

## High Court Of Judicature At Calcutta

Writ Petition No. 5600 (W) Of 2010

Judgment Date:

14-02-2017

**Sujan Kumar Ghosh**

**..Petitioner**

**State Of West Bengal**

**..Respondent**

Bench:

**{HON'BLE JUSTICE SAMAPTI CHATTERJEE, J. }**

Citation:

2017 (2) CLJ 122 ; 2017 (2) CLJ 177 ; (2017) 2 EDULC 21 ; 2017 LIC 3490 ;  
(2017) 4 SLR 212 ; (2017) 3 WBLR 490 ; 2017 CAL HC 227 ;  
LQ/CalHC/2017/165 ;

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Samapti Chatterjee, J.—The petitioner has filed the present writ petition assailing the decision of the Director of School Education, West Bengal passed on 14th/17th December, 2009 thereby holding that the petitioner is liable to refund Rs. 1,40,840/- as per the direction of Director of Pension and Provident Fund and Group Insurance under memo dated 16.05.2006, the pension payment order.

2. The petitioner's case in a nutshell is as follows :-

That the petitioner was appointed as an Assistant Teacher on 3rd May, 1967 at Jote Shibrampur, Shikshaniketan under District-South 24 Parganas (hereinafter referred to as the "said School"). After 39 years of service upon attending the age of superannuation the petitioner retired from his service on 1st June, 2006.

It is revealed that pay of the petitioner was time to time refixed by the respondent no.3 the District Inspector of School (S.E) South 24- Parganas. On 16th May, 2006 the Pension Payment Order was issued wherefrom it revealed that a sum of Rs. 1,40,840/- had been shown as overdrawn amount. Further the pension of the petitioner was sanctioned under a lesser pay scale that was allowed to the petitioner when he was in service.

It is submitted that during his service tenure the petitioner was never informed regarding the wrong fixation of the petitioner's pay scale by the authority. Unfortunately, after retirement from the pension payment order the petitioner came to know that a sum of Rs. 1,40,840/- has been deducted towards the overdrawn amount.

The petitioner made representation before the authority thereby ventilating his grievances. Since the authorities were sitting tight over the petitioner's representation, therefore, without finding any alternative the petitioner

approached this Hon'ble Court thereby filling a writ petition being W.P 7034 (W) of 2008. That writ petition was disposed of by this Hon'ble Court on 15th May, 2008 thereby directing the Director of School Education, West Bengal to dispose of the petitioner's representation by passing a reasoned order in accordance with law within eight weeks after giving an opportunity of hearing to the petitioner.

Pursuant to the said order the hearing was held by the Director of School Education, West Bengal. On the basis of such hearing the impugned order was issued by the said Director of School Education thereby holding that the authority is entitled to recover from the petitioner's gratuity amount a sum of Rs. 1,40,840/-which has been wrongly overdrawn by the petitioner.

#### Submissions of the Learned Advocates

3. Mr. Ekramul Bari, learned Advocate appearing for the petitioner submitted that it is trite law as laid down by the Hon'ble Supreme Court in catena of decisions which has been followed by the Hon'ble Division Bench as well as the Hon'ble Single Bench of this Hon'ble Court in several matters., that recovery from the retired employees is impermissible, which however, has been done in the instant case. In support of his contention learned Advocate for the petitioner relied on the decisions reported in 1994 (2) SCC 521 (Shyambabu Verma and Ors v. Union of India and Ors) and 2009 (3) Supreme Court Cases 475 (Syed Abdul Qadir and Ors v. State of Bihar and Ors). He also relied on a latest Supreme Court decision reported in 2015 (1) Supreme Today 671 (State of Punjab and Ors. v. Rafiq Masih (White Washer) etc.) Paragraph 12 at pages 19 and 20 of the aforesaid decision is quoted below :-

"Para-12-It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payment have mistakenly been made by the employer, in excess of their entitlement. Be that it may, bases on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, herein 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 iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

4. Learned Advocate for the petitioner also relied on a Hon'ble Division Bench decision delivered on 9th September, 2013 in W.P. S.T. No.216 of 2013 (State of West Bengal and Ors. v. Asis Das Gupta)

5. Before concluding his submissions Mr. Bari submitted that the impugned order dated 14th / 17th December, 2009 issued by the Director of School Education, West Bengal cannot be sustained, therefore, the impugned order should be set aside and quashed.

6. Per contra, Mr. Supriyo Chattopadhyay, learned Advocate appearing for the state vehemently argued relying on a Hon'ble Supreme Court decision reported in (2016) 43 SCD 829 (High Court of Punjab and Haryan and Ors v. Jaydev Singh) where the Hon'ble Supreme Court directed the respondent petitioner to refund excess amount on the basis of the undertaking given by him.

7. Mr. Chattopadhyay further emphasised on the point that since the undertaking has been given by the petitioner therefore the authority is entitled to recover the excess amount paid to the petitioner even after the retirement.

#### Decision with Reasons

8. After considering the submissions advanced by the learned Advocates for the parties and after meticulously perusing the records and the decision cited by Mr. Chattopadhyay I am of the opinion that the facts of the case is totally different from the fact of the case in hand. The facts of the case were narrated in cited decision are as follows :-

"Para-1- The High Court of Punjab and Haryana allowed, by its judgment dated 1 August 2005, a petition filed by the Respondent under Article 226 of the Constitution to challenge a direction issued by the State to the Accountant General for the recovery of an excess payment towards salary.

2. The facts lie in a narrow compass. The Respondent was appointed as a Civil Judge (Junior Division) on 16th July 1987 and was promoted as Additional Civil Judge on 28 August 1997 in the judicial service of the State. By a notification dated 28 September 2001, a pay scale of Rs.10000-325-15200 (senior scale) was allowed under the Haryana Civil Service (Judicial Branch) and Haryana Superior Judicial Service Revised Pay Rules 2001. Under the rules, each officer was required to submit an undertaking that any excess which may be found to have been paid will be refunded to the Government either by adjustment against future payments due or otherwise.

3. The Respondent furnished an undertaking and was granted the revised pay scale and selection grade of Rs.14300-400-18000-300. While opting for the revised pay scale, the Respondent undertook to refund any excess payment if it was so detected and demanded subsequently. The revised pay scale in the selection grade was allowed to the Respondent on 7 January 2002.

4. The Respondent was placed under suspension on 19 August 2002 and eventually, was compulsorily retired from service on 12 February 2003.

5. In the meantime, this Court in Civil Writ ( C ) 1022 of 1989 accepted the recommendations of the First National Judicial Pay Commission (Shetty Commission). Thereupon, the Haryana Civil Services (Judicial Branch) and Haryana Superior Judicial Service Revised Pay Rules 2003 were notified on 7 May 2003.

6. In view thereof the pay scales of judicial officers in Haryana were once again revised with effect from 1 January 1996. An exercise was undertaken for adjustment of excess payments made to judicial officers, following the notification of the revised pay rules. On 18th February 2004, a letter for the recovery of an amount of Rs.1,22,003/- was served upon the Respondent pursuant to the direction of the Registrar of the High Court.

7. The Respondent challenged the action for recovery in writ proceedings under Article 226. The petition was allowed by the impugned judgment of the High Court. The High Court found substance in the grievance of the Respondent that the excess payment made to him towards salary and allowance prior to his retirement could not be recovered at that stage, there being no fraud or misrepresentation on his part."

9. In Shyam Babu Verma (supra) it is held by a Three Judge Bench that since the petitioners received the higher scale due to no fault of theirs it shall only be just and proper not to recover any excess amount already paid to them. On the basis of that Shyam Babu Verma case (supra) subsequently no recovery was made by the authority. Thereafter in Syed Abdul Qadir Case (supra) a Three Judge Bench of the Hon'ble Supreme Court held that recovery of excess amount is prohibited by the authorities where there is no misrepresentation or fraud on employee's part and excess amount has been paid by applying a wrong principle or wrong interpretation of a rule/order. Such relief is granted not because employee has any right but because the Court exercises its equity jurisdiction so as to avoid hardship to an employee who is not at fault.

10. Subsequently in Chandi Prasad Uniyal and Ors v. State of Uttarakhand and Ors. Case reported in (2012) 8

SCC 417 a Division Bench of the Hon'ble Supreme Court held a different view. Against that decision reference was made before the Hon'ble Three Judge Bench and the Hon'ble Three Judge Bench in Rafiq Masih Case without answering the reference sent the matter back to the Hon'ble Division Bench and the Hon'ble Division Bench of the Apex Court disposed of the said Rafeq Mashi case (supra) thereby laying down five criteria when recovery can be made or not against the employee. Those five criteria have been quoted above.

It is not out of place to mention that the series of matters challenging the overdrawal, appeared before the Learned Singh Judge of this Court, the Learned Single Judge referred the matter before the Hon'ble Chief Justice. The Hon'ble Chief Justice constituted Larger Bench comprising of the Hon'ble The Chief Justice and other Hon'ble Judges. The Larger Bench disposed of the matter without answering the reference thereby sending the matter to the Learned Single Judge as the issues referred in those matters have already been decided in "Rafiq Masih" case (supra).

11. Thereafter, series of matters were decided by the Learned Single Judge on the basis of those five criteria laid down in "Rafiq Masih" case (supra).

12. In my considered view the issue regarding undertaking exercised by the petitioner has already been discussed in plethora of decisions of Hon'ble Supreme Court as well as Hon'ble Division Bench of this Hon'ble Court. In State of West Bengal and Ors v. Harekrishna Sardar and Anr reported in 2009 (4) CHN (CAL) Page 136 where the Hon'ble Division bench relying on the Hon'ble Supreme Court decision reported in AIR 1957 SC 1269 (State of Orissa v. Dr. Miss Binapani Dey) held that even if undertaking was given but after retirement deduction from the gratuity amount without giving any opportunity of hearing to the petitioner when the petitioner was in service cannot be sustained since it is an administrative order which causes civil consequences. Accordingly the Hon'ble Division Bench affirmed the Trial Court Judgment without any interference.

13. In Col. B.J. Akkara v. Govt. of India, (2006) 11 SCC 709 , the Hon'ble Apex Court held that it has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee if the excess payment was not caused due to any misrepresentation or fraud on the part 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 a rule/order which is subsequently found to be erroneous. Such relief is granted by Courts not because of any right of the employees but in equity, in exercise of judicial discretion to relieve the employee from the hardship that will be caused if recovery is implemented. A Government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship, relief is granted in that behalf. But where the employee was aware that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, Courts will not grant relief against recovery. The matter is in the realm of judicial discretion.

14. The form of declaration clearly means that even at the highest, recovery of excess payment could be made by the State from the salary bill of the petitioner during the tenure of his service. In my opinion, such a declaration would not entitle the State to recovery any over-drawals from the pensionary benefits of the petitioner after retirement.

15. I draw support to my view taken above, from the decision of a Division bench of this Court in the Court of Asutosh Bhattacharya v. The State of West Bengal, (2015) 2 CLT 339, in which the Hon'ble Division Bench considered the decisions in Shyam Babu Verma (supra), Syed Abdul Qadir (supra), Chandi Prasad Uniyal (supra) and Rafiq Masih (supra) and held that no recovery can be made from a retired employee who is due to retire within one year from the order of recovery.

16. In view of the discussions above I hold that, no recovery could be made from the retiral benefits of the petitioner and the deduction of the sum of Rs. 1,40,840/- was clearly contrary to law.

The same issue has also been settled by Hon'ble Division Bench decision reported in (2015) 2 CAL LT Page 2339 (HC) and by Hon'ble Single Bench decision reported in (2008) 3 CAL LT Page-308 (HC) (Dhirendra Nath Purkait v. The State of West Bengal and Ors).

17. In my considered view the cited decision of the Hon'ble Division Bench of the Hon'ble Supreme Court under Article 141 was rendered in a different fact situation. In that cited decision (High Court of Punjab and Haryana and Ors v. Jagdev Singh) the petitioner /respondent was a suspended employee of the subordinate judiciary under High Court of Punjab and Haryana. The respondent furnished an undertaking and he was granted the revised pay scale and selection grade. Subsequently the recommendation of the First National Judicial Pay Commission (Shetty Commission) was accepted by the Hon'ble Court. Thereupon, the Haryana Civil Services (Judicial Branch) and Haryana Superior Judicial Service Revised Pay Rules 2003 were notified on 7th May, 2003.

In the said backdrop the pay scale of Judicial Officers in Haryana were once again revised with effect from 1st January, 1996 where the petitioner exercised his undertaking for adjustment of excess payment made to Judicial Officers following the notification of the Revised Pay Rules. But in the case in hand the facts is totally different. No such recommended Pay Commission (Shetty Commission) has ever been accepted by the petitioner. Here the petitioner's pay scale was sanctioned according to ROPA and such benefit of ROPA was revised time to time as per subsequent ROPA.

18. On the basis of that in the latest judgment in Rafiq Masih Case (supra) the Hon'ble Court laid down five criteria. Therefore, in my considered view since the facts of the case in hand and the fact of the case in Shyam Babu Verma and Sahib Ram Verma (supra) are same and the decision rendered subsequently in Rafiq Masih case where the Hon'ble Supreme Court laid down five criteria, the authority are not entitled to recover a sum of Rs. 1,40,840/- from the petitioner. Therefore the impugned decision for recovery from the petition after retirement cannot be upheld by this Hon'ble Court.

19. Accordingly, I have no hesitation to hold that the impugned order issued by the respondent authority is bad in law which is set aside and quashed. The respondent authorities are, directed to refund the said amount of Rs. 1,40,840/- with interest at the rate of 8% per annum to the petitioner to be calculated from the date of retirement till the date of actual payment without any delay but positively within a period of eight weeks from the date of communication of this order failing which additional interest @ 2% per annum shall be payable to the petitioner.

20. With the aforesaid directions, this writ petition is disposed of without any order as to costs.

21. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties after fulfilling all the formalities.

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