

(Through Video Conference)

S/L No. 07
10.01.2022
Ct-11
(PD)

MAT 369 of 2021
With
IA. No. CAN 1 of 2021

Dilip Kumar Bose
vs.
State of West Bengal & Ors.

Mr. Manas Kumar Ghosh
Ms. Susmita Dey (Basu)
Mr. Kaustav Ghosh

... for the Appellant.

Ms. Sonal Sinha

... for the Respondent No. 4.

Party/parties is/are represented in the order of their name/names as printed above in the cause list.

This is an appeal against the order passed in WPA No. 1557(w) of 2019 dt. 23rd February 2021 wherein the Ld. Single Judge has disposed of the writ petition by passing the following order:

“This court is of the view that merely because the respondent in the Jagdev Singh decision (supra) was a Civil Judge (Senior Division), would not exempt the petitioner (admittedly a group C Employee) from the exception to the Rafiq Masih decision (supra) as carved out in the Jagdev Singh’s Case (Supra).

For the reasons stated herein above, no relief can be granted to the writ petitioner except that he is entitled to interest @ 9% per annum on delayed payment of Rs. 5,49,878/- for the period from date of superannuation i.e. February, 2017 till date of actual payment i.e. 27.12.2018.”

The counsel for the appellant submits that the appellant has retired from service on 28.02.2017 as Upper Division Assistant and out of his entitlement of

Rs. 14,29,550/-, the appellant was paid only an amount of Rs.5,49,878/- on 27.12.2018 without any interest recovering an amount of Rs. 8,79,672/- on account of over payment without giving any opportunity of hearing to the appellant and without any formal order of recovery.

The counsel for the appellant further submitted that there is no allegation of fraud and misrepresentation on the part of the appellant and the appellant had enjoyed the benefits under the Modified Career Advance Scheme with effect from 2011 till his retirement and during the period, the appellant was never notified the excess payment or recovery.

The appellant has relied upon the judgment reported in (2015) 4 SCC 334 (State of Punjab – versus- Rafiq Masih).

“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 referred to hereinabove, we may, as a ready reference, summarize the following few situations, wherein recoveries by the employers, would be impermissible in law:

(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 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."

The Ld. Counsel for the appellant further submitted that the Hon'ble Single Judge has misrepresented the judgment passed by the Hon'ble Supreme Court (supra). The Ld. Counsel for the appellant further submitted that the judgment reported in (2016)14 SCC 267 (High Court of Punjab and Haryana and Others – versus- Jagdev Singh) relied by the respondent and the Hon'ble Single is not applicable in the case of the appellant.

The counsel for the appellant prays for an order directing the respondents for refund of an amount of Rs. 8,79,762/- with interest.

Per contra the counsel for the respondent submits that the respondents have rightly recovered an amount of Rs. 8,79,672/- ,while granting the financial benefit to the appellant in the year 2011, the appellant with an open eye had submitted an under taking on 12.11.2009 stating inter alia :

"Further I would like to undertake to refund forthwith the entire amount, so drawn on account of fixation of equalization pay benefit in the event of the regrets the decision of the department of Water Resource Investigation and Development

(WRID) and intimates the cancellation of the benefit of equalization of pay extended to the appellant.”

The counsel for the respondent further submitted that the judgment passed in the case of Rafiq Masih and others (supra) is not applicable in the case of the appellant as the appellant has submitted an undertaking while getting financial benefit. The Counsel for the appellant has relied upon paragraph 9 of the judgment reported in (2016)14 SCC 267 (High Court of Punjab and Haryana & Ors – versus- Jagdev Singh).

“9. The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the State. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made.”

The Counsel for the respondents submitted that the respondents have rightly recovered the excess amount paid to the appellant as the appellant while taking the financial benefit, the appellant had submitted an undertaking that in case of excess payment, the same can be recovered and the judgment passed in the case of Jagdev Singh (supra) is squarely applicable in the case of the appellant and prayed for dismissal of the

appeal.

This court has considered the rival submissions of the parties. The appellant despite being aware of the fact that he was not entitled to the MCAS benefits but for getting the said benefit the appellant has submitted an undertaking dt. 12.11.2009 to the respondents stating that he undertook to refund forthwith the entire amount, so drawn on account of fixation of equalization pay benefit in the event the decision of the department of Water Resource Investigation and Development (WRID) intimates the cancellation of the benefit of equalization of pay extended to the appellant.

The Judgment passed in the case of High Court of Punjab and Haryana and Ors (supra) in paragraph 11 it is clarified that:

“11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.”

In the instant case the petitioner has taken the benefit of higher pay upon furnishing an undertaking and thus the judgment passed in the case of Punjab and Haryana High Court and Ors (supra) is squarely applicable in the instant case.

The judgment relied by the appellant reported in the case of State of Punjab – versus- Rafiq Masih (Supra)

is not applicable in the instant case, as the case of the appellant is not covered under any of the exception mentioned in Para 18 of the said judgment.

In view of the above, this Court did not find any illegality in the order passed by Hon'ble Single Judge dt. 23.02.2021 and thus the order does not require any interference.

The appeal being MAT No. 369 of 2021 with IA No. CAN 1 of 2021 stand **dismissed**.

Since the matter is decided purely on the points of law, affidavits are not necessary and, hence not invited and other allegations are deemed to be denied.

All parties to act in terms of a copy of the order downloaded from the official website of this Court.

(Krishna Rao, J.)

(Subrata Talukdar, J)