNICULAR TEACHER, CRAFT INSTRUCTOR/TEACHER ETC WHO ACQUIRED HIGHER ACADEMIC AUALIFICATION IN THEIR RESPECTIVE TRADE SUBJECT TO WHICH THEY ARE/ATTACHED ON OR AFTER 24-04-1982

- i) **They shall be granted higher pay scales according to their qualification w.e.f 01-01-1988 or the date of publication of result whichever is later.**
- ii) **The benefit shall be admissible only for those incumbents who acquired higher qualification upto the period of 31-12-1991 (date of publication of result),**
- iii) **Pay shall be notionally fixed under the provision of F.R 22(a) (i) upto 31-12-1991 with actual financial benefit from 01-01-1992. However, after fixation of pay under F.R22(a) (i), date of next increment of the concerned employees shall fall due on the date of their earning of periodical increment as usual;**
- iv) **Such benefit admissible on the event of acquiring higher qualification shall be restricted only for the Graduation/Graduation with Honours/Post Graduation Degree (Not Diploma/Certificate in the particular trade/Subject to which the Particular incumbent belongs to.**
- v) **Pay scale for the posts of Librarian and Physical Instructor on acquiring higher qualification, shall be determined in accordance to SL Nos 1 and 2 as shown under (D) above.
Pay Scales for the posts of Coach and Senior Coach on acquiring higher qualification, shall be determined in accordance to SL Nos 3 and 4 shown under (D) above.**
- vi) **Benefit of movement from Lower grade to higher highest grade under part-B or part-C or Notes as P/59 (for School Teacher) under Schedule- III of the R.O.P Rules, 1988 shall be allowed after calculating the period of service from the date of enjoying such higher pay scales, pay scales in such cases shall be determined in the light of scales mentioned at (B) and (D).**

- vii) **The aforesaid benefits shall be admissible in respect of such categories of employees who acquired higher qualification in the respective trade/subject prior to 24-04-1982, but were not granted the appropriate scale according to their qualification."**

03. There cannot be any confusion that the passage (vii) provides financial benefit would be available to those who did not get such benefits under the previous scheme. It is exclusionary in any manner. The said scheme had been truncated with effect from 01.01.1992 by providing grant of one additional increment from the date of acquisition of degree in the same trade. But that benefit was withdrawn with effect from 01.06.1996 by operation of Tripura State Civil Services (Revised Pay) Rules, 1999. Accordingly, the petitioner got the scale up-gradation first to the scale for Graduate Teacher with effect from 01.01.1988 and then upgraded to the scale of Post Graduate Teacher with effect from 31.12.1990. In terms of the scheme, he was continued in the under graduate establishment. After introduction of the Career Advancement Scheme (CAS) by the ROP Rules 1999 and Assured Career Progression (ACP) by the ROP Rules 1999, the petitioner was entitled under Rule 10 of those rules to get scale up-gradation as stagnant relief.

04. There is no dispute that the petitioner has retired from the service on 28.02.2017 afternoon. According to the petitioner the benefit of 3rd ACP was released in his favour before his retirement and his last pay was accordingly determined but by the memorandum No.Pen-1/PR

No.28/2017-18/SKC dated 03.08.2017, the Accounts Officer in the office of the Accountant General (A & E), Tripura, Agartala has observed that the petitioner was not entitled to 3rd ACP with effect from 01.01.2006. In his case three advancements had already taken place within 31.12.1997, has the first advancement took place on 01.01.1988, the second advancement on 31.12.1990 and third advancement on 31.12.1997. As such, they had suggested that the pay be re-fixed in the manner as reflected hereunder:

	1-1-2006	-	₹20120(₹15720+ ₹4400)
	1-7-2006	-	₹ 20730
	1-7-2007	-	₹ 21360
	1-7-2008	-	₹ 22000
	17-10-2008	-	₹ 22600
	1-7-2009	-	₹ 23340
"Training	1-7-2010	-	₹ 24040
Incentive	1-7-2011	-	₹ 24770
	1-7-2012	-	₹ 25520
	1-7-2013	-	₹ 26290
	1-7-2014	-	₹ 27080
	1-7-2015	-	₹ 27900
	1-7-2016	-	₹ 28740 (Last pay)
	28-2-2017	-	Date of retirement

Thus, last pay would be ₹28740/- instead of ₹29880/-.

In view of above, department may regulate the pay in the Service Book under proper attestation and after recovery of overpayment as occurred in the shape of overdrawal of Pay and Allowances, Leave Salary with effect from 01-01-2009 to 30-11-2012 as per multiplication factor 1.74 and with effect from 01-12-2012 to 31-03-2015 as per multiplication factor 1.86 and with effect from 01-04-2015 to 28-02-2017 as per 12th Amendment and thereafter it may be re-submitted along with Due and Drawn Statement of the same and a revised LPC for release of DCRG from the end.

However, pension and commutation based on last pay of ₹28740/- have been authorized provisionally, pending DCRG."

05. The petitioner by filing a representation on 24.10.2017 had requested that the scale up-gradation as made on 01.01.1988 and 31.12.1990 cannot be treated as CAS or ACP rather the scale up-gradation as made on 31.12.1997 and 01.01.2006 be treated as the first CAS and the second ACP

respectively. Thus, according to the petitioner the 3rd ACP was to be released with effect from 31.12.2015. He has raised serious objection against recovery by filing the representation dated 24.10.2017.

06. The respondent No.5 by filing the reply has categorically submitted that during verification of the pension proposal of the petitioner it has been observed that the writ petitioner was initially appointed as Under Graduate Teacher on 24.03.1976 and the first up-gradation was allowed on 01.01.1988 for acquiring the Bachelor Degree and the second up-gradation/advancement was given on 31.12.1990 for acquiring the Master Degree and 3rd up-gradation was given on 31.12.1997 for completion of seven years as Post Graduate Teacher. The respondent No.5 has also asserted in their reply that the letter bearing No.F.7(1)FIN(PC) 2001 dated 16.06.2004 of Government of Tripura, Finance Department, the movement to higher pay scale for acquiring higher qualification will be treated as gradation/movement for the purpose of CAS. As per Rule 10 of the ROP Rules, 1999 and ROP Rules, 2009 all Government employees in PB-1, PB-2 and PB-3 shall be entitled to get a maximum of three financial up-gradation in their service. The fixation of pay of the petitioner was thus properly and correctly made by the Accounts Officer showing the details of fixation of pay to the Head of Office by their communication dated 03.08.2017 [Annexure-3 to the writ petition]. In this regard it would be apposite to extract the

content of the communication made to the Senior Accounts Officer, office of the Accountant General (A & E) Tripura, by the Under Secretary to the Government of Tripura on 16.06.2004 [Annexure-R/1 to the reply]. For purpose of reference and accordingly, it is extracted hereunder:

**No.F.7(1)-FIN (PC)/2001
GOVERNMENT OF TRIPURA
DEPARTMENT OF FINANCE**

**To
The Sr. Accounts Officer,
Office of the Accountant General (A & E),
Tripura, Agartala,**

Subject: Movement to higher pay scale on acquiring qualification by teaching staff under TSCS (Revised Pay) Rules, 1988 – Clarification thereon.

Sir,

I am directed to refer to your D.O. No.Pen-I/Clarification/ROP 99/2000-01/1634 dated 14-6-2002 on the subject cited above and to clarify that movement to higher pay scale on acquiring higher qualification should be treated as movement under CAS (modified) of the TSCS (Revised Pay) Rules, 1999.

**Yours faithfully,
Sd/-illegible
(A.Roy)
Under Secretary to the
Govt. of Tripura**

This is the basis of re-fixation of pay by the office of the Accountant General, Tripura.

07. The respondents No.1-4 and 6 by filing a composite counter-affidavit has also subscribed the same view and contended that the Finance Department by their memorandum No.F.6(1)-FIN(PC)/98 dated 17.02.2005 has clarified that movement to the higher pay scale on acquiring the qualification should be treated as movement under CAS (modified) or TSCS ROP Rules, 1999. After ROP Rules, 2009 came into force that would be treated as ACP. The said

memorandum dated 17.02.2005, as referred, has been challenged by the petitioner in this writ petition. For purpose of making reference, the entire text of the said memorandum dated 17.02.2005 [Annexure-4 to the writ petition and Annexure R/1 to the counter-affidavit filed by the respondents No.1-4 & 6] is extracted hereunder:

**No.F.6(1)-FIN(PC)/98
GOVERNMENT OF TRIPURA
FINANCE DEPARTMENT**

Dated, Agartala, the 17th February 2005

MEMORANDUM

Subject: Grant of benefit of higher pay scales on acquiring of higher qualification in the respective trade/subject to the Assistant Teachers and some others categories of employees under Education Department-clarification regarding treating thereof as movement of CAS (modified) under TSCS (RP) Rules, 1999.

Government in Finance Department vide OM No.F.4(62)-FIN(PC)/92 dated 7-12-1992 read with Memorandum of School Education Department vide No.F.2(10-23)-DSE/79 dated 7-3-1981 issued with FD's approval vide U.O No.793-FIN(G)/81 dated 7-3-1981 granted higher pay scales/advance increment to under graduate/graduate teachers and some other categories of employees under Education Department under Part-B/C (Sch-III) of TSCS(RP) Rules, 1988 subject to certain terms and conditions on acquiring of higher qualification in the respective trades/subject.

2. Tripura State Civil Services (Revised Pay) Rules, 1999 vide Rule-10 read with the proviso (bb) below Clause-(ii) under Para-2 of Seventh Amendment thereof inter-alia provides that a group-C employee (other than cadre services) mentioned in Clause(b) whose Second scale advancement (CAS-2) is lower than the pay scale of the next higher post of his service shall be entitled to get third advancement on completion of 12(twelve) years continuous and satisfactory service in CAS-2 and total 29 (twenty-nine) years of service (10+7+12) or (7+10+12) if in the meantime he does not get any promotion. Rule-10(e)(iii) of the TSCS(RP) Rules, 1999 further provides that the existing employees who have already availed the prescribed number of scale advancements by way of promotion or gradation under Part-B or C of the TSCS(RP) Rules, 1988 as per Rule-5(3) thereof as on 1-1-1999 after entry in the service, will not be eligible for any further advancement.

3. Now, School Education Department as well as the AG, Tripura has sought a clarification as to whether aforesaid higher pay scales/advance increment as granted to graduate/under-graduate teachers and some other categories of employees under Education Department on

acquiring of higher qualification in the respective trade/subject should be treated as a movement under Career Advancement Scheme (modified) of the TSCS(RP) Rules, 1999.

4. After careful consideration of all aspects, it is clarified that movement to higher pay scales on acquiring higher qualification should be treated as movement under CAS (modified) of the TSCS (RP) Rules, 1999.

**Sd/-illegible
(D. Darlong)
Under Secretary to the
Government of Tripura**

08. Mr. R. Datta, learned counsel appearing for the petitioner has made his submission and stated that the Career Advancement Scheme (CAS) or the Assured Career Progression (ACP) were designed to provide relief to employee who was not been promoted meanwhile, from stagnation in the service. Movement to a higher scale from a lower scale in consideration of acquiring higher qualification cannot be treated as promotion inasmuch as, the petitioner had been working in the under graduate establishment though he had acquired post graduate degree in Arabic. The promotion is an upliftment position of an employee based on service for a specified period and acquisition of merit/experience whereas benefit of higher scale is given by upgradation due to acquisition of higher qualification and that cannot be equated with promotion. Higher pay is given not in consideration of promotion, but due to acquisition of higher qualification. He therefore has seriously criticized the memorandum dated 17.02.2005 issued by the Finance Department, Government of Tripura by contending that memorandum is absolutely unconstitutional, illegal, arbitrary, irrational and unjust and thus liable to be quashed.

Since denial of the 3rd ACP is clearly attributable to the memorandum dated 17.02.2005, the petitioner being affected thereof, has challenged the said memorandum dated 17.02.2005. In this regard Mr. Datta, learned counsel has referred a decision of the apex court in **State of Punjab and Others vs. Rafiq Masih (White Washer) and Others** reported in **(2015) 4 SCC 334** to persuade this court that recovery as directed cannot be made from the petitioner. The apex court in **Rafiq Masih** (supra) has observed as under:

"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 herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from 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 inequitable or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

09. Mr. Datta, learned counsel has submitted that the said recovery is not permissible in view of the law as laid down by the apex court. Hence the order of such recovery warrants to be interfered by this court. For purpose of reference Rule 10 of the ROP Rules 1999 may be revisited. That Rule' provides that the state government employees will have the scale advancement by way of promotion, failing which by the time

bound movement in a higher scale as per the table in the Annexure A after entry into service in the whole service life in the following manner:

(a) The employees entering by direct recruitment in scale No.1 as per statement at Annexure- A or corresponding scale earlier will have 3 scale advancements at the end of 10, 7 and 7 years of continuous and satisfactory service in the scale 1, 2 & 3 to the scale 2, 3 and 4 respectively unless they get promotion to a post of higher scale before the period at each stage.

(b) The employees entering by direct recruitment in the existing scales No.4 to 10 or revised scale No.5 to 11 or corresponding earlier scale will have 2 scale advancement in next higher scales as per Table in Annexure A at the end of 10 and 7 years of continuous & satisfactory service in the entry scale and higher scale of promotion/gradation or advancement respectively, as the case may be, to the higher scales unless they get promoted to the higher scale before the prescribed period at each stage.

(c) The employees entering by direct recruitment in the scale above Rs.5500-10700 (pre-1996 scale of Rs.1700-3980 or pre-1986 scale of Rs.780-1780 or corresponding earlier scale) will have one scale advancement in the next higher scale as per table in Annexure A at the end of 10 years of continuous & satisfactory service in the entry

scale unless they get promoted to higher scale before the prescribed period.

(d) Regarding the employees of Cadre service, they will have scale advancement as prescribed as per Annexure-B with effect from 01-01-1999.

The said Rule 10 has been further modified by the ROP Rules, 1999 stating that with effect from 01.01.2006 the new rule 10 of ROP Rules, 2009 would replace the existing CAS introduced by the ROP Rules, 1999. Under the new scheme (ACP), all Government employees in PB-1, PB-2 & PB-3 shall be entitled to get a maximum of 3 (three) financial up-gradations, the first after 10 years of service under regular scale, 2nd after another 7 years of service (total 17 years) and 3rd after further 8 years of service (total 25 years) in their service career provided the concerned employee had not got up to 3 (three) benefits of scale up-gradations including promotions already. In the case of PB-4, the employees borne under Grade Pay of Rs.3700/- (against pre-revised scale of Rs.7800-15,100/-), under Grade Pay Rs.4500/- (against pre-revised scale of Rs.10,000-15,100/) and Grade Pay Rs.4800/- (against pre-revised scale of Rs.10,650-15,850/-) would be entitled to get 3, 2 and 1 financial up-gradations respectively under the scheme provided the concerned employee had not got the scale up-gradation including promotion up to 3, 2 & 1 respectively already.

10. Mr. M. Debbarma, learned Addl. G.A. appearing for the respondents No.1-4 & 6 has submitted that this issue has been settled by the judgment dated 16.07.2015 delivered in W.P.(C) No.179 of 2008 titled as **Yunuch Mia Sarkar vs. The State of Tripura & Ors.** by this court. In the said judgment it has been held that since the concerned employees got the first CAS after his graduation when he was given the graduate scale of Rs.325-665/- and he got the second CAS on 31.03.1989 when he was moved to the scale of pay of Rs.1450-3710/-. He was entitled to 3rd CAS only after 29 years of continuous service and so the respondents had rightly held that he was only entitled to CAS-3 with effect from 19.06.2002 and not from 31.03.1996 as claimed by the petitioner.

11. Thus, this court had observed that there is no infirmity in the letter dated 30.09.2005 which was challenged in the said writ petition on the ground that the up-gradation made on the basis of acquisition the higher qualification cannot be treated as to the up-gradation/advancement of the scale under CAS/ACP. The said objection was not accepted by this court in **Yunuch Mia Sarkar** (supra).

12. Mr. Debbarma, learned Addl. G.A. has further submitted that the said decision of the state is also in conformity to Rule 10 of the ROP Rules, 2009.

13. Mr. H. Deb, learned ASGI has stated that there is no infirmity in the modification of the pay fixation as suggested by the office of the Accountant General (A & E), Tripura vide the

memorandum dated 03.08.2007 [Annexure-2 to the writ petition].

14. There cannot be any amount of dispute that usually in absence of the CAS or ACP no employee cannot get the scale up-gradation unless they had acquired higher qualification before 01.01.1996 and that to in the same trade. Thus, the scale up-gradation under the CAS/ACP and for acquisition of the higher scale cannot be equated. Though the memorandum dated 17.02.2005 [Annexure-4 to the writ petition] has been challenged in this writ petition but the petitioner did not challenge Rule 10 of the ROP Rules, 1999 which has, as it appears, having taken care of the operational difficulty in respect of advancing or upgrading to the higher scale vis-a-vis the scales as provided under the memorandum dated 07.12.1992 introduced the new scheme. Rule 10 of the ROP Rules, 2009 has clearly stated that under the new scheme (ACP), all government employees, borne in PB-1, PB-2 and PB-3 shall be entitled to three financial up-gradations the first after 10 years of service under regular scale and the second after 7 years of service (total 17 years) and the third after 8 years of service (total 25 years). It has been clearly stipulated that if in their service career any employee has not got up to three benefits of scale up-gradation 'including promotion' they would be entitled to the benefits. Thereafter, the employees borne in PB-4 has been separately dealt with. These words- the concerned employee had not got the scale up-gradation

including promotion (3, 2 and 1) respectively they will come within that Assured Career Progression. It cannot be denied that the petitioner had got two scale advancement for his acquisition of the higher scale, though he was borne in the under-graduate establishment and later on consideration the years of service he was given the 3rd ACP.

15. In view of the above-stated fact-situation, the petitioner cannot claim the further benefit. Rule 10(1) of ROP Rules, 2009 does not suffer from vice of arbitrariness or irrationality. True it is that, the incentive which is provided for the petitioner's acquisition of higher qualification had merged with the scale fell due to ACP (the Assured Career Progression). It is a consolidated position of law that the state has the competence to regulate the pay of the government employees in a reasonable manner. This court does not find any irrationality in the Rule 10(1) which has assimilated the impugned memorandum dated 17.02.2005 [Annexure-4 to the writ petition].

16. Having observed thus, the relief as sought by the petitioner cannot be allowed. However, the respondents are restrained from recovering any amount from the petitioner, even though they can act on the last pay as determined by the Accounts Officer of the office of the Accountant General (A & E), Tripura by their communication dated 03.08.2017 [Annexure-2 to the writ petition]. It is made clear that for the fresh fixation of pay the amount that may be shown as drawn

in excess by the petitioner cannot be recovered in view of the principle as laid down in **Rafiq Masih** (supra).

In terms of the above, this writ petition is partly allowed.

JUDGE

