**15.03.2023**
Item No. 02
Crt.No.11
b.r.

**FMA 1269 of 2021**
**IA No. CAN 1 of 2021**

***Chandra Nath Bandyopadhyay***
***-vs-***
***State of West Bengal & Ors.***

**Mr. Piyush Chaturvedi**
**Mr. Asim Hati,**
**Mr. Debabrata Mondal**
**Ms. Sreetama Neogi**
**..... for the appellant.**

**Ms. Sonal Sinha**
**Ms. Kakali Naskar**
**.... For the WBSMICL Ltd.**

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

Two issues arise for consideration in this appeal. The first issue pertains to the deduction effected by the Respondents/the West Bengal State Minor Irrigation Corporation Limited (for short, the Corporation) from the superannuation benefits of the appellant, who was also the writ petitioner before the Hon'ble Single Bench. By way of the said deduction, the Corporation withdrew the equalization of pay benefits paid to the appellant during his service as a Lower Division Clerk (LDC) with the Corporation.

The second issue pertains to the deduction, also from the superannuation benefits of the appellant, of

MCAS (Modified Career Advancement Scheme) benefits received by the appellant during the period of his service.

The Hon'ble Single Bench upheld the deduction of the equalization of pay benefits of the appellant as the appellant had given an undertaking to the Corporation that in the event the payment of such equalization of pay benefits was found to be erroneous, he undertook to repay the same.

Second, with reference to the receipt of the MCAS benefits, the Hon'ble Single Bench was of the view that the Managing Director (MD) of the Corporation should institute an enquiry to ascertain as to whether the appellant during his capacity as LDC had influenced the decision for grant of MCAS benefits in his favour.

Mr. Chaturvedi, Learned Counsel appearing for the appellant with Mr. Hati, Learned Advocate, draws the attention of this Court to a document dated 17th of May, 2018 issued by the Deputy Secretary, Water Resources Investigation and Development Department, Establishment (Secretariat) Branch (for short, the Department) Government of West Bengal. It is submitted that the said document dated 17th May, 2018 is the basis for directing withdrawal of the equalization of pay benefits granted to the appellant.

Referring to the Paragraph- 2 of the said document dated 17th of May, 2018, Mr. Chaturvedi submits that the said Deputy Secretary came to the conclusion that wrong equalization of pay benefits were disbursed to the appellant by the Board of the Corporation on the basis of the reasoning that the appellant' counterpart in service, one Bimarendra Nath Singha, who was shown to be junior in service to the appellant in the Gradation List for LDC/Group-C Cadre was enjoying higher pay fixation that the appellant, particular emphasis is placed by Mr. Chaturvedi to the following observation in the letter dated 17th May, 2018 (supra) which, reads as follows:-

> *" As no photocopy page of the Service Book of Shri Singha is attached with the Service Book of Shri Bandyopadhyay, it has not been possible to examine the Service Book of Shri Singha. As per Order of 960-F dated 27.01.1994 of Finance Department (Audit), before giving pay protection benefit to Shri Bandyopadhyay, the Service Books of Shri Bandyopadhyay and Shri Singha should have been referred to Finance Department for taking their views."*

Next, Mr. Chaturvedi draws the attention of this Court to the Gradation List of LDC/Group-C which shows that the said Bimarendra Nath Singha was at Serial No. 41 as compared to the appellant, who was at Serial No. 29. Learned Counsel clarifies that such gradation list of LDCs/Group-C Cadre was followed in 2009 when the equalization of pay benefits were conferred by the Board on the appellant along with three other LDCs. However, at the stage when the order of the Deputy Secretary dated 17th of May, 2018 was issued cancelling such equalization of pay benefits, the said Bimarendra Nath Singha had been promoted to the UDC Grade. Such promotion does not nullify the position that at the stage of confirmation of the equalization of pay benefits in 2009, the factual position of the *inter se* seniority between the appellant and the said Bimarendra Nath Singha as reflected in such gradation list had remained undisturbed.

In the light of the above arguments, it is submitted that the undertaking taken from the appellant is subsumed by the effect of the findings reflected in the letter dated 17th of May, 2018, being the basis for withdrawal of the equalization of pay benefits. It is submitted that the findings were arrived at in the letter dated 17th May, 2018 without considering the service book of the said Bimarendra Nath Singha.

Reliance is also placed on the pronouncement of an unreported decision of a concurrent Hon'ble Division Bench of this Court dated 14th August, 2019 in *W.P.S.T 79 of 2019 (State of West Bengal & Ors. –vs- Subrata Sankar Roy & Anr.).* The Hon'ble Division Bench at *Paragraphs 10 and 11* thereof was pleased to, *inter alia*, hold as follows:-

> " 10. *For the purpose of an effective decision on this writ petition, we need to consider how the*

*law came to be laid down in Rafiq Masih (supra). A Bench of two learned Judges of the Supreme Court had made an order of reference, reported in (2014) 8 SCC 892 (Rakesh Kumar Vs. State of Haryana). The Bench formed an opinion that there was an apparent difference of views expressed on the one hand in the decision reported in (1994) 2 SCC 521 (Shyam Babu Verma Vs. Union of India) and 1995 Supp (1) SCC 18 (Sahib Ram Vs. The State of Haryana & Ors.) and on the other hand in Chandi Prasaid Uniyal (supra). Opinion on the reference was delivered by a Bench of three learned Judges of the Supreme Court. It is reported in (2014) 8 SCC 883 [State of Punjab & Ors. Vs. Rafiq Masih (Whitewasher)]. The Bench of three Learned Judges held the decision in Chandi Prasad Uniyal (supra) to be a precedent within the meaning of Article 141 of the Constitution whereas the decision in Shyam Babu Verma (supra) and Sahib Ram (supra) were held to be decisions under Article 142 thereof. While holding that the reference was unnecessary and without answering the reference, the Bench referred the matter to the Division Bench for appropriate disposal. The decision in Rafiq Masih (supra) was rendered thereafter. It was held therein that recovery of excess payment by the employer would not be permissible in law in the following situations:-*

> *"... (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 5 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."*

*11. In Jagdev Singh (supra), this is what the Supreme Court has held while dealing with proposition (ii) in the above extract from the decision in Rafiq Masih (supra):-*

*" 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."*

It is submitted that the conditions enumerated in *Re: Rafiq Masih* as noticed in the judgement of the concurrent Hon'ble Division Bench *(supra),* namely, conditions (i), (ii) (iii) and (v) stood fulfilled in the facts of this case.

Second, it is submitted that contrary to the stand taken by the Corporation that no MCAS were extended to the appellant at the time of retirement, an amount corresponding to the MCAS benefits was deducted from the superannuation benefits of the appellant.

Mr. Chaturvedi refers to the Report of the MD of the Corporation to the effect that there is **no** ( emphasis supplied) such finding reflected from the Report that the appellant misused his position as LDC of the Department to facilitate grant of MCAS benefits in his favour.

On behalf of the Corporation, Ms. Sinha, Learned Counsel appearing with Ms. Kakali Naskar, Learned Advocate, appears and reiterates the position that the equalization of pay benefits were rightly withdrawn by the Corporation. Ms. Sinha submits that since the Deputy Secretary by the letter dated 17th May, 2018 found that the said Bimarendra Nath Singha was in a different cadre of UDC the equalization of pay benefits would not stand in favour of the appellant.

Having heard the parties and considering the materials placed, this Court is of the view that the basis on which the equalization of pay benefits were withdrawn from the appellant and deducted from his superannuation reflecting the rationale of the order of the

Deputy Secretary dated 17th of May, 2018 (*supra),* stands incomplete in the absence of the Service Book of the said Bimarendra Nath Singha.

This Court is therefore of the view that the Deputy Secretary passed the order dated 17th May, 2018 without the benefit of the records relevant to the period, i.e. 2009, during such period both the said Bimarendra Nath Singha and the appellant, as well as three other similarly circumstanced persons, were in the identical cadre of Group-C/LDC. Therefore, the steps taken by the Corporation on the basis of the communication dated 17th May, 2018 reflecting the incomplete nature of the findings of the Deputy Secretary, stands flawed both in facts and in law. To the contrary the Gradation List of the Corporation for 2009 shows the said Bimarendra Nath Singha to be junior to the LDC/Group-C cadre to the appellant.

Accordingly, this Court is of the view that the appellant deserves to be restored the deduction of equalization of pay benefits from his superannuation benefits.

Similarly, the appellant also deserves to be restored the *MCAS* deducted from his superannuation benefits. Since there is no adverse report of the MD of the Corporation showing that the appellant misused his official position to effect grant of the MCAS benefits in his favour.

With the above reasons, the Order impugned of the Hon'ble Single Bench stands set aside.

There shall be an order directing the Corporation to refund the equalization of pay benefits as well as MCAS benefits, as deducted from the superannuation benefits of the appellant, within a period of six weeks from the date of communication of this order. The amount shall carry an interest of 6% per annum from the date of such deduction till the date of actual payment.

**FMA 1269 of 2021** stands accordingly **allowed.**

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

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance with all necessary formalities.

**(Supratim Bhattacharya,J.)** **(Subrata Talukdar,J.)**