

Calcutta High Court
In the Circuit Bench at Jalpaiguri
Appellate Jurisdiction

WPA 760 of 2019

Niharika Ghosh
-versus
The State of West Bengal & Ors.

Mr. Anindya Lahiri
... For the petitioner

Mr. Bikramaditya Ghosh
Ms. Bedashruti Basu
... For the State

The petitioner was appointed as an Assistant Teacher at Banarhat Girls' High School, Post Office – Banarhat, District – Jalpaiguri (hereinafter referred to as the “said School”) on and from 12th August, 1987. The petitioner's appointment was approved by the District Inspector of Schools (Secondary Education), Jalpaiguri (hereinafter referred to as the “said DI”) on 18th September, 1987 against normal vacancy. The petitioner while in service took admission for obtaining Master Degree in English from North Bengal University. The petitioner appeared in the MA English Part-I Examination between 15th November, 1988 and 3rd December, 1988. She appeared for the Part-II MA English Examination between 1st December, 1989 and 18th December, 1989. The petitioner took admission and subsequently appeared in the Part-I and Part-II of

the MA Examination with the approval of the Managing Committee of the said School. The petitioner on obtaining MA degree in English applied to the Managing Committee of the said School for post graduate scale of pay. The said School in a meeting of its Managing Committee held on 9th September, 1988 unanimously resolved that in the event the said DI would approve the petitioner's Master Degree and grants higher scale of pay for enhancing the educational qualification, the Managing Committee of the School shall have no objection. The said DI after considering the petitioner's case approved higher scale of pay to the petitioner with effect from 30th October, 1988 by issuing a Government Order No.33-Edn.(B) dated 7th March, 1990. Since then the petitioner was enjoying the post graduate scale of pay.

The petitioner was to be superannuated from service on 31st August, 2018. Prior to the date of superannuation, the Secretary of the Managing Committee of the said School requested the Headmistress /Teacher-in-Charge of the said School to prepare the service book of the petitioner by a letter dated 12th March, 2018. The petitioner also made representations to the Managing Committee as also to the Headmistress/Teacher-in-Charge of the said School for preparation of her service book in March, 2018 as she was to retire within a short span of time.

The petitioner thereafter made a representation on 5th May, 2018 to the said DI. The said DI, by a memo dated 25th April, 2018 asked the petitioner to attend a hearing on 27th April, 2018 regarding the petitioner's retiral benefits. It appears from the records that the said DI came to a conclusion that the petitioner, having pursued the MA course in English as a regular candidate, did not take prior permission and also did not serve the School during such period and, as such, has to refund the benefits received by her. The Managing Committee of the said School was thereby directed by the said DI to ask the petitioner to deposit an amount of Rs.5,21,390/- in the account of the Government of West Bengal in TR Form No.7 before her retiral benefits are disbursed. This amount was on account of refund of excess drawn pay and allowance with effect from 12th August, 1987 to 31st August, 2018 due to EOL with effect from 12th August, 1987 to 1st December, 1987 under Revision of Pay and Allowances (ROPA) 1990, ROPA 1998 and ROPA 2009.

The petitioner says that the petitioner had obtained the Master Degree after informing the Managing Committee of the said School. Her prayer for higher scale of pay, upon being considered by the Managing Committee of the said School, was referred to the said DI, who in writing had approved the higher scale of pay. The petitioner had enjoyed such higher

scale of pay from 1988 by virtue of the Government Order dated 7th March, 1990. The DI or the State respondents did not figure out any anomaly or alleged illegality in the petitioner availing such higher scale of pay for about 30 years. Only at the time of superannuation, these issues were raised and an allegation was made against the petitioner for having overdrawn salary and allowances which the petitioner was asked to refund. The petitioner says that in view of the judgment reported in **(2015) 4 SCC 344 (State of Punjab & Ors. vs. Rafiq Masih (White Washer) & Ors.)** and in particular for the ratio laid down in paragraph 18(ii), 18(iii) and 18(iv) thereof, the petitioner cannot be directed to refund any alleged overdrawal amount at the time of retirement or after retirement. The said three clauses are reproduced hereunder:-

“18. ...

(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.*

(iii) *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.”*

The petitioner also relies upon two orders, one dated 16th July, 2019 passed in WP 18418 (W) of 2012 (Dolgobinda Panda vs. The State of West Bengal & Ors.) and another dated 3rd December, 2019 passed in WPA 745 of 2019 (Amal Kumar Chaudhuri vs. State of West Bengal & Ors.) to show that recovery on account of alleged overdrawn salary and allowances cannot be made from a retired person or from a person who is due to retire within one year of the order of recovery. The writ petitioner also submits that the alleged excess payment has been made for a period in excess of five years before the order of recovery was issued and as such, in view of the judgments cited, the respondents are not entitled to recover any alleged payment of salary and allowances.

The respondent no.3 has used an affidavit stating that the petitioner has suppressed the facts and by such suppression got the approval of the Managing Committee of the School as also of the said DI. The specific allegation as to suppression is that the petitioner obtained MA degree in regular course while she was in service and the same was done by her without any prior permission of the respondent no.3.

So far as the prior permission of the said DI is concerned, the same came into effect in the year 1997.

The petitioner pursued and obtained her master degree between 1987 and 1988.

In that view of the matter, the question of prior permission from the DI to take admission in the MA course in the case of the petitioner cannot and does not arise. The petitioner has been appointed and granted higher scale of pay much prior to the School Service Commission Act, 1997 and the West Bengal School (Control of Expenditure) Act, 2005 coming into operation and, as such, these Acts have no manner of application in the petitioner's case. Moreover, this Court in several of its judgments passed by the Division Bench has held that prior permission is not necessary even in cases where a teacher had enhanced his/her qualification after the notification of 1997 for prior permission came into effect. So far as the allegation of suppression levelled against the petitioner, I am also not convinced. The petitioner approached the Managing Committee and after taking due permission, took admission in the MA course. The petitioner also obtained leave for appearing in the Part-I and Part-II MA Examination. All these facts were known to the Managing Committee of the said School as also to the said DI. In fact, the said DI had approved higher scale of pay after considering the petitioner's case on having enhanced her qualification. It is also not the case of the respondents that the students of

the said School suffered when the petitioner pursued her Master Degree. No details of the leave alleged to have been availed by the petitioner while pursuing her Master Degree has been granted. In order to wriggle out of the ratio laid down in **Rafique Mashhi** (supra), it has to be convincingly shown that the petitioner has obtained benefits fraudulently by suppressing material fact as it has been held therein as follows:-

“It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or soon before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee’s retirement, or within one year of the date of his retirement on superannuation.”

In the instant case, the question of suppression of facts by the petitioner does not arise as all facts relating to the petitioner's enhancement of qualification was known to the School as also to the said DI. In fact, the said DI had approved the higher scale of pay in writing. After all these things at the time of retirement, the petitioner cannot be accused of having overdrawn salary and allowances which can be recovered from her as sought to be done by the respondents.

*“In the facts and circumstances of the instant case, it is found that the petitioner's case does not come within the ambit of the exceptions curled out in a circular issued by the Directorate of Pension, Provident Fund and Group Insurance on 19th July, 2010, after pronouncement of the judgment reported in **2009 (3) SCC 475** (Syed Abdul Qadir Vs. State of Bihar), which judgment has been approved in Rafiq Masih (supra), and considered in Rajkumar Jana (supra). The said exceptions are as follows:-*

- (a) “The excess amount was not paid on account of any misrepresentation or fraud on the part of the employee,*
- (b) 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 rule/order, which is subsequently found to be erroneous,*

(c) *It is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid and*

(d) *The error is detected or corrected within a short time of wrong payment, no overdrawal/excess payment is to be deducted from the retiral benefits of the employee.”*

It has been specifically stated in the said circular that except in the cases which fall within the exception, no overdrawal/excess payment is to be deducted from the retiral benefits of the employee. Both **Rafiq** (supra) and **Qadir** (supra), therefore, take into consideration in the retiral benefits which include pension. The reduction of pension that may happen in the case of the petitioner on being placed in the graduate scale instead of post-graduate scale which the authorities claim to have been given by mistake is a retiral benefit and as such taken into consideration. It is, therefore, not required to deal separately with the said issue.

Permitting the realization of alleged excess payment from the petitioner at the fag end of his service career or at the time of his retirement or to reduction of pension, in a situation where the exceptions as aforesaid are not attracted will be

iniquitous, inquest and arbitrary. The same should not be allowed.

The order directing recovery of Rs.5,21,390/- passed by the respondent authorities is set aside.

The petitioner is entitled to all her retiral benefits on the date of superannuation. There has already been a delay of more than one and a half years in granting the petitioner her retiral benefits.

The non-cooperation of the Headmistress/Teacher-in-Charge of the said School, being the respondent no.7 in preparing the service book or uploading the same in the portal appears to me a plea to deprive the petitioner from receiving her retiral benefits otherwise the State respondents, particularly, the said DI would have taken steps including disciplinary action against the said respondent no.7 for not having complied with their orders.

The Principal Secretary, the Department of School Education, and the respondent nos.2, 3, 4 and 5 shall release all retiral benefits to the petitioner within a period of six weeks from the date of communication of a server copy of this order. The respondent nos.6 and 7 should cooperate in all respect for the release of the retiral benefits to the petitioner within the time frame as provided hereinabove.

The petitioner shall be entitled to interest at the rate of nine per cent per annum on the retiral benefits from 1st September, 2018 till the date of payment. The Principal Secretary and the respondent nos.2, 3, 4 and 5 shall calculate the interest on the unpaid retiral benefits for the period at the rate as aforesaid and make over the same to the petitioner at the time of paying her retiral benefits.

With the above observations, the writ petition stands disposed of.

There shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties on compliance of all requisite formalities.

(Arindam Mukherjee, J.)