

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

THE HON'BLE JUSTICE RAJA BASU CHOWDHURY

**W.P.A. 29429 of 2013
CAN 1 of 2020 (Old CAN 2402 of 2020)
CAN 2 of 2020 (Old CAN 5622 of 2020)
CAN 3 of 2020 (Old CAN 5624 of 2020)**

**Tapati Dutta Gupta & Anr.
(substituted in place and stead of
Indranil Dutta Gupta)**

Versus

West Bengal Comprehensive Area Development Corporation & Ors.

For the petitioner	:	Mr. Pratik Dhar, Sr. Adv. Mr. Ritwik Pattanayak Mr. Samir Halder Mr. Aritra Roychowdhury Ms. Cardina Roy
For the State	:	Mr. Subir Kumar Bhattacharya
For the respondent no. 7	:	Mr. S.Basu
Heard on	:	21.09.2023
Judgment on	:	21.09.2023

Raja Basu Chowdhury, J:

1. The present writ petition has been filed, *inter alia*, challenging the memoranda dated 11th April 2013 & 27th May 2013 and the office order dated 23rd August 2012. It is the petitioners' case that the

original petitioner, on the basis of his application was appointed as a Junior Accountant on 2nd February 1977 with the respondent no.1 (herein after the Corporation). Subsequently, he was appointed by an office order dated 1st February 1980 on a temporary basis for 2 years with effect from the date of joining, as an accountant with the Corporation at the scale of pay of Rs.450/- - Rs.625/- along with usual allowances as admissible under the rules of the State Government, which were being followed by the Corporation. Subsequently, however, by an office order dated 30th July 1987, the original petitioner was confirmed as an accountant in the pay scale of Rs.425/- - 1050/- with effect from 1st August 1984.

2. In usual course, the original petitioner having reached the age of superannuation, was issued a release order dated 31st January 2011, on completion of 60 years. Subsequently, on the implementation of the ROPA **Regulations**, 2009 for the employees of the corporation, vide an office order dated 2nd June 2011, the competent authority of the corporation accorded sanction for payment of unpaid arrear salary, admissible under the ROPA Regulations 2009 in respect of the original petitioner which, inter alia, included arrear, salary amounting to Rs.55,819/-.
3. Subsequently, however, the original petitioner received a communication dated 11th April 2013, whereunder, the respondent no. 2 had called upon the original petitioner to refund a sum of

Rs.2,93,076/- on account of refixation of pay with retrospective effect, as per the office order dated 23rd August 2012, from 9th March 1978 to 31st January 2011. The aforesaid direction for refund was issued to recover the payment made to the original petitioner in usual course, which became excess by reasons of retrospective revision of the original petitioner's pay. The original petitioner was taken aback, by letter dated 7th May 2013 while expressing shock, had informed the respondent no.2 that he had not even been favoured with the order dated 23rd August 2012, based on which the purported refixation of his pay was made. It is in response to such communication that the respondent no.2 had served the original petitioner the communication dated 27th May 2013, enclosing therewith the order dated 23rd August 2012, and while reiterating its contention had called upon the original petitioner to refund the aforesaid amount of Rs.2,93,076/-. It is the case of the original petitioner that by the aforesaid orders the respondents had informed the original petitioner that the refund of the aforesaid amount would help them to facilitate the processing of the payments in relation to disbursal of pensionary benefits and other retiral benefits.

4. Challenging both the aforesaid orders, *inter alia*, including the order dated 23rd August 2012, whereby the original petitioner's pay had been refixed, the present writ petition has been filed. At the interim stage, a Coordinate Bench of this Hon'ble Court, by an order dated 2nd December, 2013, by arriving at a prima facie conclusion that the

Administrative Secretary of the corporation, having exceeded its jurisdiction, was, *inter alia*, pleased to stay the operation of the memo dated 11th April, 2013, until further orders and further observed that the petitioner shall be entitled to payment of provisional pension at the same rate that was released in his favour lastly on 28th January, 2011 without prejudice to the rights and contention of the parties. Notwithstanding such observation/direction provisional pension was not released until the time mentioned herein after.

5. Mr. Dhar, learned senior advocate appearing for the petitioners by drawing attention of this Court to the office order dated 23rd August 2012 submits that the initial pay of the original petitioner was Rs.570/- as on 1st April 1981, in the scale of pay of Rs.425/- Rs1050/-, which pay was revised to Rs.510/-. Proceeding on the basis of the aforesaid refixation, there had been consequential refixation of the original petitioner's pay and based on the aforesaid refixation of the pay, a sum of Rs.2,93,076/- was treated as overdrawal on account of pay and allowances and was directed to be reimbursed by the original petitioner. He says that the mode and manner in which the refixation had been made subsequent to the original petitioner having retired from service is unknown in law.
6. He says that the original petitioner had no role in his initial fixation of the pay. Based on the initial fixation, the corporation had

disbursed the salary in favour of the original petitioner which had been realized by him over a span of three and half decades. The respondent no 2, while issuing the office order dated 11th April 2013 and while directing the original petitioner to refund a sum of Rs.2,93,076/- chose not to give any opportunity of hearing to the original petitioner. The decision to re-fix the original petitioner's pay after his retirement is arbitrary. The office orders dated 11th April 2013 and 27th May 2013 had been issued without giving any opportunity of hearing to the original petitioner and are based on the arbitrary re-fixation of the original petitioner's pay. The aforesaid re-fixation if given effect to, would not only create an anomalous situation but would create huge financial burden on the petitioners. The aforesaid memoranda dated 11th April, 2013 and 27th May, 2013 and the re-fixation order of the original petitioner's pay by office order dated 23rd August, 2012 cannot be sustained. The same should be set aside and quashed.

7. By placing reliance on a judgment delivered by the Hon'ble Supreme Court in the case of ***State of Punjab and others v. Rafiq Masih (White Washer)***, reported in **(2015) 4 SCC 334**, it is submitted that ordinarily, a recovery of this nature is impermissible. The Hon'ble Supreme Court has even categorized in paragraph 18 of the said judgment the circumstances under which it is impermissible to make any recovery. The present case specifically falls under the category of impermissible recovery, as provided in the aforesaid

judgment. It is still further submitted that from a perusal of the aforesaid office memoranda dated 11th April 2013 and 27th May 2013, it would not appear that there are any other reasons based on which the aforesaid direction for refund has been issued. He submits that it is well settled that an order issued by the authority must be adjudged on the grounds provided in such order and cannot be supplemented by fresh reasons. In support of his aforesaid contention, he places reliance on the judgment delivered in the case of ***Mohinder Singh Gill & Anr. v. Chief Election Commissioner New Delhi & Ors.***, reported in **(1978) 1 SCC 405**.

8. It is still further submitted that during pendency of the present writ petition, in terms of the order passed by the Coordinate Bench of this Court on 22nd January 2015, the provisional pension has been released in favour of the original petitioner. However, such provisional pension has been computed on the basis of his refixed pay which is impugned. By placing reliance on an undated computation sheet, counter signed by the Law cell in charge of the corporation which is taken on record, it is submitted that the Corporation has, sometimes in the month of November 2020, has disbursed provisional pension and other retiral benefits in favour of the original petitioner. However, such payments had been made based on the revised and/or refixed pay of the original petitioner in terms of the office order dated 23rd August 2012. Since, the office order, itself, cannot be sustained, the corporation should be directed

to re-compute the same and disburse the arrears along with interest as per the statutory rate.

9. Mr. Bhattacharya, learned advocate appearing for the Corporation, on the other hand, submits that there is no irregularity on the part of the respondent no. 2, in refixing the original petitioner's salary or in directing the original petitioner to reimburse the over drawn pay. In any event, it is submitted that although, the order dated 11th April 2013 had been passed, the same could not be given effect to, in view of the order of injunction passed by the Coordinate Bench of this Court. It is submitted that during pendency of the writ petition not only the provisional pension, but the other entitlements of the original petitioner had also been disbursed. It is submitted that by reasons of the failure on the part of the original petitioner to comply with the office order dated 11th April 2013, the respondents could not finally settle the pension in favour of the original petitioner.
10. The Corporation was and is interested to release the terminal benefits, as are payable to the original petitioner in favour of the present petitioners and do not intend to stand in the way of legitimate entitlement of the legal heirs of the original petitioner.
11. Heard the learned advocates appearing for the respective parties and considered the materials on record.
12. I find that the issue that falls for consideration in the present writ petition is whether the corporation could have refixed the salary of

the original petitioner, after the original petitioner had retired from service and whether the respondent no. 2 could have called upon the original petitioner to refund a sum of Rs.2,93,076/-, which had already been disbursed in his favour over the years since 1981, by issuing the memorandum dated 11th April 2013.

13. I find that from the aforesaid memorandum dated 11th April 2013, the only reason provided by the respondent no. 2, for seeking refund is refixation of pay of the original petitioner with retrospective effect, as per the office order dated 23rd August 2012. A perusal of the aforesaid office order would demonstrate that the original petitioner was allowed initial pay of Rs.570/- on 1st April 1981, at the scale of pay of Rs.425/- - Rs.1050/-, which pay was ordered to be refixed to Rs.510/-. Consequentially, the other pay revisions had been effected, which had cumulative effect of an overdrawal to the extent of Rs.2,93,076/-.

14. Admittedly, it is the case of the corporation, as would appear from the aforesaid office order/ memoranda that the original petitioner had no role in the fixation of his pay. It is also not the case of the corporation that the original fixation of pay was done at the behest of the original petitioner. In fact, even when the petitioner was issued the release order and subsequently, when ROPA 2009 was given effect to by the corporation by office order dated 2nd June 2011, the corporation did not think it fit to take any decision as

regards refixation of the original petitioner's pay. The refixation of the original petitioner's pay as made, clearly appear to be unjustified and arbitrary to say the least. Such a refixation of pay with retrospective effect has created an anomalous situation and is likely to cause great hardship to the petitioners.

15. It is now well settled that no recovery of this nature can be made from the employees who have received such payment in good faith. As rightly pointed out by Mr. Dhar, learned Senior advocate representing the petitioner, the Hon'ble Supreme Court in the case of **Rafiq Masih (White Washer) (supra)** in paragraph 18 has summarized certain situations which make recovery impermissible. The relevant paragraph of the judgment is extracted herein below:-

“18. 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 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.”

16. Having regard to the aforesaid and taking note of the fact that the aforesaid direction to reimburse Rs. 2,93,076/- had been made after the original petitioner having already retired from service, by refixing the initial pay of the original petitioner which dates back to the year 1981, I am of the view that the aforesaid order of pay refixation, if given effect to, would be iniquitous, harsh and would result in financial instability.

17. Having regard to the same, I am of the view that the office order dated 23rd August 2012, whereby the pay of the original petitioner was refixed and the subsequent communications issued by the respondent no.2, on 11th April 2013 and 27th May 2013 cannot be sustained and the same are accordingly set aside and quashed.

18. During pendency of the present writ petition, the original petitioner has, however, died and by order dated 25th November 2022 passed by this Court, present petitioners have been substituted in place and stead of the original petitioner.
19. Having regard to the aforesaid, the respondents are directed to finalize the pension payable in favour of the original petitioner by recomputing the same in terms of this order and to disburse the same in favour of the present petitioners for the period from 1st February 2011 to 27th March 2021 along with interest as applicable for delayed payment by issuing a revised pension payment order.
20. The respondents are further directed to finalize and disburse arrears of family pension in favour of the petitioner no. 1 with effect from 1st April 2021, with a further direction upon the respondents to re-compute the gratuity and other retiral benefits payable in favour of the original petitioner in light of the observations made in this judgment and to disburse the same in favour of the present petitioners along with interest at the rate of 10 per cent per annum.
21. The entire process of computation, re-fixation of the pension, gratuity including the actual disbursal thereof, must be completed within a period of 10 weeks from the date of communication of this order.
22. With the above observations and directions, the writ petition being WPA 29429 of 2013 along with the connected applications

being CAN 1 of 2020, CAN 2 of 2020 and CAN 3 of 2020, stands ***disposed of.***

23. Urgent photostat certified copy of this judgment, if applied for, be given to the parties on priority basis upon completion of requisite formalities.

(Raja Basu Chowdhury, J.)