IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Before:

The Hon'ble Mr. Justice Lapita Banerji

W.P.A. 9851 of 2021

Prasad Kumar Mondal

Vs.

Union of India & Ors.

For the Petitioner: Mr. Amal Baran Chatterjee,
Mr. Satadal Chatterjee,
Mr. Nemai Chandra Betal

For the Respondent Nos. 2,3, &4: Mr. Arijit Bakshi

Heard on: 06.09.2022

Judgement delivered on: 06.09.2022

Lapita Banerji, J. :- The petitioner's grievance in this writ petition arises out of the fact that the respondent authorities illegally deducted a sum of Rs. 2,18,681/- from his gratuity amount leading to extreme hardship of the petitioner by not being able to provide sufficient funds for admission of his daughter in B.Ed Course for 2017-2018 session.

2. The writ petitioner has claimed for release of the said amount along with interest in this writ petition being **WPA 9851 of 2021**. The facts of this case are as follows:

i) The petitioner joined as a Typist in the Indian Museum, Kolkata in 1983. The petitioner had an unblemished service record. The petitioner retired as Head Assistant (Accounts) on August 31, 2017.

ii) The petitioner was granted two increments on March 26, 2005 in the revised scale of pay following the Government of India Office Memorandums of 1966 and1968.

iii) Just prior to his retirement by an Office Order dated 24.08.2017 the petitioner was notified that there was previous incorrect pay fixation involving excess payment to the petitioner. One advance increment was given with effect from August 1, 2004 and second increment was given with effect from March 26, 2005. The said increments were granted without approval of Government of India and the Board of Trustees. Therefore, the office order dated March 26, 2005 stood cancelled being ab initio void. Consequently, as per the office order dated August 24, 2017 the excess salary paid to the writ petitioner was sought to be recovered from his retiral benefits.

3. Mr. Chatterjee, learned advocate appearing for the writ petitioner argues that his client has neither misrepresented nor has acted in complicit to any fraud in the grant of two increments which were given to his client. Admittedly, such increments were given to his client, due to wrongful understanding of the departmental rules.

4. He draws the attention of Court to the fact that since March 26, 2005 the writ petitioner has been getting benefits of the aforesaid two increments. At the fag end of the petitioner's career just before his retirement on August 31, 2017 by impugned office order dated 24.08.2017 recovery of the excess amount was impermissible in law.

5. He relies upon a judgment of Hon'ble Apex Court in **Thomas Daniel vs. State of Kerala** (Civil Appeal No. 7115 of 2010) to support his contention that in the event the excess amount was not paid on account of any misrepresentation or fraud of the employee or if 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, such excess payment of emoluments or allowances are not recoverable. The relief to the employee was granted not because of any right in favour of the employees but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be caused if the recovery is ordered.

6. He also relied upon judgments **Sahib Ram vs. State of Haryana & Ors., reported in 1995 Suppl.(1) SCC 18** and **State of Punjab & Ors. Vs. Rafiq Masih, reported in (2015)4 SCC 334** wherein the Apex Court examined the validity of an order passed by the State to recover the monetary gains wrongly extended to the beneficiary employees in excess of their entitlements without any fraud or misrepresentation at the behest of the recipients.

7. Mr. Bakshi, learned advocate appears on behalf of the respondent nos.2, 3 and 4 and submits that excess payment on account of wrong pay fixation, grant of scale without prior approval, permission without following the procedure or in excess of entitlements can be recovered in all cases barring a few exceptions of extreme hardships. No waiver of recovery may be allowed without the approval of the department of expenditure. Reliance was placed on an office memorandum dated April 22, 2022 and also office

memorandum dated March 02, 2016 on the issue of recovery of wrongful/excess payments made to the government servants. He relies on the paragraph 7 of the judgment of **Rafiq Masih (supra)** in support of his contention. Mr. Bakshi also relies upon the decision reported in **Chandi Prasad Uniyal & Ors. Vs. State of Uttarakhand & Ors., reported in AIR 2012 SC 2951**, **at para-9 to 12** in support of his contention for recovery of excess amount. The case of **Shyambabu Verma & Ors. vs. Union of India & Ors. reported in (1994)2 SCC 521** disentitling recovery has been discussed in paragraphs under reference. The Apex Court in **Chandi Prasad Uniyal (supra)** expressed its concern regarding the "taxpayers' money" being wrongfully disbursed which belongs neither to the officers who have effected over payment nor to the recipients.

8. Having considered the rival contention of the parties and the materials placed on record, this Court finds:

(a) Just prior to the retirement of the writ petitioner/employee on August 31, 2017 the office memorandum dated August 24, 2017 was issued for recovery of excess amount paid to him;

(b) Clause 4 of the office memorandum dated February 07, 1968 clearly stipulated that as far as the persons serving in Indian Audit and Accounts Department are concerned office memorandum/orders are issued after consultation with the Comptroller and Auditor General.

(c) Therefore, argument that increments have to be issued only after being advised by the Ministry/Department, cannot be accepted as the said approval is inbuilt in the office memorandum of 1968 issued by the Ministry of Finance, Department of Expenditure, Government of India.

9. This Court further finds that the principles laid down in paragraph 18 of the case of **Rafiq Masih (supra)** which reads as follows:

> " (i) . . . . . .
> (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) . . . . .
> (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."

are squarely applicable to the instant case. Hence, the question whether the petitioner suffered extreme hardship need not be considered in this case as the writ petitioner was due to retire within few days of the order of recovery and the benefits were given to him for more than 12 years which was much over and above the period of five years.

10. In view of the aforesaid, the impugned order dated March 24, 2017 is **set aside**.

11. Accordingly, the writ petition being WPA 9851 of 2021 stands **allowed**.

12. There shall be no order as to costs.

13. Urgent photostat certified copy of this judgment and order, if applied for, be given to the parties on fulfilling necessary formalities.

(Lapita Banerji, J.)