05.
12.4.2023
S.D.

WPA 21988 of 2019

Sri Amit Kumar Ghosh
Vs.
State of West Bengal & Ors.

Mr. Manas Kumar Ghosh
Ms. Susmita Dey (Basu)
...for the petitioner.
Mr. Amal Kumar Sen
Mr. Sabyasachi Mondal
….for the C.S.T.C.

The petitioner was an employee of the Calcutta State Transport Corporation (CSTC). The petitioner was superannuated from service with effect from January 31, 2019. The petitioner worked as a Fuel Assistant (Junior) at Howrah Depot of CSTC and was a Group – "C " employee.

After his superannuation, a Clearance Certificate was issued on March 12, 2019 by the Administrative and Personal Officer, Howrah Depot in favour of the petitioner, stating that all the dues to the credit of the petitioner may be disbursed to him after observance of the formalities. It was stated in the Clearance Certificate that there were no outstanding liabilities against the petitioner. However, it was also mentioned that he will be responsible for recovery of any outstanding subsequently found out.

By a Memo dated September 3, 2019, the petitioner's sanction of gratuity dues was made. The total amount payable to the petitioner aggregated Rs.7,64,178/-. A sum of Rs.97,272/- was deducted from the gratuity dues payable to the petitioner. A sum of Rs.6,66,906/- was paid to the petitioner.

Mr. Ghosh, learned counsel appearing on behalf of the petitioner submits that the overdrawn amount could not be recovered from the petitioner after his retirement on January 31, 2019 from his gratuity dues. Furthermore, the petitioner was a Group "C" employee. 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 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 25, 2010 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 record, this Court finds that the petitioner was a retired employee. He retired from his service on January 31, 2019 and the recovery was sought to be made from him by an Office Memo dated September 3, 2019.

The overdrawn amount has been sought to be recovered from the gratuity dues payable to the petitioner. As such, 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 the retired employee/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. 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 September 3, 2019 is set aside and/or quashed.

The respondent/CSTC is directed to refund the overdrawn amount of Rs.97,272/- within three months from the date of the order along with interest @ 6% p.a. from February 1, 2019 (being the date subsequent to the date of retirement) till such date the aforesaid amount is wholly disbursed to the petitioner.

With the directions aforesaid, **W.P.A. 21988 of 2019** is **disposed of**.

All parties shall act on the server copy of this order duly downloaded from the **website** of this Court.

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

(**Lapita Banerji, J.**)