IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
(Appellate Side)

MAT 1158 OF 2019
With
I.A. No. CAN 1 of 2019
(Old No. CAN/8685/2019)

The Durgapur Municipal Corporation & Ors.

Vs.

Bimal Kumar Chowdhury & Ors.

Before: The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Apurba Sinha Ray

For the Appellant	:	Mr. Sandipan Banerjee, Adv. Mr. Sobhon Majumdar, Adv. Mr. Pinaki Ranjan Chakraborti, Adv. Ms. Utsa Dutta, Adv.
For the respondent no. 1	:	Mr. Dilip Kr. Maiti, Adv.
For the State	:	Mr. Amal Kumar Sen, Adv. Mr. Bipin Ghosh, Adv.
Heard on	:	16.09.2022 & 20.09.2022
CAV On	:	20.09.2022
Judgment On	:	29.09.2022

Arijit Banerjee, J. :-

1. A judgment and order dated July, 11, 2019, whereby the writ petition of the respondent No. 1 was allowed, is under challenge in this appeal.

2. The brief facts of the case are that the respondent/writ petitioner was appointed as Secretary of Durgapur Notified Area Authority, presently known as Durgapur Municipal Corporation (in short 'DMC'), pursuant to he being successful in a selection process. His appointment letter dated March 19, 1985, mentions his scale of pay as Rs. 500-20-540-25-640-30-820-40-1,260—60-1,360/-.

3. By an Office Order dated October 18, 1996, the writ petitioner was re-designated as Education Officer of DMC.

4. The Office Order mentioned that the terms and conditions of the original appointment of the writ petitioner will remain the same.

5. The writ petitioner retired as Education Officer of DMC upon his superannuation on May 31, 2006.

6. By a memo dated February 28, 2008, the Joint Secretary to the Government of West Bengal wrote to the Secretary, DMC as follows:-

> "With reference to your Memo. No. DMC/G/2111(En) dated 19.07.2007 on the subject cited above and to say that the pay

> scale of Shri Chowdhury would be fixed at the initial stage of Rs. 440/-1170/- in the post of Secretary, Durgapur Municipal Corporation on 17.05.2005 i.e., the date of his appointment. So, the Authority may be requested to fix his pay accordingly. The amount overdrawn by Shri Chowdhury should be recovered from his gratuity as he retired from his service on 31.05.2006 on superannuation and if gratuity has meanwhile been paid, the overdrawn amount may be recovered from his relief on pension. This is issued with the concurrence to Finance Department's U.O. No. 2934 Group P(pay) dated 22.02.2008."

A copy of the said memo was marked to the writ petitioner.

7. Subsequently DMC issued a memo dated 14-1-2010 which was to the following effect:-

> "The Director of Pension, Provident Fund and Group Insurance, Govt. of West Bengal has sanctioned final pension as provided in Rule 30 of amended Pre-2006 D.C.R.B Rules and 93/MA/O/C/5/IR-1/98, dt. 17/02/99 which is subsequently revised and read with Memorandum No. 230/MA/O/C-9/2P-6/2009, dt. 9th June, 2009; 231/MA/O/C-9/2P-6/2009, dt. 09th

June, 2009 & 232/MA/O/C-9/2P-6/2009, dt. 09th June, 2009. Sri Bimal Kumar Chowdhury, Ex-Education Officer, Durgapur Municipal Corporation is entitled to get final pension with effect from his date of superannuation i.e. 01.06.2006; P.P.O. No & rate of pension are furnished below.

Sl. No.	Name of the Pensioner	P.P.O No & Date	Rate of Pension	With effect from
01	Sri Bimal Kumar Chowdhury, Ex-Education Officer, DMC	MUN/M/BUR/00002/2010, dt. 07/01/2010	Rs. 2618.00	01-06-2006
			Rs. 6125.00	01-04-2008

The gratuity amount as entitled of Rs. 2,02,440/- will be adjusted with the overdrawal amount of Rs. 5,52,811/- and the balance amount of Rs. 3,50,371/- will be adjusted with the admissible relief payable to him w.e.f. 01.06.2006 as mentioned in the P.P.O.

It is also hereby ordered that the provisional pension which has already been paid to Sri Bimal Kumar Chowdhury will be adjusted with his final pension order."

8. A pension payment order issued in favour of the writ petitioner reflected a deduction of Rs. 5,51,711/- on account of alleged overdrawal upon taking in account the re-fixation of the writ petitioner's scale of pay.

9. Being aggrieved by the re-fixation of his scale of pay much after his superannuation and consequential deduction from his Pensionary benefits on account of alleged overdrawal, the writ petitioner made several representations to the authorities, but in vain. Hence he approached the learned Single Judge with his grievance.

10. From the order of the learned single Judge it appears that the writ petition was once disposed of and the order was carried in appeal. The order was set aside and the matter was remanded to the learned Single Judge. Thereafter by an order dated March 6, 2017, time was granted by the learned Single Judge to the respondents to file affidavit-in-opposition. No such affidavit was filed in spite of extension of time having been obtained on June 8, 2018 and on August 3, 2018.

11. On July 11, 2019, when the matter was taken up by the learned Single Judge, it was submitted on behalf of DMC that because of a change in the panel of advocates, the affidavit could not be filed but was lying ready after affirmation. The learned Judge rejected DMC's prayer for leave to file affidavit-in-opposition. Treating the allegations in the writ petition to be admitted, the learned Judge allowed the writ petition setting aside the re-fixation of the writ petitioner's scale of pay and the consequential deduction

from his retirement benefits on account of alleged overdrawal. Being aggrieved, DMC is before us by way of this appeal.

12. Appearing for DMC, Mr. Sandipan Banerjee, learned Advocate referred to various provisions of the West Bengal Municipal Corporation Act, 2006 including Sections 30, 32 and 34 thereof, in support of his submission that it is the State Government which fixes the salary of the secretary of DMC. Any major decision of DMC concerning the secretary has to be with prior approval of the State Government. It was pursuant to the direction of the State Government that the revised scale of pay was made applicable to the writ petitioner and the consequential deduction on account of alleged overdrawal was made. If the State Government provides funds, DMC will have no objection in paying to the writ petitioner the amount deducted on account of alleged overdrawal from the retiral benefits of the writ petitioner.

13. Appearing for the State Government, Mr. Amal Sen, learned Advocate submitted that there was an obvious error in fixing the scale of pay of the writ petitioner.

14. Such error was detected after the writ petitioner retired from service. Accordingly such error was corrected. The writ petitioner should not be permitted to enjoy a financial benefit which he is not entitled to in law.

15. Mr. Sen further submitted that learned Single Judge ought to have allowed the respondents in the writ petition to file affidavit-in-opposition. Allowing the writ petition merely on the basis of non-traverse of the averments there in, was not proper. Although the principles of Order 8 Rule 5 of the Code of Civil Procedure may apply to writ proceedings in view of Rule 53 of the Writ Rules of this Court, even under Order 8 Rule 5, the Court may require the plaintiff to prove by adducing evidence certain facts in the plaint although not controverted by the defendant. He further submitted that just because the respondents have failed to deny the allegations in a writ petition, on the basis of admission, no relief, which would be contrary to law, can be granted by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

16. In this connection learned Counsel relied on Hon'ble Apex Court's decision in the case of ***District Basic Education Officer & Anr. v. Dhananjai Kumar Shukla & Anr., reported at (2008) 3 SCC 481***. Learned Counsel relied on paragraphs 12 and 14 of the said decision, which read as follows;-

> "12. We would proceed on the basis that the High Court might have been justified in proceeding ex parte but then it should have

kept in mind the principles underlying Order 8 Rule 5 CPC (assuming that the provisions of CPC are applicable in terms of the High Court Rules framed by the High Court of Allahabad despite Section 141 CPC), that not only despite non-filing of the written statement a Court of law may call upon the plaintiff to prove his case but also there cannot be any doubt whatsoever, that no relief can be granted by the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India which would be contrary to law.

14. Rules of pleading contained in the Code of Civil Procedure do not cover questions of law. If a fact stands admitted the same in terms of Section 56 of the Evidence Act need not be proved. Only because such a question was not allegedly raised before the High Court, this Court could not shut its eyes to the legal position. Yet again only because an illegality has been committed, this Court would not allow its perpetuation. The respondent's father was on leave for a temporary period. He thereby did not cease to be the Manager of the school. It is apparent that he went on leave only for

defeating the statutory provisions. Such an act amounts to fraud on the administration."

17. Mr. Sen further submitted that in the field of Public Service, an employer is empowered under the Constitution to make rules regulating the conditions of service of persons appointed to Civil Services of the Union or the State, as the case may be. Relying on the observation of the Hon'ble Supreme Court at Paragraph 9 of the decision in the case of ***State of Madhya Pradesh and Ors. v. Shardul Singh, reported at 1970 (1) SCC 108,*** Mr. Sen submitted that the expression 'conditions of service' means all those conditions which regulate the holding of a post by a person right from the time of appointment till his retirement and even beyond it in matters like pension, etc.

18. Appearing for the respondent/writ petitioner Mr. Dilip Kumar Maiti learned Advocate submitted that almost two years after the writ petitioner superannuated, the State Government could not have re-fixed his scale of pay by making a downward revision and could not have directed deduction of alleged overdrawal amount from the retirement benefits of the writ petitioner. He submitted that unless any excess payment made by the employer to an employee is caused by reason of fraud or misrepresentation

on the part of such employee, the same cannot be recovered from such employee particularly long after his retirement. In this connection Mr. Maity relied on the decisions of the Hon'ble Supreme Court in the cases of ***Shyam Babu Verma & Ors. v. Union of India & Ors., reported at (1994) 2 SCC 521 and State of Punjab & Ors. etc. v. Rafiq Masih (White Washer) etc., reported at AIR 2015 SC 696.*** Learned Counsel also relied on the decision of a Division Bench of this Court in the case of ***State of West Bengal v. Asis Das Gupta, reported at 2013(5) CHN (CAL) 440.***

19. I have carefully considered the rival contentions of the parties.

20. Without dwelling on whether or not the learned Single Judge was justified, in the facts and circumstances of the case, to reject the prayer of DMC to file affidavit-in-opposition and allow the writ petition on the principle of non-traverse of the allegations in the writ petition, we have chosen to decide the writ petition on merits.

21. The material facts are not in dispute. On October 18, 1996, the writ petitioner was re-designated as Education Officer of DMC. He superannuated from such post on May 31, 2006.

22. After about 2 years, an order was issued by the Competent Authority in the Government of West Bengal to the effect that the scale of pay of the

writ petitioner had been wrongly fixed on a higher side. The scale of pay was revised by bringing it down. It was directed that an overdrawn amount of approximately Rs. 5.52 lakh be recovered from the retiral benefits of the writ petitioner.

23. It is now well settled that unless the employee concerned fraudulently or otherwise induces the employer to fix a scale of pay which is higher than what he is entitled to as per applicable rules or the employee has even innocently supplied wrong information which resulted in fixation of higher scale of pay or unless there is some such similar fault on the part of the employee which has caused the employer to fix a higher scale of pay, the excess payment made to an employee cannot be recovered after retirement of the employee. There are several Supreme Court decisions on this issue including the decisions in ***Shyam Babu Verma & Ors. v. Union of India & Ors. reported at, (1994) 2 SCC 521; Syed Abdul Qadir v. State of Bihar (2009)3 SCC 475; Col. B. J. Akkara v. Government of India, (2006) 11 SCC 709; Sahib Ram Verma v. Union of India (1995) Supp 1 SCC 18;*** and many more. However, it will suffice to refer to the decision of the Hon'ble Supreme Court in the case of ***State of Punjab and Ors. v. Rafiq Masih***

reported at AIR 2015 SC 696, which considers and discusses all the previous cases.

24. In the case of ***Rafiq Masih*** after reviewing all the previous decisions of the Supreme Court on this aspect, including the decision of the three Judge Bench in ***State of Punjab v. Rafiq Masih***, delivered on July, 2014, on a reference made by a Division Bench of the Supreme Court in view of apparent contradictions between the decisions in ***Shyam Babu Verma & Ors. and Sahib Ram Verma*** on one hand and ***Chandi Prasad Uniyal & Ors. v. State of Uttarakhand & Ors., reported at (2012) 8 SCC 417,*** on the other hand, the Supreme Court held that the benefit of not being obliged to refund excess payment cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation on the part of the employee. The Hon'ble Court laid down parameters of the fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of

the employee, may not be compelled to refund the same. At paragraph 12 of the judgment the Hon'ble Supreme Court held as follows:-

> "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, 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.
>
> (ii) 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."

25. The instant case is covered by the second category of employees mentioned under paragraph 12 of the judgment in ***Rafiq Masih***. Hence, no recovery of overdrawn amount from the writ petitioner/respondent is permissible.

26. In so far as the fixation of pay scale to correct the error is concerned, we are of the view that even if the same is permissible after retirement of the concerned employee, principles of natural justice warrant that an opportunity of hearing should be given to the concerned employee before such a decision is taken, particularly when the scale of pay is being reduced. Such a step would have obvious adverse consequences for the employee and hence he ought to be heard before such an order is issued.

27. In view of the aforesaid the order re-fixing the scale of pay of the respondent/writ petitioner as well as the order for recovery of overdrawn amount/excess payment are set aside. If recovery of such amount has already been made from the writ petitioner, the same shall be refunded forthwith to him, in any event within a period of 4 weeks from date, with interest at the simple rate of 8% per annum from the date of recovery till the date of repayment.

28. The concerned authority shall grant an opportunity of hearing to the writ petitioner on the issue of re-fixation of his scale of pay and take a fresh reasoned decision in the matter in accordance with law. Such hearing will be fixed within six weeks from date after giving at least one week's notice to the writ petitioner who will be entitled to urge all points before the competent Authority as to why his scale of pay should not be reduced. The reasoned decision will be taken by the Competent Authority within three weeks from the date of hearing and will be communicated to the writ petitioner within a week thereafter. Till the completion of such exercise, the writ petitioner will be entitled to draw pensionary benefits on the basis of the scale of pay that he enjoyed as on the date of his retirement.

29. The appeal and the connected application are disposed of accordingly without any order as to costs.

30. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(Apurba Sinha Ray, J.) **(Arijit Banerjee, J.)**