175 **05.07.23**
Ct. No.25
Sws.M

WPA 5541 of 2023

Mrinal Kanti Ghosh
vs.
State of West Bengal & Ors.

Mr. Manas Kumar Ghosh
Ms. Susmita Dey (Basu)
…for the petitioners.

Mr. Amal Kumar Sen
Mr. Sabyasachi Mondal
….for the CSTC

Mr. Arjun Roy Mukherjee
…for the State

The petitioner was an employee of the Calcutta State Transport Corporation (CSTC). The petitioner was superannuated from service with effect from September 30, 2021. The petitioner worked as a Mate. He was a Group – 'C' employee.

After his superannuation, a clearance certificate was issued on December 3, 2021 by the Accounts Officer Central Bill Group, CSTC. From the said certificate it appears that there were no outstanding dues lying pending in the office against the petitioner. The said certificate was issued by the Accounts Officer to the Administrative and Personnel Officer, CSTC. By a memo dated December 28, 2021, the Senior Administrative Officer computed the gratuity dues of the petitioner.

By a memo dated February 26, 2021 the Administrative and Personnel Officer, Central Traffic Zone, CSTC sought to recover an amount of Rs.5,40,500/- from the petitioner on the ground of over payment to an employee/petitioner whose retirement was imminent/within 1 year of the impugned order of recovery.

Mr. Ghosh, learned counsel appearing on behalf of the petitioner submits that the overdrawn amount could not be recovered from the petitioner being a Group 'C' employee after his retirement on September 30, 2021. He draws the attention of this Court to Section 4 of the Payment of Gratuity Act, 1972 in support of his contentions that no amount can be recovered from the gratuity dues payable to the petitioner unless the petitioner comes under the exception of Section 4(6) of the 1972 Act.

Section 4(6) of the 1972 Act reads as thus:-

> "Notwithstanding anything contained in sub-section (1),-
> (a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer shall be forfeited to the extent of the damage or loss so caused;
> (b) the gratuity payable to an employee [may be wholly or partially forfeited]-
> (i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or
> (ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral

turpitude, provided that such offence is committed by him in the course of his employment."

He also contends that the 1972 Act has an overriding effect on any other enactment. He refers to Section 14 of the 1972 Act. Reliance is placed on a decision of the Apex Court reported in (2015) 4 SCC 334 (**State of Punjab and Ors. vs. Rafiq Masih (White Washer & Ors.**) to show the circumstances when the recovery cannot be made for overdrawn amount. The five conditions laid down in **Rafiq Masih** (supra) are as follows:-

"(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."

He also draws the attention of this Court to an unreported judgment of the Division Bench of this Hon'ble High Court passed in **F.M.A. 1269 of 2021** (**Chandra Nath Bandyopadhyay vs. State of West**

Bengal & Ors.) to contend that the conditions enumerated in **Rafiq Masih**'s case can be read disjunctively.

Mr. Sen, learned Additional Government Pleader appears on behalf of the CSTC and submits that the writ petition suffers from gross suppression of material facts since the petitioner's prayer challenging recovery of overdrawn amount was considered by the Managing Director, CSTC. By an order dated July 26, 2016 it was decided that the scale admissible for an ITI certificate holder could not be extended to the petitioner. The certificate produced by the petitioner for claiming the higher scale could not be equated with the certificate issued by National Council of Technical Education. Therefore, his scale of pay was re-fixed at the level admissible for non-ITI holder, Mate. Any amount that was overdrawn by the petitioner wrongfully was directed to be realised from the petitioner in easy monthly installments, not extending Rs.2000/- per month. He submits the order dated July 26, 2016 attained finality, as the petitioner did not challenge the same. Pursuant to the said order a sum of Rs.2000/- was deducted from the monthly salary payable to the petitioner from the month of September, 2019 till his retirement in September, 2021. The Corporation, admittedly realised a sum of Rs. 45,500/- from the petitioner during the said period.

He further submits that since the petitioner was aware that the sum has to be refunded by him due to erroneous pay fixation in ITI scale of pay, he cannot now agitate his grievance against recovery of the same in the present writ petition. Mr. Sen draws the attention of this Court to the undertaking given by the petitioner on October 1, 2009 for refund of any money that may be drawn by him in excess of the admissible amount on account of erroneous fixation of pay in the revised pay structure.

He further submits that the case of the petitioner is not a case of a simpliciter retired employee covered under condition (ii) of **Rafiq Masih** (supra). In the present case, the petitioner had given an undertaking on October 1, 2009 whereby he undertook to refund to the Government any amount which may be drawn in excess to the admissible amount due to him on account of erroneous fixation of pay in the revised pay structure under the Revision of Pay and Allowances Rules (ROPA), 2009.

He refers to a decision reported in (2016) 14 SCC 267 (**High Court of Punjab and Haryana and Ors. vs. Jagdev Singh**) to contend that once an undertaking has been given by an employee, the employee would have to refund any payment found to have been made in excess since the employee was clearly placed on notice that any overdrawn amount has to be refunded. Once an *officer* furnished an undertaking while **opting** for revised pay scale, he would be bound by such undertaking.

Considering the rival submissions of the parties and the materials placed on records, this Court finds that the petitioner is a retired employee. He retired from his service in September, 2021. The overdrawn amount has been sought to be recovered from him vide memo dated February 26, 2021 within 1 year prior to his date of **retirement.**

A part of the overdrawn amount that has been sought to be recovered from the gratuity dues payable to the petitioner cannot be done since there is a statutory bar to the same. Unless an employee comes under the provisions of Section 4(6) of the 1972 Act, no amount can be withheld/deducted from the gratuity dues payable to a retired employee/petitioner.

Upon perusal of the undertaking given by the petitioner it clearly transpires that the undertaking was given to refund any sum that was paid in excess by revision of pay under Pay and Allowance Rules, 2009. The undertaking is given for erroneous fixation of pay under ROPA 2009 effective from January 1, 2006 and cannot be attributed to over payment due to fixation of pay under CAS - 1990.

Furthermore, this Court is of the view that the respondent/Corporation is estopped from making any recovery of any further sum after December, 2021 especially in view of the certificate issued on December 3, 2021. However, since the petitioner did not challenge the order dated July 26, 2016 the sum that has already been recovered from September, 2019 till the petitioner's retirement in September, 2021 cannot be sought to be reimbursed to the petitioner.

Upon consideration of the unreported judgment of **Chandra Nath** (supra), this Court finds that the said case cannot be relied upon for the proposition that even if the condition no. (ii) of **Rafiq Masih** (supra) is not fulfilled, the other conditions can be considered for disallowing the recovery of the overdrawn amount as there is no finding of the Court to that effect. The said case is also distinguishable on facts.

In **Jagdev Singh** (supra), the retired employee was a judicial officer who was appointed as a Civil Judge, Junior Division on July 16, 1987 and promoted as an Additional Civil Judge on August 28, 1997. The only issue that was under consideration was whether a payment which has been made in excess can be recovered from an employee who has already retired from the service of the State. In such a case, the Hon'ble Apex Court held that an *officer* to whom the payment has been made would be clearly bound by his undertaking. An exception was carved out to condition nos. (ii) of **Rafiq Masih** (supra). However, the other conditions laid down in **Rafiq Masih** (supra) were not touched by the Hon'ble Apex Court. The employee in question in that case was a *judicial officer* who was neither a Group "C" employee nor a Group "D" employee. The question whether the excess payment has been made for more than 5 years was also not under consideration as in that case. The revised pay scale in the selection grade was allowed to the retired employee on and from January 7, 2002 and the employee/*officer* was placed under suspension from August 19, 2002 and was compulsorily retired from service (after one year of receiving the revised pay scale) on February 12, 2003.

This Court is of the view that the facts of **Jagdev Singh** (supra) are completely distinguishable from the facts of the present case. This is a case of a Group "C" employee who has received the benefits of pay fixation for more than 5 years and recovery, if made from the employee after his retirement would be extremely harsh and would far outweigh the equitable balance of the employer's right to recover. Therefore, this Court also finds that all the conditions of **Rafiq Masih** (supra) can be read disjunctively to determine whether an overdrawn amount can be recovered from an employee who neither mis-represented nor committed any fraud for payment of such amount. Such was the view taken by this Court in WPA 21988 of 2019 **(Sri Amit Kumar Ghosh vs. State of West bengal).** Reliance is placed on **Sahib Ram vs. State of Haryana and Ors.** reported in 1995 Supp (1) SCC 18.

In the light of the discussions above, the memo dated February 26, 2021 stands quashed and or set aside.

The respondents/CSTC is directed to refund and the overdrawn amount of Rs.5,40,500/- after deducting a sum of Rs.45,000/- within 3 months from the date of the order along with interest @6% per annum from the date when the said amount was deducted till the date the entire aforesaid amount is disbursed wholly to the petitioner.

With the directions aforesaid, **WPA 5541 of 2023** is **disposed of.**

All parties are to act on a server copy of this order downloaded from the official website of this Hon'ble Court.

Urgent certified website copies of this order, if applied for, be made available to the parties subject to compliance with all requisite formalities.

(Lapita Banerji, J)