18 **24.03.22**

Ct. No. 04

Akd

WP.ST. 05 of 2022

The State of West Bengal & Ors.
Vs.
Santilata Maity & Ors.

Mr. Swapan Kumar Datta,
Mr. Tapas Kumar Dey.
... for the petitioners.
Mr. Swapan Kumar Nandi,
Mr. Sib Narayan Chattopadhyay,
Mr. Debjyoti Ghosh.
... for the respondent no. 1
Mr. Suman Basu.
... for the proforma respondent no. 2.

The State has challenged the order dated 17th February, 2020 passed by the West Bengal Administrative Tribunal in OA 707 of 2019 allowing the tribunal application filed by the respondent no. 1, wherein the challenge was restricted to the deduction of excess amount because of the mistake committed while fixation of scale of pay.

Admittedly the husband of the respondent no. 1 was a Group – D staff and attained superannuation on December 31, 2011. Ultimately the said employee died on May 11, 2017. It was detected while disbursing the amount of gratuity, a sum of Rs.1,14,498/- was deducted therefrom on account of excess payment of salary because of wrong fixation of pay.

The Tribunal after noticing the judgement of the Supreme Court rendered in case of *State of Punjab & Ors. vs. Rafiq Mashi (White Washer) & Ors.* reported in (2015) 4 SCC 334 held that such deduction from the amount of gratuity is impermissible and directed the payment of amount so deducted to the respondent no. 1 without interest.

The State has come up with a plea that the employee during his lifetime did not raise any objection over the deduction of the excess payment made on wrong fixation of pay and, therefore, it is too late in a day to lay claim at the behest of the wife. It is further submitted that the mistake does not confer any right into an employee, as such mistake is not allowed to be perpetuated to continue eternally. It is further submitted that the employee did not raise any objection, rather received the balance amount of gratuity without any protest and, therefore, the Tribunal ought to have rejected the application filed by the wife.

It appears from the record that the employee was appointed as Group–'D' staff and attained superannuation. The gratuity is neither a bonanza nor an incentive but is a payment of deferred salary. It is not a case that the employee by his conduct or divulgence of any information received the amount of salary, as if the fixation was done on the basis of such information. There was no role of the employee in fixation of pay, which is within the domain and realm of the employer. The mistake is required to be corrected, but the question is still begging at what stage. There has been a rampant deduction of amount from the gratuity on account of wrong fixation of pay and the matter traveled many occasions before the Supreme Court where such deduction was held to be impermissible.

In case of Rafiq Mashi (supra), in fact, the Division Bench of the Supreme Court referred the point to be decided by a Larger Bench, but the Larger Bench found that such reference was unnecessary and without answering the reference remitted the matter to the Division Bench for appropriate disposal. The matter came up before the Division Bench comprising of two Hon'ble Judges and it was observed that the concept of justice is paramount pitted against the unequal parties and the party who is weaker of the two and if there is no serious consequence invited therefor, such issue should be decided in the perspective of the preamble of the Constitution of India. The State should not take technical plea unless there is a serious detriment to the interest, which has a larger impact on the society.

The Apex Court further held that recovery from an employee would be more unfair, wrongful and may sometime be unwarranted if the comparison is made with the corresponding right of the employer in recovery of the said amount. Ultimately the Apex Court held that in certain eventualities the recovery of an excess amount may be impermissible in the following:

> "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 freferred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
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> (i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).
>
> (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.

(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.

As indicated hereinabove, the employee was a Group 'D' staff and retired upon attaining the superannuation age. Such an employee if subjected to the recovery on account of a mistake committed by a nodal employer, it would create more hardship as during his lifetime whatever a meagre amount, which he received, were spent for upbringing and welfare of the children and the family members.

We thus find that the order of the Tribunal cannot be impinged in view of the ratio *decidendi* in Rafiq Mashi (supra). Furthermore, the Tribunal was conscious of the fact that a person who committed a mistake should not be penalized if the mistake appears to be bona fide and not tainted with any malice and, therefore, did not award any interest thereupon.

In view of the above, we do not find any infirmity or illegality in the impugned order.

The writ petition is thus dismissed.

There shall however be no order as to costs.

(Harish Tandon, J.)

(Rabindranath Samanta, J.)