

03-12-2019
Court No.2
Sh/51.

**CIRCUIT BENCH OF
CALCUTTA HIGH COURT
AT JALPAIGURI
WRIT APPELLATE JURISDICTION
APPELLATE SIDE**

W.P.A. 889 OF 2019

Sumitra Sarkar. Petitioner.

Vs.

State of West Bengal & Ors.... .Respondents.

Ms. Arpita Saha.

. . .For the Petitioner.

Mr. Bikramaditya Ghosh,

Mr. Momenur Rahaman.

. . .For the State.

1. Affidavit of service filed in Court is kept with the record.

2. This is an application under Article 226 of the Constitution of India, wherein the petitioner is aggrieved by the inaction on the part of the respondent authorities in repaying the alleged over-drawal amount along with interest on the delayed disbursement of the pensionary benefits.

3. In the present case the writ petitioner is aggrieved by the order of deduction of the overdrawn amount of a sum of **Rs.73,785/-** after his retirement. The petitioner was an Assistant Teacher who retired from service on 28-02-2002 and the pension was paid by the authorities after deducting the aforesaid amount as overdrawn amount.

4. Counsel on behalf of the respondent authorities submits that there is considerable delay in

approaching the writ Court and accordingly, the Writ Court should not allow such prayer.

5. The petitioner relied upon several judgments of the Supreme Court as well as a recent judgment delivered on May 1, 2019 by a Co-ordinate Bench in Adhir Kumar Jana -Vs- The State of West Bengal & Ors (W.P. 22171(W) of 2018). After considering the judgments delivered in High Court of Punjab and Haryana Vs. Jagdev Singh reported in (2016) 14 SCC 267 and the judgment in the State of Punjab Vs. Rafiq Masih (White Washer) reported in (2015) 4 SCC 334, the coordinate bench held as follows:-

" 14. The later decision of High court of Punjab and Haryana Vs. Jagdev Singh reported in (2016) 14 SCC 267 was concerned with an officer who had availed of the revised pay scale by furnishing a specific undertaking to the effect that any excess payment which may be found to have been made will be refunded to the Government either by adjustment against future payment or otherwise. The letter for recovery of excess payment was served on the officer one year after he was made to retire from service. The Supreme Court upheld the recovery process holding that the principle laid down in Rafiq Masih would not apply in view of the specific undertaking given by the Officer.

15. The Principle which emerges from these decisions, including those rendered in Asitosh Bhattacharya Vs. The State of West Bengal reported in (2015) 2 CLT 339, Kalyan Kumar Chattopadhyay Vs. The State of West Bengal reported in (2006) 1 WBLR (Cal) 591 and Sachindra Nath Maiti Vs. the State of

West Bengal is that recovery of excess payment cannot be permitted from the retirement dues of an employee unless the employee had knowledge of the fact that all such excess payments were being wrongly made and where the error was corrected within a short period of time; or where the employee had undertaken to render the payment made in excess upon coming to know of it by due adjustment or otherwise; or where the employee had participated in the process of re-fixation of his scale of pay and was thus aware that he was not entitled to the excess payment made and particularly, where there has been misrepresentation or fraud on the part of the employee. These principles would have to be read in tandem with the cases where recovery would not be permitted as laid down in paragraph 18 of Rafiq Masih, particularly sub-paragraph 5, which considers cases where a court may conclude that recovery would result in extreme hardship and outweigh the equitable balance of the employer's right to recovery. It may be said that the courts have consistently given primacy to providing a measure of financial security to an employee in the remaining years of his life after retirement.

16. It may also not be out of place to mention that paragraph 15 of Uniyal recognizes the ratio of Abdul Qadir and B.J. Akkara as exceptions to the recovery of excess payment made due to irregular pay fixation. Second, the appellants in Uniyal were serving as teachers when the proceeding was brought to the Court, unlike the petitioners in the present writ petitions who are all retired teachers. This factual distinction has been brought in paragraph 13 of Uniyal

and can also be distinguished from paragraph 18 of Rafiq Masih. It may be mentioned that an exception to what the Supreme Court held in Uniyal, has been stated in paragraph 14 of Uniyal itself, namely, that an amount paid or received without the authority of law can be recovered barring cases of extreme hardship but not as a matter of right. The construction of this would be that a Court will consider instances where recovery of excess payment would result in extreme hardship. In all the writ petitions before this Court, the petitioners have retired from service in the late 90's and have hence been without salaried service for more than twenty years. Permitting the State to continue to withhold the alleged overdrawn amount would entail financial consequences to all the writ petitioners".

6. A Coordinate Bench judgment of this Court in the case of **Shiba Rani Maity Vs. The State of West Bengal (W.P 29979 (W) OF 2016) with Biswanath Ghosh Vs. The State of West Bengal (W.P.27562(W) of 2016)**, has categorically held that in case where no third party right accrues, the petitioner who has suffered due to non-payment of the withheld amount on account of alleged overdrawal has a right to approach the Writ Court and get relief. The relevant paragraphs of the judgment are quoted below:-

" (15). The only other question is that whether the writ petition should be entertained in spite of delay of about 17 years in approaching this Court. In a judgment and order dated 6th September, 2010 delivered in MAT 1933 of 2010 passed by a Division

Bench of this Court and held that although the petitioner had approached the Court after a lapse of nine years, no third party right had accrued because of the delay and it was only the petitioner who suffered due to non-payment of the withheld amount on account of alleged over-drawal. Accordingly the Division Bench set aside the order of the Learned Single Judge by which the writ petition had been dismissed only on the ground of delay.

(16) Following the Division Bench judgment of this Court adverted to above, I hold that it is only the petitioner who suffered by reason of the wrongful withholding of the aforesaid sum from his retiral benefits. Although there has been a delay of about 17 years in approaching this Court, the same has not given rise to any third party right and allowing this writ application is not going to affect the right of any third party. It may also be noted that the Hon'ble Apex Court observed in its decision in the case of Union of India Vs. Tarsem Singh, (2008) 3 SCC 648 that relief may be granted to a writ petitioner in spite of the delay if it does not affect the right of third parties."

7. In view of the above judgment, it is clear that a writ of mandamus lies in the present facts and circumstances of this case.

8. I, accordingly, direct the respondent authorities to release the amount of **Rs.,73,785/-** to the petitioner along with interest at the rate of 8% per annum with effect from the date of issuance of the pension payment order. Such payment is to be made

to the petitioner within a period of six weeks from the date of communication of this order.

9. The petitioner has undertaken before this Court that she shall not claim any further benefits on account of pension that is being paid to him based on the last drawn pay as per the pension payment order dated 03-04-2003.

10. This writ petition is accordingly disposed of without however, any order as to costs.

11. Since no affidavit has been called for, all allegations made in the writ petition are deemed not to have been admitted.

12. Photostat certified copy of this order, if applied for, be supplied to the learned advocates appearing for the parties expeditiously on compliance of all requisite formalities.

(SHEKHAR B. SARAF, J)