

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION

APPELLATE SIDE

W.P.A. 14214 of 2015
(IA NO: CAN 1/2018 (Old No: CAN 1814/2018))

Ommey Kulsum Mullick
-vs-
The State of West Bengal & Ors.

For the Petitioner : Mr. Ekramul Bari, Adv.
Ms. Tanuja Basak, Adv.
Syed Mansur Ali, Adv.
Sk. Intiaj Uddin, Adv.

For the State : Mr. Jaharlal Dev, Adv.
Ms. Debarati Sen (Bose), Adv.

Hearing concluded on : 01.03.2023

Judgment On : 01.03.2023

Saugata Bhattacharyya, J.:

The writ petition is presented by a retired assistant teacher after superannuation on 31st May, 2015, *inter alia*, challenging memo dated 1st August, 2014 issued by the District Inspector of Schools (S.E.), Howrah

whereby the school authority was asked to downgrade the fixation of pay of the petitioner with effect from 8th March, 1994 and to calculate overdrawn amount paid to the petitioner.

On behalf of the petitioner Mr. Bari has drawn attention of this Court to the Pension Payment Order issued under memo dated 16th January, 2018 wherein it was indicated by the State respondents that Rs.1,26,513 was drawn in excess by the petitioner during the tenure as assistant teacher of a Government aided high school. The Pension Payment Order was issued during pendency of the writ petition. Petitioner, as it has been contended, was paid provident fund dues contemporaneously after her retirement but petitioner did not receive other retiral dues pursuant to the Pension Payment Order since she did not accept the demand of the State respondents to refund the overdrawn amount which was calculated pursuant to the impugned memo dated 1st August, 2014 issued by the concerned District Inspector of Schools. Till date petitioner is not in receipt of monthly pension and other retiral dues excepting provident fund.

In support of such submission made on behalf of the petitioner reliance has been placed on the judgment of the Supreme Court, reported in **(2015) 4 SCC 334 (State of Punjab & Ors. -vs- Rafiq Masih (White Washer) & Ors.)** and a judgment reported in **2022 SCC Online SC 536 (Thomas Daniel -vs- State of Kerala & Ors.)**.

Upon placing reliance on the aforesaid two judgments of the Apex Court it has been contended on behalf of the petitioner that appropriate fixation of pay which was required to be made by the State respondents in 1994 was not made contemporaneously and just before the date of retirement of the petitioner school authority was directed to downgrade the pay fixation of the petitioner and calculate the amount which was allegedly excess drawn by her for recovery from the gratuity of the petitioner which was required to be paid on her superannuation and such belated act on the part of the State respondents is impermissible in view of the law laid down by the Supreme Court in the aforesaid two judgments.

On the contrary Mr. Dey, learned advocate representing the State respondents has opposed the writ petition on facts upon placing reliance on the application made by the petitioner for processing her pension case dated 29th November, 2013 and a letter dated 26th November, 2014 which are annexed to the supplementary affidavit-in-opposition used on behalf of the State respondents.

It has been submitted that there was an undertaking on the part of the petitioner since she signed the prescribed proforma which was required to be submitted before the authority for processing the pension case on 29th November, 2013 and subsequently by letter dated 26th November, 2014 she accepted demand of the State respondents and was ready to deposit the overdrawn amount.

On behalf of the State respondents reliance has been placed on the judgments of the Supreme Court, reported in **(2012) 8 SCC 417 (Chandi Prasad Uniyal & Ors. -vs- State of Uttarakhand & Ors.)**, **(2015) 4 SCC 334 (State of Punjab & Ors. -vs- Rafiq Masih (White Washer) & Ors.)**, **(2014) 8 SCC 883 (State of Punjab & Ors. -vs- Rafiq Masih (White Washer) & Ors.)** and **(2016) 14 SCC 267 (High Court of Punjab & Haryana & Ors. -vs- Jagdev Singh)**. Emphasis has been laid on behalf of the State respondents on paragraph 14 of **Chandi Prasad Uniyal (supra)** wherein it was decided by the Apex Court that 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 and in such situations law implies an obligation on the payee to repay the money otherwise it would amount to unjust enrichment.

However, the decisions of the Apex Court rendered in **Shyam Babu Verma -vs- Union of India** reported in **(1994) 2 SCC 521** and **Sahib Ram -vs- State of Haryana** reported in **(1995) Supp 1 SCC 18** on the contrary the decision of **Chandi Prasad Uniyal (supra)** were considered by three Judge Bench of the Apex Court in the case of **Rafiq Masih (supra)**. While answering the reference three Judge Bench of the Supreme Court in **Rafiq Masih (supra)**, reported in **(2014) 8 SCC 883** held in paragraph 13, which runs infra:

“13. Therefore, in our opinion, the decisions of the Court based on different scales of Article 136 and Article 142 of the Constitution of India cannot be

best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion, there is no conflict in the views expressed in the first two judgements and the latter judgment.”

Ultimately, the issue went back to the two Judge Bench of the Apex Court and the issue was finally set at rest by the judgment delivered in **Rafiq Masih (supra)**, reported in **(2015) 4 SCC 334**.

In addition to the aforesaid judgments it has been argued on behalf of the State respondents that in view of undertaking furnished by the petitioner on 29th November, 2013 read with letter dated 26th November, 2014 the decision rendered by the Apex Court in **Jagdev Singh (supra)** is attracted and therefor petitioner is required to deposit the amount which the State respondents found to have paid in excess with effect from 8th March, 1994.

This Court on consideration of the submissions made on behalf of the petitioner and State respondents as well as in view of chronology of decisions rendered by the Apex Court as relied upon by the parties finds that it is required to follow the law laid down by the Apex Court in **Rafiq Masih (supra)** as reported in **(2015) 4 SCC 334**. In paragraph 18 of the said judgment in no uncertain terms Apex Court has postulated few situations where recovery from the retiral dues is impermissible; in subparagraph (ii) as contained in paragraph 18 of the said judgment it has

clearly been decided that recovery from retired employees or the employees who are due to retire within one year is not permissible.

The present case at my hand according to the assessment of this Court comes within the purview of paragraph 18(ii) of the judgment of **Rafiq Masih (supra)**. Petitioner retired on 31st May, 2015 whereas process was initiated by the concerned District Inspector of Schools for recovery by issuing impugned memo dated 1st August, 2014 directing the concerned school authority to downgrade pay of the petitioner for the purpose of recovery. In view of decision rendered in **Rafiq Masih (supra)** such act on the part of the State respondents is wholly contrary to the view expressed by the Apex Court. The decision of the Apex Court as contained in **Rafiq Masih (supra)** has been echoed in the judgment of **Thomas Daniel -vs- State of Kerala & Ors., reported in 2022 SCC Online SC 536** wherein it has been held that attempt to recover incremental benefits after passage of ten years of retirement is unjustified.

Much emphasis has been laid on behalf of the State respondents on the letter dated 26th November, 2014 of the petitioner wherein according to the State respondents petitioner agreed to deposit the overdrawn amount. The stand emanates from the submission of the State respondents is found to be unjustified by this Court keeping in view the contents of the said letter dated 26th November, 2014.

This Court believes that the concerned State respondents might not have read the letter in its true spirit wherefrom it appears that the petitioner was compelled to write the letter in desperation at the juncture when her husband was on death bed and the petitioner was in dire need of money.

In the aforesaid conspectus of facts, this Court is required to find out whether the law laid down by the Apex Court in **Jagdev Singh (supra)** is applicable in the present case or not. On reading the decision of the Supreme Court, it appears that the Hon'ble Supreme Court proceeded on the basis of admission made by the respondent/employee in the counter affidavit relating to furnishing undertaking to refund the excess amount if paid which was furnished at the time of receiving higher scale of pay which was before the date of compulsory retirement of the employee. Facts of the case which was considered by the Apex Court as it appears from the judgment goes to show that under the specific rules applicable to the employee concerned, employees were required to furnish undertaking for getting the benefit of revised scale of pay to the extent of receiving the excess amount if it is found to be paid in favour of the employees subsequently. In **Jagdev Singh (supra)** the employee got the benefit of revised pay and subsequently on completion of proceeding was compulsorily retired. In view of these facts the Hon'ble Supreme Court has held in paragraph 11 that furnishing of undertaking to act as a fetter in enjoying the amount which was paid to employee in excess.

It is found by this Court that facts of the present case is completely different. The State respondents initiated the process of recovery by issuing impugned memo dated 1st August, 2014 that too in respect of payment made to the petitioner with effect from 8th March, 1994 whereas petitioner retired on 31st May, 2015. Such conduct on the part of the State respondents for recovery of excess amount paid with effect from 8th March, 1994 is found to be impermissible just before the date of retirement i.e. 31st May, 2015.

Accordingly, the impugned memo dated 1st August, 2014 stands set aside.

The State respondents are directed to issue revised Pension Payment Order without showing any amount to be recovered towards excess amount paid to the petitioner as it has been done previously.

The revised Pension Payment Order is to be issued within a period of eight weeks from the date of communication of this order.

The respondents are directed to pay interest @ 8% per annum on the pensionary benefits as well as gratuity of the petitioner excluding Rs.1,26,513/-(overdrawn amount) from the date following the date of retirement till the date of issuance of pension payment order. However, respondents shall pay interest at the rate of 8 % per annum on Rs. 1,26,513/- from the date following the date of superannuation till the date of payment.

It has been clarified that petitioner to receive pension to be calculated based on admissible last pay of the petitioner.

With the aforesaid direction the writ petition stands allowed and the same stands disposed of.

Application, if any pending, also stands disposed of.

There shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the learned Advocates for the parties on the usual undertakings.

(Saugata Bhattacharyya, J.)