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W.P.A. 22066 of 2017
(Through Video Conference)

Kali Sadhan Bhattacharjee @ Bhattacharyya
Vs.
State of West Bengal & ors.

Mr. Uttam Kumar Bhattacharya
...for the petitioner

Mr. Susanta Pal
Mr. Prabir Kumar Ray
... for the State

None appears on behalf of the school authorities. The matter was running in the warning list and was also listed before this Court. On two occasions the matter was adjourned as a last chance.

This writ petition has been filed challenging inaction on the part of the respondents in paying the retirement benefits to the petitioner pursuant to his retirement on June 30, 2017. The petitioner served as the headmaster of Gopinathpur Devayatan Vidyapith, District Paschim Medinipore on and from January 7, 2000. At the time of his joining, the said school was a 10-Class High School. Subsequently, the school was upgraded to 10+2 Higher Secondary School with effect from July 1, 2012 by a memo no. 1039/KGP dated April 18, 2013. The Additional District Inspector of Schools fixed the pay of the petitioner at Rs.32,710/- in the Pay Band-4, Rs.9000/- -

Rs.40,500/- with Grade Pay of Rs.5,600/-. According to the petitioner, such pay fixation was made pursuant to the memo no. D/AC(E) 207/2014 dated August 6, 2014 issued by the Director of Accounts, Government of West Bengal, School Education Department. According to the said memo, pay fixation of headmasters of schools upgraded to a higher secondary school after February 27, 2009 was to be done by allowing one increment at the rate of 3% of the existing basic pay along with an additional grade pay of Rs.200/- on the basis of G.O. No. 181-SE(B) dated October 8, 2009 and G.O. No. 30-SE(B) dated February 10, 2010.

During the pendency of the writ petition before this Court, the State respondents filed their affidavit annexing the documents which reveal that the District Inspector of Schools by a memo no. 56 S/Pen(0) dated June 29, 2017 raised an objection with regard to inadmissibility of one increment at the rate of 3% of the existing basic pay of the petitioner. It was specifically stated in the said memo that unless the service book was rectified and overdrawn amount was not deposited by TR 7, retirement benefits of the petitioner shall not be disbursed. The pension file was directed to be sent back to the school.

It is pertinent to mention here that upon upgradation of these schools, the Joint Director of Accounts, Paschim Medinipore had enquired by two memoranda dated August 8, 2013 and January 24, 2014 soliciting instruction from his higher authority as to what should be the modalities of fixation of pay of headmasters of high schools upgraded to a Higher Secondary school after February 27, 2009. The decision of the Director of Accounts, Government of West Bengal, School Education Department came as an administrative instruction which finally answered the queries of the Joint Director of Accounts.

Thus, the pay fixation was neither a mistake nor at the instance or at the request of the petitioner. One increment of 3% of the existing basic pay along with additional grade pay of Rs.200/- was granted after the queries of the Joint Director of Accounts, Secondary Education, Paschim Medinipur was answered by the Director of Accounts, School Education Department, Government of West Bengal, by issuing the executive instruction. The pay, so fixed, was granted to the petitioner and similarly situated headmasters for more than five years and no objection was raised from any corner whatsoever. It is only when the petitioner moved this Court alleging non-payment of retirement benefits that the respondents came up with their objections. Reliance has been also placed by the respondents on a memo 292-st/ss-294/12 dated March 22, 2017 from which it appears the Joint Secretary (Secondary) intimated the Deputy

Director of School Education, that the one increment of 3% of the existing basic pay had not been proposed by the department in favour of headmasters of higher secondary schools upgraded after February 27, 2009. Only additional grade pay of Rs.200/- was allowed. No order of cancellation or supersession of the administrative order of the Director of Accounts was made.

Mr. Bhattacharya, learned Advocate appearing for the petitioner has drawn the attention of this Court to a document regarding pay fixation of another headmaster similarly situated as the petitioner who was allowed one increment of 3% of the existing basic pay along with additional Grade Pay of Rs.200/- on the basis of G.O. No.181-SE(B) dated 08-10-2009 and G.O. No.30-SE(B) dated 10-2-10. The service book incorporating such calculation has been annexed to a supplementary affidavit filed by the petitioner.

From the records and submissions of the learned Advocate for the respondents, it is clear that this is neither a case of fraud or misrepresentation nor a case of miscalculation or mistake arising out of a bona fide misinterpretation of the government orders or circulars applicable in this regard.

On the verge of retirement of the petitioner, the Joint Secretary, School Education Department, Secondary Branch, by a general circular, informed the Deputy

Director, School Education Department that one increment of 3% of the existing basic pay would not be allowed to the headmasters of schools upgraded to 10+2 after February 27, 2009.

There is nothing on record to show that prior to such circular being issued by the Joint Secretary, any of the respondents had taken a different view or had objected to or had disagreed with the modalities of pay fixation done as per the direction of the Director of Accounts, West Bengal, School Education Department.

Mr. Pal, learned Advocate appearing on behalf of the State-respondents, submits that the petitioner had signed a proforma thereby undertaking to refund any excess amount that may have been paid to him by erroneous fixation of pay scale as soon as the fact of such excess drawal would be brought to his notice. Thus, on the basis of such undertaking, the respondents would be justified in not paying the retirement benefits until and unless the erroneous fixation of pay scale was rectified, the service book was corrected and the over drawn amount was recovered. He submitted that the pay should be fixed after deducting the one increment of 3% of the existing basic pay that had been erroneously granted.

Reliance has been placed on the decisions of the Hon'ble Apex Court in the matter of ***High Court of the Punjab and Haryana & Ors. vs. Jagdev Singh reported***

in (2016) 14 SCC 267 and in the decision in Chandi Prasad Uniyal & Ors. vs. State of Uttarakhand & Ors. reported in 2012 AIR SCW 4742.

Mr. Pal vehemently urges that excess payment of money to the petitioner from the public ex-chequer cannot be allowed and even if there has been an erroneous fixation, the petitioner did not get any right over such public money as the same would amount to unjust enrichment.

I have heard the learned Advocates for the respective parties and have considered the judgments cited by the respective parties.

Some admitted facts in this case are on record. The petitioner was not responsible for the pay fixation. No fraud or mis-statement has been alleged. There is nothing on record to show that it was an error, miscalculation or a mistake. Rather there is a specific direction by a general administrative order issued by the Director of Accounts, Government of West Bengal, School Education Department dated August 6, 2014, which has been referred to hereinbefore, indicating how the pay in respect of headmasters of schools upgraded to 10+2 class, after February 27, 2009 would be fixed, that is, one increment @ 3% of his or her existing basic pay along with additional grade pay of Rs.200/- for having taken higher responsibility vide paragraph 4 of the G.O. No.181-SE(B) dated 08.10.09 and paragraph 6 of the G.O. No.30-SE(B) dated 10.02.2010. Only on March 22, 2017, after three years, the Joint Secretary to the Government of West Bengal, School Education Department, Secondary Branch intimated the Deputy Director of School Education (GA), West Bengal that one increment of 3% was not proposed by the department. By then, more than five years had elapsed since the petitioner had been enjoying the pay scale fixed in terms of the administrative order of the Director of Accounts, West Bengal, School Education Department. There is nothing on record to show that the order of the Director of Accounts, West Bengal, School Education Department on the basis of which the petitioner's pay was fixed, had been either withdrawn or cancelled or superseded by the subsequent order of the Joint Director. Rather records reveal that the memo of the Director of Accounts, West Bengal, School Education Department was the final decision in this regard, answering the queries made by the Joint Director of Accounts (SE), Paschim Medinipur. This fact persuades the Court to come to the conclusion that the memorandum was issued by the Director of Accounts, West Bengal, School Education Department upon considering the issues involved. An executive decision was taken as a policy, upon considering certain government orders, keeping in mind the additional responsibility undertaken by the headmasters. The administrative order issued by the Director of Accounts on behalf of the Government of West Bengal is quoted below:

"Government of West Bengal
Directorate of Accounts, School Education Department,
Bikash Bhavan, Salt Lake, Kolkata-91

Memo No.D/AC (E) – 207/2014
6AD-216/2014
To
The Joint Director of Accounts,
School Education Department,
Paschim Medinipur,
Siksha Bhavan (2nd floor),
Head Post Office Road,
Midnapur, Pin: 721101.

Sub: Pay fixation of Head Master of upgraded H.S. Schools.
Ref: Your No.50/DA dt. 08.08.13 & 08/DA dt. 24.01.14.

With reference to above, this is to inform him that the school which was upgraded from Secondary to Higher Secondary after 27.02.2009, the pay will be fixed in respect of Head Master of that school in the following manner:
One increment @ 3% of his/her existing basic pay (pay in the Pay Band+ Grade Pay) in addition to the additional Grade Pay is admissible for the post of Head Master for taking higher responsibility (Vide para 4 of the G.O. No. 181-SE(B) dt. 08.10.09 and para 6 of the G.O. No. 30-SE(B) dt. 10.02.2010).

Sd/- T.K. Sikdar
Director of Accounts, W.B.
School Education Deptt.

Memo No.D/AC (E) – 207/2014 Dated: 06.08.2014.
Copy forwarded for information and necessary action to:-
The District Inspector of Schools (Secondary Education)
Paschim Medinipur, Siksh Bhava,
Midnapur, Pin 721101.".

Mr. Pal submits that the Joint Secretary issued the circular before the retirement of the petitioner, that is, on March 22, 2017, when the error was discovered. He further submits that the objection was raised by the District Inspector of Schools (SE), Paschim Medinipur, one day prior to the retirement of the petitioner, that is, on

June 29, 2017. Thus overdrawal and correct fixation was permissible in the case. Although the said memorandum is dated June 29, 2017, there is nothing on record to show that the same was either received by the petitioner or by the school before the relevant of the petitioner.

The payment was made with the increment and grade pay from the date of upgradation. Throughout the career of the petitioner, since the upgradation of the school till the date of his retirement, there was no whisper of such excess payment, irregular fixation and overdrawal. For the first time, the petitioner came to know the reasons for non-disbursement of the retirement benefits when the affidavit-in-opposition to the writ petition was filed on or about February 13, 2018. The petitioner was allowed to retire without any information in this regard.

In the decision of State of Punjab and Ors. versus Rafiq Masih (White Washer) dated December 18, 2014, the Hon'ble Apex Court laid down certain grounds when recovery from employees other than Group-C and Group-D staff could not be done, that is, when the Court arrived at a conclusion that the recovery made from the employee, would be iniquitous or harsh or arbitrary to such an extent, that it would outweigh the equitable balance of the employer's right to recover. At least there is one case of another headmaster on record which shows that one increment at the rate of 3% of the existing basic pay was given by the state respondents. No denial is forth coming to the contrary in the affidavit-in-opposition filed by the respondents. In this case, the grant of the increment was not a result of miscalculation, fraud, collusion, error or favouritism. It was allowed by the Directorate of Accounts, Education Department, Government of West Bengal.

In my opinion, such conscious decision based on two government orders cannot be termed as an erroneous pay fixation. Rather it is a policy decision. After retirement of the petitioner, the proposal to recover such amount retrospectively, in my view, would be iniquitous, arbitrary, discriminatory and contrary to law.

Mr. Pal's argument that Rafiq Masih (Supra) is a judgment in personam and applicable to only Group-C and Group-D services is not accepted as the Hon'ble Apex Court has made a general observation about other employees in Paragraph 12(v) of the judgment which is quoted below:

> *"12(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."*

Although Mr. Pal argues that before retirement, the Joint Secretary to the Government of West Bengal, School Education Department, instructed that such increment cannot be given to any of the headmasters. Such circular issued by the Joint Secretary only three months prior to the retirement of the petitioner was a general circular in respect of all headmasters but the decision of the Directorate of Accounts, Government of West Bengal, School Education Department, who had allowed such increment had not been superseded or cancelled. In my opinion, the subsequent administrative instruction cannot be made applicable retrospectively in case of the petitioner. In case of the petitioner, no specific objection was raised prior to June 29, 2017, that is the day before the retirement. The salary of the month of June, 2017 was also paid by allowing such increment. Once the higher pay has been given to the petitioner for over a period of five years on the basis of the decision of the Government of West Bengal, School Education Department through the Director of Accounts, the argument of Mr. Pal, that the order of recovery was rightly passed a day prior to the retirement of the petitioner is not accepted. The respondents have not produced any document to show that the petitioner was ever made aware of such objection prior to filing of the writ petition.

With regard to the contention of Mr. Pal about the petitioner being bound to repay the money, in view of the undertaking, reference is made to the decision of this Court in the matter of Raj Kumar Jana versus The State of

West Bengal and Ors. passed in W.P. No.21935 (W) of 2017 on December 7, 2017. This Court held that signing on a cyclostyled general proforma, applicable in general to all, cannot be enforced against the employee after his retirement.

In this case too, the proforma, which was signed by the petitioner contained an universal statement applicable to all, with an undertaking to refund to the government any amount which may be drawn in excess of what was admissible to him on account of erroneous fixation of pay. In my view, this is not an erroneous fixation of pay. In this case by a subsequent circular dated March 22, 2017, the respondents sought to deny one increment at rate of 3% of the existing basic pay to headmaster of such school, which was upgraded after February 27, 2009. This was a general circular. The petitioner's pay was fixed on the basis of an earlier executive decision by issuance of an administrative order by the respondent authorities who now are estopped from denying the benefit granted to the petitioner continuously upto the date of retirement. The respondents cannot go back on such decision and withdraw the benefit retrospectively.

In the decision of Chandi Prasad Uniyal (Supra) the Hon'ble Apex Court held that there may be cases where due to bona fide mistake or carelessness or negligence or collusion or favouritism, excess payment given to the employee could be recovered in order to prevent unjust enrichment as the excess payment was made from the tax payers' money. Primarily, in the said decision, the Hon'ble Apex Court distinguished some of the earlier decisions of the Hon'ble Apex Court and held that it was not only when fraud was practised by the payee that recovery could be made but also in cases of bona fide mistake, carelessness, collusion or favouritism, the overdrawn amount could be recovered. In the case in hand, the pay fixation was not due to bona fide mistake nor collusion, carelessness or favouritism. By an administrative order issued by the Government of West Bengal, School Education Department signed by the Director of Accounts, the modality of pay fixation of the headmasters of schools upgraded to higher secondary after February 27, 2009 was fixed. The revised pay was paid for more than five years to the petitioner and only when the petitioner approached this Court challenging non-disbursement of his retirement benefits, was the objection with regard to the pay fixation raised on the basis of another administrative order issued three years after the earlier administrative order of the Director of Accounts, Government of West Bengal, School Education Department was issued five years after the payment was made to the petitioner. Thus, the decision of Chandi Prasad Uniyal (Supra) does not help the respondents in this case.

In Syed Abdul Qadir and Ors. versus State of Bihar and Ors. reported in (2009) 3 SCC 475, the Hon'ble Apex Court observed that relief against recovery was granted by courts not because of any right of the employees but in equity exercising judicial discretion to relieve the employees from the hardship that would be caused if the recovery was ordered. If in a given case it could be proved that the employee had knowledge that he was receiving excess payment over and above what he was entitled to, the case would be different. However in the case in hand, the petitioner did not have any knowledge of any excess payment, rather the petitioner was given to believe by the state respondents and the School Education Department that because of the higher responsibility he had to undertake as a headmaster on the basis of the government orders.

Jagdev Singh (Supra) is distinguishable on facts as the judicial officer availed of revised pay scale by furnishing a specific undertaking while exercising his option in taking the revised pay scale that the amount would be refunded either by adjustment or by future payment due or otherwise. The judicial officer was put on compulsory retirement from service on February 12, 2003 after a disciplinary proceeding and thereafter on the basis of the undertaking the recovery was made. Such recovery was upheld. Thus, in my view, the respondents do not have any right to recover the excess amount drawn by the petitioner as the case in hand is based on a totally different set of facts. The undertaking in this case was a general proforma filled in by all persons in the same language.

In the Memorandum No. 181-SE(B)/5B-1/09 dated October 8, 2009 under paragraph 4, the right of headmasters of schools upgraded to 10+2 after February 27, 2009 to get an additional grade pay for taking higher responsibility and one increment of 3% of the existing basic pay has been provided for.

It has been categorically stated that the headmaster/headmistress would get his/her pay fixed in the pay structure upon getting one increment @ 3% of his/her existing basic pay. The Memorandum dated February 10, 2010 was issued in clarification to the queries raised as to the implementation of the Memorandum dated October 8, 2009. One of the queries clarified in the Memorandum dated February 10, 2010 was with regard to the method, how additional grade pay for taking higher responsibility of Head Teacher (Primary School), headmaster/headmistress of schools of different nomenclature would be regulated in the revised scale in the case of existing teachers.

There was no query with regard to payment of one increment @ 3% of the existing basic pay to the headmaster/headmistress of newly upgraded higher secondary schools after the February 27, 2009.

The Director of Accounts, West Bengal, School Education Department issued the administrative instruction on the basis of which the petitioner was given one increment @ 3% of his existing basic pay from the date of upgradation of schools. Since the petitioner was already the headmaster of the school which was upgraded during his tenure, he was not treated as a teacher from another school and was not disentitled to such benefit under the Memorandum dated October 8, 2009. When the Government of West Bengal, School Education Department upon a combined reading of the above-mentioned memoranda dated February 10, 2010 and October 8, 2009, as a matter of policy, allowed the increment, the Memorandum dated March 22, 2017 issued after three years cannot be made applicable in case of the petitioner. In the decision of this Court in **Shree Ganesh Steel Rolling Mills v. Union of India and ors**. reported in **AIR 1989 Cal 230**, it has been held that administrative orders and/or circulars cannot be given retrospective effect by issuing administrative orders and/or directions to deny the rights which already accrued. The same at best could be allowed to be implemented prospectively.

The respondent has no lawful authority to prejudicially affect an employee retrospectively by a mere executive fiat other than by his consent, unless the said respondents are authorized to do so by express provision of some valid law. Rights which have already accrued to an employee and the benefits which he might already have enjoyed under, or by virtue of a pre-existing executive instruction or administrative direction cannot be taken away with retrospective effect by another executive instruction or a mere administrative direction.

In view of the observation made hereinabove, this Court is of the opinion that by a conscious decision the government allowed one increment of 3% of the existing basic pay along with additional grade pay of Rs.200/- over a period of five years that is, from the date of upgradation. The pay of the petitioner was fixed accordingly, which he received till the last month of his service. Only on the day before the retirement, an objection was raised by the District Inspector. The benefit once granted by an administrative order of the government cannot be withdrawn retrospectively on the basis of the subsequent order dated March 22, 2017. The school authorities are directed to forward the pension papers and the service book of the petitioner as it was without any correction, to the District Inspector of Schools (SE), Paschim Medinipur within two weeks from date of communication of the order. The District Inspector of Schools shall forward the same to the appropriate respondent after sanctioning the retirement benefits on the last pay drawn, for disbursement of the same in accordance with this order within three weeks thereafter and the concerned respondent will pay the retirement benefits to the petitioner on the basis thereof within 6weeks thereafter. The memo dated June 29, 2017 and December 7, 2017 and all other decisions raising any objection with regard to the pay fixation of the petitioner by any authority whatsoever is set aside and quashed.

The entire exercise should be completed by the respondents within the aforesaid period.

The writ petition is, thus, disposed of.

There will however be no order as to costs.

All parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar,J.)