

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE RABINDRANATH SAMANTA

WPA No. 9999 of 2022

Srabani Taraphder

Vs

The Indian Institute of Technology, Kharagpur & Ors.

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Ms. Chama Mookherji, Sr. Adv.

Mr. Anujit Mookherji, Adv.

Ms. Rinky Kumari Shaw, Adv.

..... for the Petitioner

Mr. R.N. Majumder, Adv.

Ms. S.M. Obaidullah, Adv.

..... for the Respondents

Heard On : 07.11.2022

Judgment on : 14.12.2022

Rabindranath Samanta, J:-

1. The petitioner by preferring this writ petition challenges two Orders dated 15th February, 2022 and 19th April, 2022 passed by the Indian Institute of Technology, Kharagpur (in short IIT Kharagpur) directing recovery of Rs.7,71,270/- subsequently modified as Rs. 7,44,737/- as overdrawn amount from the petitioner.
2. The facts which led to the filing of the writ petition may be adumbrated as under:-

The petitioner was appointed as a visiting lecturer of IIT Kharagpur on 31st October, 1996 under its academic category. In response to an advertisement published by the authority of IIT Kharagpur the petitioner applied for the post of Assistant Professor of the Institute. After being selected she was appointed as Assistant

Professor with effect from 12th February, 1998. Thereafter, in response to an another advertisement published by IIT Kharagpur the petitioner applied for the post of Associate Professor and after being selected she was appointed as the Associate Professor with effect from 24th April, 2007. Presently, she is working as a Professor appointed through the same selection procedure with effect from 16th November, 2011. It may be noted that her service as an employee of the Institute is in continuity since her initial appointment while she was appointed as the Assistant Professor on 12.02.1998. An employee code being No. 96023 was allotted to her. Besides, the G.P.F Number in which she contributes still remains the same. The service rendered by her from the date of her initial appointment is continuing.

3. Amongst the Indian Institutes of Technology set up in different parts of India, IIT Kharagpur was set up first in May, 1950 in Hijli, Kharagpur, West Bengal. This institute started functioning on and from August 18, 1951. In 1956 the Indian Institute of Technology, Kharagpur Act was passed declaring the Institute as an Institute of national importance. Subsequently, the Indian Institute of Technology Act, 1961 was enacted to declare certain Institutes of Technology to be of national importance. According to Indian Institute of Technology Act, 1961, all appointments of the staff of an Institute excepting the post of Director was to be made in accordance with the procedure laid down by the statutes of such institute. The IIT Kharagpur statutes came in force with effect from November, 1962. According to Regulation 12 of the Statutes all posts of the Institute shall normally be filled by advertisement, but the Board shall have the power to decide on the recommendation of the Director that a particular post be filled by invitation or by promotion from amongst the members of the staff of the Institute. The petitioner states that she was discharging her duties with efficiency and devotion without any hindrance. But, she became

shocked after receiving a communication dated 15.02.2022 issued by the Assistant Registrar (E-I) by which she was conveyed that as per the observation of the Comptroller & Auditor General and approved by the Board of Governors at its 200th meeting held on 23rd July, 2021, her pay as a Direct Appointee shall be governed by the FR (Fundamental Rule 22(1)(a)(1) of the Government of India. Accordingly, her pay was revised to lower pay and recovery of Rs.7,71,270/- was ordered from her as overdrawn payment. By the Order dated 19th April, 2022 the Order dated 15.02.2022 was modified to this extent that over payment of Rs. 7,44,737/- instead of Rs.7,71,270/- would be recovered from her. The petitioner submits that the authority of the IIT Kharagpur before passing the Order of recovery of the aforesaid amount did not serve any notice upon her, nor she was given any opportunity of hearing. In such context, the petitioner, by making a representation dated 8th March, 2022, to the Registrar, IIT Kharagpur ventilated her grievances that recovery of the amount would not only cause irreversible adverse civil consequences to her, but it would cause tremendous mental agony and hardship to her and her family. She, citing a government memorandum dated 2nd March, 2016 issued by the Ministry of Personnel, Public Grievances & Pensions, Department of Personnel & Training, Government of India informed the authority that recovery of wrongful/excess payments made to Government Servants for a period in excess of five years before the Order of recovery was impermissible in law. But, her representation has fallen on deaf ears. Under such circumstances, the petitioner seeks direction that the office Orders dated 15.02.2022 and dated 19.04.2022 be set aside and the respondents be directed not to give any effect to these Orders.

4. In their affidavit-in-opposition the respondent Nos.1 to 5 state that the writ petition is liable to be dismissed due to non-joinder of necessary parties. They state that in the audit conducted by the Comptroller and Auditor General (in short C & AG) it was observed

that the IIT Kharagpur allowed the faculties to exercise option under FR 22 (1)(a)(1) and because of exercising such option there resulted in irregular pay fixation. In terms of Section 10 of the Indian Institute of Technology Act, 1961, the Finance Committee of the Institute made recommendation to the Board of Governors for approval of revision of pay and recovery of excess amount which was paid to the faculties. The Board of Governors at its 200th meeting held on 23rd July, 2001 approved the recommendation of the Finance Committee. Such approval of the Board of Governors being the statutory authority formed under the Statute is binding upon all the employees of the Institute. These answering respondents submit that the amount overdrawn by the petitioner ordered to be recovered by the Institute vide Orders dated 15.02.2022 and 19.04.2022 is lawful. Denying and disputing the averments as made in the writ petition the answering respondents submit that the writ petition is liable to be dismissed.

5. However, the petitioner in her affidavit-in-reply states that the Finance Committee as stated by the answering respondents is a mere recommendation body. She states that no scrap of paper has been placed on record by the respondents to show that any attempt was made on its part to fix the liability of the official or officials for whom alleged overpayment was made. Controverting the averments as made in the affidavit-in-opposition the petitioner reiterates her stand that the recovery Order of the amount as overdrawn from her is impermissible in law.
6. The answering respondents aver that the writ petition is liable to be dismissed due to non-joinder of necessary party. However, perusal of the affidavit-in-opposition does not show who is the necessary party in absence of which the writ petition would be defeated.
7. Learned Counsel appearing for the answering respondents submits that the Director General of Audit who made the observation as regards over drawal of pay by the faculties of IIT Kharagpur in irregular manner is a necessary party.

8. Undisputedly, IIT Kharagpur is the appointing and disciplinary authority of the petitioner. True, the IIT Kharagpur authority made the aforesaid two Orders dated 15.02.2022 and 19.04.2022 as impugned on the basis of the observations made by the Director General of Audit. But, the fact remains that the IIT Kharagpur authority passed the Orders against the petitioner as to recovery of overpayment as the appointing and disciplinary authority of the petitioner. As the statutes of Kharagpur indicate, the IIT Kharagpur authority as an autonomous body guided by its own statutes and laws may pass such order or orders upon its employees as it deems just and proper. Such being the position, the Director General of Audit, in my view, is not necessary party to the instant writ petition. As such, the argument as advanced by learned counsel for the respondents is not acceptable.
9. Certain facts which are not in dispute may be delineated as under:

Initially the petitioner was appointed as a visiting lecturer of IIT Kharagpur on 31.10.1996. Thereafter, she was appointed as the Assistant Professor on 12.02.1998. Subsequently, she was appointed as Associate Professor on 24.04.2007 and Professor on 16.11.2011. The scale of pay of Assistant Professor, Associate Professor and Professor at the relevant time was i) Rs. 12000-420-18300, ii) Rs.16400-450-20000 and iii) Rs.18400-500-224000 respectively. Regulation 12 of the Statutes of IIT Kharagpur enjoins that all posts at the Institute shall normally be filled by advertisement, but the Board shall have the power to decide, on the recommendations of the Director that a particular post be filled by invitation or by promotion from amongst the members of the staff of the Institute. The uncontroverted averments in the writ petition show that for the purpose of appointing an Assistant Professor to the post of Associate Professor and Professor of the Institute there is no feeder post and no statutory rule exists for promoting an Assistant Professor up to the post of Professor.

10. What the record evinces, the petitioner was appointed to the post of Assistant Professor, Associate Professor and Professor after being selected through selection process which was conducted after publication of advertisements by the Institute inviting applications from the eligible candidates for the posts. An appointment letter dated 11.04.2007 (Annexure P/2) shows that the petitioner Dr. Srabani Taraphder was appointed as Associate Professor as against a permanent post at the scale of pay of Rs.16400-450-20000 and her basic pay would be fixed as per the rules. It is evident from an Office Order dated 14.05.2007 of the Institute (Annexure P/4) that this scale of pay of the petitioner as an Assistant Professor prior to her appointment as Associate Professor was Rs.16620 and the date of her next increment was 01.02.2008 and after she was appointed as Associate Professor her pay was fixed at Rs. 17300 as on 23.04.2007 in the scale of pay of Rs. 16400-450-20000 and the next date of her increment was 01.04.2008. Similarly, her pay was fixed in terms of the scale of pay as indicated above while she was appointed as a Professor.
11. The petitioner stoutly asserts that to the best of her knowledge she never exercised option to get higher pay from any particular date. It is the IIT Kharagpur authority which on its own fixed her scale at every stage of her career from Assistant Professor to Professor.
12. The bone of contention of the instant matter hovers round the impugned orders dated 15.02.2022 and 19.04.2022 by which IIT Kharagpur authority directed that the aforesaid amount of Rs. 7,71,270/- modified as Rs. 7,44,737/- would be recovered from the petitioner as overdrawn for the period from 23.04.2007 to 01.02.2022 during which she held the post as Associate Professor and Professor. As stated above, the impugned Orders were made based on the observation of C & AG and approved by the Board of Governors at its 200th meeting held on 23.07.2021. In such

context, it will be apposite to refer to the relevant observation made by the Director General of Audit which runs as under:

“ Test-check of records showed that both the Institutes had allowed newly appointed faculty members, selected on the basis of direct recruitment, to exercise options regarding the date of fixation of their pay under F.R. 22(I)(a)(I), at the time of their appointment. Consequently, the pay of these faculty members was fixed from the date of accrual of the next increment in the time scale of the post previously held by them, either in the Institute, or elsewhere. Audit noted that, permitting the newly recruited faculty members to exercise this option, had led to fixation of pay at a higher stage in the time scale of the new post from the date of next increment. Thus, permitting exercise of this option, in violation of the Fundamental Rules, resulted in irregular fixation of pay, along with overpayment of pay, amounting to Rs.2.09 crore (till March 2020), in regard to 54 faculty members (Annexure enclosed).

IIT Kharagpur, replied that the pay fixation of the newly recruited faculty members had been carried out in terms of MHRD's Order (October 2017), vide which candidates were allowed one notional increment in the existing academic level of pay previously held by them. It further stated that the pay fixation had been made from the date of next increment, by exercising option under FR 22(I)(a)(I) vide DOPT's OM dated 27.07.2017, which envisages that a government servant shall have the option to have the pay fixed under this rule from the date of such promotion, or to have the pay fixed from the date of accrual of the next increment in the scale of the pay in the lower grade.

IIT Guwahati, replied that it was aware of the provisions of pay fixation, as observed by Audit, and had followed the same till the implementation of 6th CPC. With the implementation of the recommendation of the 6th CPC, however, there had been anomalies in pay among faculty members, as the date of increment was uniform (1st July every year) for all employees. To remove these pay anomalies, the Board of Governors (BoGs), in its 63rd Meeting, had

decided to give an option for fixation of pay from the date of the next increment, to all faculty members appointed to a higher post after 01.01.2006.

The replies of both the Institutes are not tenable, as the provisions under FR 22 (I)(a)(I), read with said DOPT's OM, provide that a Government servant, appointed on the basis of direct recruitment, shall not have the option to have his pay fixed from the date of accrual of next increment in the scale of the pay previously held by him. Thus, the methodology of allowing the option for fixation of pay from the date of the next increment, to the newly appointed faculty members, selected on the basis of direct recruitment by these Institutes was irregular."

13. The observations as above, substantially, speak that the Director General of Audit made the observations on test-check on records of some faculty members selected on the basis of direct recruitment who exercised their option. The petitioner vehemently avers that she never exercised option. No iota of document has been produced from the side of the IIT Kharagpur authority to show that the petitioner ever exercised option after being appointed to the post of Associate Professor and Professor.
14. It appears from the orders dated 15.02.2022 and 19.04.2022 that the IIT Kharagpur authority by the orders as above not only directed the recovery of the aforesaid amount from the petitioner, but the authority reduced her pay which was granted to her.
15. The office Memorandum dated 27.07.2017 (Annexure P/7) issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel & Training, inter alia, reads that on the date of next increment in the level of the post to which Government Servant is promoted, his/her pay will be re-fixed and two increments (one accrued on account of annual increment and the second accrued on account of promotion) may be granted in the level from which the Government Servant is promoted and he/she shall be placed, at a cell equal to

the figure so arrived in the level of post to which he/she is promoted; and if no such cell is available in the level to which he/she is promoted, he/she shall be placed at the next higher cell in that level.

16. As the case of the petitioner suggests, the petitioner from the initial appointment as Assistant Professor to the appointment of professor served the Institute uninterruptedly having one employee Code being No. 96023 and the same G.P.F Account. The IIT authority treating the appointment of the petitioner either as Associate Professor or as Professor to be promotional post fixed her pay allowing her the increments as provided in the Office Memorandum dated 27.07.2017. On the face of record it is found that the IIT authority, without inviting any option from the petitioner, on its own fixed her pay at the scale admissible to an Associate Professor and a Professor.
17. The only point which falls for determination is whether the orders of recovery of Rs.7,71,270/- modified as Rs.7,44,737/- as overdrawn payment from the petitioner is sustainable in law.
18. Learned Counsel appearing for the petitioner submits that by the impugned Orders the IIT Kharagpur authority directed recovery of the amount as above from the petitioner for the period which was more than fourteen years ago. Citing a catena of decisions in the case of **Chandi Prasad Uniyal and Others-Vs- The State of Uttarakhand and Others** reported in (2012) 8 SCC 417, in the case of **State of Punjab and Others -Vs- Rafiq Masih (White Washer)** reported in (2015) 4 SCC 334, in the case of **Thomas Daniel-Vs- State of Kerala and Others** reported in 2022 SCC OnLine SC 536, in the case of **Prasanta Kumar Das-Vs- The State of West Bengal** reported in (2015) SCC OnLine Cal 7459 and **Sudarsan Dasadhikary -Vs The State of West Bengal and Others** reported in (2015) SCC OnLine Cal 8390 learned counsel argues that recovery of the amount as overdrawn from the petitioner for a period which took place more than five years back and without giving any opportunity

of hearing to the petitioner is impermissible. Learned Counsel submits that the IIT authority fixed the pay of the petitioner on its own and no option was exercised by the petitioner nor she resorted to any fraud or misrepresentation to get the pay fixed or re-fixed on her appointment to the higher grade of post. On such score, learned counsel submits that the Orders as impugned are liable to be quashed.

19. Per Contra, learned counsel for the respondents argues that as per the statutes of IIT Kharagpur any decision or resolution taken by the Board of Governors is binding upon all the employees of their Institute. That being the legal position, the petitioner is now estopped from challenging the orders dated 15.02.2022 and 19.04.2022 relating to recovery of the amount overdrawn by her. To buttress his argument learned counsel also places reliance on ***Chandi Prasad Uniyal and Others-Vs- The State of Uttarakhand and Others*** reported in **(2012) 8 SCC 417**.

20. In ***Chandi Prasad Uniyal*** the Hon'ble Apex Court at paragraphs 13, 14 and 15 has held as under:

“13. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or were on the verge of retirement or were occupying lower posts in the administrative hierarchy.

14. We are concerned with the excess payment of public money which is often described as “taxpayers’ money” which belongs neither to the officers who have effected overpayment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. The question to be asked is whether excess money has been paid or not, may be

due to a bona fide mistake. Possibly, effecting excess payment of public money by the government officers may be due to various reasons like negligence, carelessness, collusion, favouritism, etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

15. We are, therefore, of the considered view that except few instances pointed out in Syed Abdul Qadir case and in Col. B.J. Akkara case, the excess payment made due to wrong/irregular pay fixation can always be recovered.”

20. However, the Hon’ble Apex Court in **Rafiq Masih** on consideration of the judgments rendered in **Chandi Prasad Uniyal and Others, Syed Abdul Qadir** reported in (2009) 3 SCC 475 and in **Col. B.J. Akkara**, reported in (2006) 11 SCC 709 has held at paragraph 18 as follows:

“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 herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from 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.”

21. In the subsequent decisions in the case of **Thomas Daniel** reported in **(2022) SCC Online SC 536**, **Prasanta Kumar Das** reported in **(2015) SCC OnLine Cal 7459** and in **Sudarsan Dasadhikary** reported in **(2015) SCC OnLine Cal 8390** the legal proposition as propounded by the Hon'ble Apex Court in **Rafiq Masih** has been reiterated and followed.

22. What I find, no iota of paper has been produced from the side of the respondents to evince that the petitioner managed to get the pay fixed or re-fixed at the scale as referred to in the impugned Orders by practising fraud or misrepresentation upon the authority of IIT Kharagpur. Undisputedly, no notice was served upon the petitioner nor any opportunity of hearing was given to her before passing the orders of recovery of the aforesaid amount. The petitioner by the representation dated 08.03.2022 (Annexure P/15) apprised the authority of IIT Kharagpur with severe anxiety that the recovery of the aforesaid amount would cause immense mental agony and hardship to her and her family and as such she appealed to the authority not to take any step to implement the impugned orders. It is averred by her in the writ petition that the reduction of her pay at lower level and recovery of the amount would adversely affect her service career both at national and international level. Such grievances as ventilated by

the petitioner do not appear to be unjust and such being the scenario the authority of IIT Kharagpur ought to have given opportunity of hearing to the petitioner before taking the drastic step against her.

23. As excerpted from the observation of the Director General of Audit, the Director General of Audit made the observation/recommendation after conducting test-check of records of newly appointed faculty members. The observation doesnot reflect that the Director General of Audit after scrutinising all the relevant factors of the pay of the petitioner came to the aforesaid inference. The recommendation of the Director General of Audit cannot be termed as an enquiry report. But, surprisingly, the authority of the IIT Kharagpur passed the impugned orders blindly relying on the observations of Director General of Audit.

24. Reduction of pay of the petitioner to a lower level and recovery of the amount as above from her are factually in the nature of penalties imposed upon her under regulation 15 of the Statutes of Kharagpur IIT. But, regulation 15 of the Statutes unequivocally enjoins that the authority cannot pass such penalty except after an enquiry has been held and the member of the staff has been given reasonable opportunity of showing cause of the action proposed to be taken in regard to him/her.

25. Viewed from all aspects it is axiomatic that the authority of IIT Kharagpur passed the aforesaid orders in violation of its own statutes as well as in violation of the mandate of the Hon'ble Apex Court as pronounced in **Rafiq Masih** (supra). Therefore, the orders dated 15.02.2022 and 19.04.2022 as impugned are not sustainable in law and the orders are liable to be quashed.

26. Thus the point is answered in the negative.

27. In the result, the writ petition merits success and accordingly the writ petition is allowed on contest.

28. The Office Order No. Esst/83/2022/96023 dated 15.02.2022 and the Memorandum being No.HT/3-3/1494 dated 19.04.2022 issued by

the respondent authorities are hereby quashed. The respondents are directed to restore the petitioner's status to the pay scale as existed prior to giving effect to the Office Order No. Esst/83/2022/96023 dated 15.02.2022 and Memo No. HT/3-3/1494 dated 19.04.2022. The respondents are directed to refund the amount which has been recovered from her so far in terms of the aforesaid orders to her within six weeks from date.

29. With the aforesaid direction the writ petition stands disposed of.

30. Connected application, if any, also stands disposed of.

31. No order as to costs.

32. Urgent certified website/Photostat copy of the judgment, if applied for, be given to the parties upon compliance with all requisite formalities.

(Rabindranath Samanta,J.)

Later

After the judgment is pronounced learned counsel for the respondents prays for stay of the operation of the order.

On due consideration the prayer is refused.

(Rabindranath Samanta,J.)