

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

W.P.A. No. 6976 of 2017

Swapan Kumar Saha

VS

The State of West Bengal & Ors.

Before : The Hon'ble Justice M.V. Muralidaran

Mr. Indranath Mitra

----- for the petitionerss.

Mr. Wasim Ahmed,

Mr. M. Shehabuddin,

----- for the State.

Mr. S. Chakraborty,

- for the High Court Administrator.

Hearing concluded on :

03.04.2024

Judgment On :

12.04.2024

M.V. Muralidaran, J.:

Heard Mr. Indranath Mitra, learned counsel for the petitioner; Mr. Wasim Ahmed, learned counsel for the respondent State and Mr. S. Chakraborty, learned counsel for the respondent High Court Administration.

2. This writ petition has been filed by the petitioner to quash the impugned order dated 10.8.2016 issued by the sixth respondent and also seeking direction restraining the respondents from giving any effect or further effect of the order dated 10.8.2016.

3. The case of the petitioner is that he joined as Copyist on 8.1.1971 in the Judicial Department, Government of West Bengal and was promoted to different higher grade and retired from service on 31.10.2007. In consonance with the order dated 30.4.2012 followed by the orders dated 20.7.2012 and 30.7.2012, the arrear salary for the period from 1.4.2003 to 31.10.2007 to the tune of Rs.2.09 lakh was released and paid to the petitioner. While so, by a letter dated 13.12.2012, the Treasury Officer, Burdwan Treasury-I informed the sixth

respondent that the petitioner is not entitled the arrear salary on the basis of ROPA 2009. Upon receipt of the letter of the Treasury Officer, the petitioner has submitted reply on 13.12.2012 through the sixth respondent stating that the Finance Department, Government of West Bengal, vide Memorandum dated 23.7.2014, accepted the order dated 7.10.2009 passed by the Hon'ble Supreme Court wherein it has been categorically stated that the employees of the District Court are also covered by the memo bearing No.1683-F dated 23.2.2009 and further clarification dated 19.11.2010.

4. Further case of the petitioner is that although the Hon'ble Supreme Court following the recommendation of the Shetty Commission, time and again, directed the State Government to revise the pay scale with effect from 1.4.2003, the Government of West Bengal in Judicial Department did not consider such aspect of the recommendation and revised the scale of pay of the petitioner till his retirement i.e. 31.10.2007. The arrear salary of the petitioner to the tune of 2.09 lakh for the period from 1.4.2003 to 31.10.2007, following the recommendation of the Shetty Commission, was recommended and paid on 29.12.2012. In the aforesaid backdrop, the issuance of the impugned order by the sixth respondent directing the petitioner to return the

amount of overdrawn arrear salary to the tune of Rs.2.09 lakh is *ex-facie* bad. Hence, the writ petition.

5. Assailing the impugned order, the learned counsel for the petitioner submitted that, following the recommendation of the Shetty Commission, the pay of the petitioner was revised and, consequent thereto, arrear salary for the period from 1.4.2003 to 31.10.2007 was released and paid. Since the District Judge, Burdwan has already acted upon pursuant to the recommendation of the Shetty Commission and the order of the Hon'ble Supreme Court, the order of recovery of arrear salary is not sustainable in the eye of law. The action on the part of the respondent authorities, more particularly, on the part of the respondent Additional District Judge, 3rd Court, Burdwan is bad and not sustainable in the eye of law.

6. The learned counsel for the petitioner urged that the learned Additional District Judge ought not to have ordered recovery of arrear salary from the petitioner, as the arrear salary drawn and paid as per the order of the Hon'ble Supreme Court dated 7.10.2009 and 16.3.2015. The learned counsel would submit that a discrimination is meted to the petitioner since some of the Bench Clerk/Stenographer/Ex-Sheristadar

have been released the arrear salary and no notice was served upon them for recovery of the arrear salary.

7. The learned counsel further submitted that the respondents being limbs of the State should act fairly, justly and reasonably. In the instant case, it would be evident that the respondent authorities have been acting in an unreasonable, unfair and arbitrary manner which clearly violates the petitioner's right protected under Article 14 and 16 of the Constitution of India. Thus, a prayer is made to quash the impugned order.

8. The learned counsel appearing for the High Court Administration submitted that by a memo dated 6.6.2016, the Treasury Officer informed the office of the Additional District Judge, 3rd Court, Burdwan that an overdrawal of arrear salary to the tune of Rs.2.09 lakh was made by the petitioner, who was ex-Bench Clerk, while submitting his salary arrears bill which was then prepared in manual mode. According to the audit observation, no government employee retiring in between 1.6.2006 and 30.3.2008 was entitled to any arrear salary for the period from 1.6.2006 to 30.3.2008. The petitioner retired from the post of Bench Clerk on 31.10.2007. Under the order dated 3.9.2012 of the Additional District

Judge, 3rd Court, the petitioner was allowed post-facto promotion from the post of Bench Clerk Grade-III to Bench Clerk Grade-II with effect from 1.4.2003 fixing his basic pay at Rs.8,800/- in the time scale of pay band Rs.4500-9700. By the same order, the petitioner was allowed post-facto promotion from Bench Clerk Grade-II to Bench Clerk Grade-I with effect from 1.8.2004 fixing his basic pay as Rs.9675/- with effect from 1.4.2005 as per his option in the time scale of pay of Rs.4800-10,925/-.

9. The learned counsel would submit that subsequent to the enforcement of ROPA 2009, the petitioner was entitled to the notional fixation of revised pay with effect from 1.6.2006 with no arrear to be payable till his last day of service i.e. 31.10.2007. Under the revision, his basic pay was fixed at Rs.22,400/- with Grade Pay Rs.4400/- in the pay band No.4 with effect from 1.6.2006. However, violating the above restriction of arrear as per memo dated 27.5.2009, the petitioner was allowed to withdraw the arrear at revised pay for the period from 1.4.2006 to 31.10.2007.

10. The learned counsel further submitted that the arrear at the revised pay for the period from 1.4.2006 to 31.10.2006 amounted to Rs.2,08,907/- which stood inadmissible and appears to be fraudulently

withdrawn. So this excess payment of Rs.2,08,907/- need to be recovered from the incumbent concerned.

11. The learned counsel for the respondent State submitted that violating the restriction of arrear in the ROPA 2009, the petitioner was allowed to draw arrear at the revised pay for the period from 1.4.2006 to 31.10.2007. He was allowed total arrear pay and allowance of Rs.2,35,828/- for the period from 1.4.2003 to 31.10.2007 from Burdwan Treasury vide order dated 7.12.2012. Of which, the arrear at revised pay for the period from 1.4.2006 to 31.10.2007 amounted to Rs.2,08,906/- which stood inadmissible and has been fraudulently drawn and paid to the petitioner. In fact, for the aforesaid period, the petitioner was entitled to the benefit of Grade I post at unrevised pay prior to ROPA 2009 only. Therefore, the respondent authorities are right in issuing the impugned order directing to recover the excess payment made to the petitioner.

12. This Court considered the rival submissions and also perused the materials available on record.

13. It is not in dispute that the petitioner was promoted to the post of Bench Clerk Grade-II and his pay was fixed at Rs.8100/- on 1.4.2003.

Subsequently, he was promoted to the post of Bench Clerk Grade-I on 1.8.2004 and his pay was increased to Rs.9675/- and the petitioner finally retired from service on 31.10.2007.

14. With a view to implement the recommendation of the Shetty Commission as per the order of the Hon'ble Supreme Court, the Judicial Department in the State of West Bengal issued Government Orders dated 20.7.2009 for the Court employees. Pursuant to the said orders, the District Judge, Burdwan issued an order dated 30.4.2012 whereby and whereunder the scale of pay qua Bench Clerk Grade-III, Bench Clerk Grade-II and Bench Clerk Grade-I has been revised as under:

"Bench Clerk Grade-III are allowed to continue to draw pay scale of Rs.4000-8850 (pre-revised) until further orders.

Bench Clerk Grade-II who have been appointed on promotion from Bench Clerk Grade-III/Head Clerk-cum-Translator/Nazir/Cashier/Accountant etc. are allowed to enjoy the pay scale of Rs.4500-Rs.9700/- (pre-revised) with effect from the date mentioned against each of their name.

Bench Clerk Grade-I who have been appointed on promotion from bench Clerk Grade-II/Head Clerk-cum-Translator/Nazir/Cashier/Accountant etc. are allowed to enjoy the pay scale of Rs.4800—10925/-

(pre-revised) with effect from the date mentioned against each of their name.

15. It appears that, on 20.7.2012, the Secretary to the Government of West Bengal intimated to all the District Judges, Chief Judge and other Judges in the State of West Bengal that in compliance with the order of the Hon'ble Supreme Court dated 7.10.2009, the Governor was pleased to decide that the holders of the common categories posts as mentioned other than those to whom the Commission has recommended the higher scale of pay with effect from 1.4.2003. As per the order dated 30.4.2012 followed by the order dated 20.7.2012, the arrear salary for the period from 1.4.2003 to 31.10.2007 to the tune of Rs.2.09 lakh was released and paid to the petitioner.

16. The following facts emerge from the materials produced by the parties:

- *By the order dated 7.1.1988, the Hon'ble Supreme Court requested the Shetty Commission to examine the service condition of the staff of subordinate Courts and make a report about the steps to be taken in each State/UT for improvement of the service conditions of the staff of the Courts.*

- *Pursuant to the orders dated 17.12.1997 and 7.1.1998, the Shetty Commission submitted the report in March, 2003.*
- *The report of the Shetty Commission was approved by the Hon'ble Supreme Court on 7.10.2009.*
- *In W.P.(C) No.1022 of 1989, Intervening Application was filed and, on 16.3.2015, the Hon'ble Supreme Court observed that wherever in the Shetty Commission recommendation depending upon the nature of job performed by different categories of employees, a higher scale of pay came to be recommended in the pre-existing scale that existed prior to the 6th Pay Commission recommendation and on such higher scale the corresponding revised scale of pay in the 6th Pay Commission recommendation as applicable from 1.1.2006 should have been continued and it was not permissible for the States to revert back to the earlier scale of pay that existed under the 5th Pay Commission which was directed to be improved of applying the corresponding revised scale of pay under the 6th Pay Commission recommendation.*
- *The Hon'ble Supreme Court directed that wherever under the Shetty Commission recommendation which came to be approved by the order of the*

Court dated 7.10.2009, a higher scale of pay was recommended for different categories, which the Hon'ble Supreme Court has highlighted in the tabulated form in paragraph 9, after the introduction of 6th Pay Commission recommendation, the revised pay should only correspond to such higher scale of pay recommended by the Shetty Commission which alone is the proper way of implementing the recommendation of the Shetty Commission as approved by the Hon'ble Supreme Court.

- *In compliance with the order of the Hon'ble Supreme Court, the District Judge, Burdwan approved the scale of pay vide order dated 30.4.2012 after getting concurrence of the Finance Department, Government of West Bengal.*

17. It is apposite to note that the petitioner retired from service on 31.10.2007 on attaining the age of superannuation when neither the order of the Hon'ble Supreme Court has seen the light of the day, nor the ROPA 2009 has not been published by the State. It is also to be noted that the bill was presented by the Drawing and Disbursing Officer of the 3rd Court, Burdwan, which was subsequently released by the Treasury Officer. Any bill related to the salary is prepared by the staff of the Court concerned, which has to be placed before the Drawing and Disbursing

Officer for his approval and after approval only the bill was sent to the Treasury Officer for release of the bill. Therefore, no fault can be attributed against the petitioner.

18. Though the respondents contended that violating the restriction of arrear as per the memo dated 27.5.2009 the petitioner was allowed to withdraw the arrear at revised pay for the period from 1.4.2006 to 31.10.2007, nothing has been produced to prove the same by the respondents.

19. The learned counsel for the petitioner submitted that some of the Bench Clerk/Stenographer/Ex- Sheristadar have been allowed to draw the arrears and also drawn and paid to them. No notice was issued to them for recovery of the arrear salary. However, the petitioner has been issued the impugned order of recovery, which is unsustainable in the eye of law.

20. In the present case, the entitlement of the revised pay and drawal thereof has been clearly proved by the petitioner and, therefore, there is no question of drawal of the excess amount by the petitioner. Further, as could be seen from the records, in compliance with the order of the Hon'ble Supreme Court, the State of West Bengal passed the

matching order with the concurrence of the Finance Department. As such, the order of recovery of Rs.2.09 lakh issued to the petitioner is not sustainable and/or permissible in the eye of law.

21. In *State of Punjab and others v. Rafiq Masih and others*, (2015) 4 SCC 334, the Hon'ble Supreme Court examined the validity of an order passed by the State to recover the monetary gains wrongly extended to the beneficiary employees in excess of their entitlements without any fault or misrepresentation at the behest of the recipient. In the said decision, the Hon'ble Supreme Court also considered situations of hardship caused to an employee, if recovery is directed to reimburse the employer and disallowed the same, exempting the beneficiary employees from such recovery.

22. In *Rafiq Masih (White Washer)*, the Hon'ble Supreme Court held as follows:

"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, summarize the following few situations, wherein

recoveries by the employers, would be impressible 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."*

23. The Hon'ble Supreme Court in the case of *Thomas Daniel v. State of Kerala and others*, 2022, SCC On Line SC 536 held that "if the excess amount was not paid on account of any misrepresentation or fraud of the employee or if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order which is subsequently found to be erroneous, such excess payment of emoluments or allowances are not recoverable".

24. The Hon'ble Supreme Court and this Court, time and again, held that a recovery at the fag-end of the career of an employee or after his superannuation is not at all permissible in law.

25. In the case on hand, the petitioner is a retired employee. The petitioner retired from service on 31.10.2007 and the impugned order of recovery of over drawal of arrear salary was issued on 10.8.2016. Thus, it is clear that the recovery order was issued after a period of nearly 10 years from the date of retirement. Thus, paragraph 18(ii) and (iii) of the decision in the case of *Rafiq Masih*, supra, would squarely apply to the case on hand. The excess amount, if any, drawn and paid to the petitioner is without any fault of the petitioner. It is not on account of any misrepresentation made by the petitioner the benefit of the higher pay scale was given to him.

26. Since the arrear salary of the petitioner to the tune of Rs.2.09 lakh for the period 1.4.2003 to 31.10.2007 following the recommendation of the Shetty Commission was released and paid, the impugned direction of the Additional District Judge, 3rd Court, Burdwan to return the amount of the alleged overdrawn arrear salary cannot be sustained in the eye of

law. Moreover, the impugned recovery order cannot be issued after a long period of ten years from the date of retirement. Thus, for all the reasons stated above, the impugned order cannot be sustained in the eye of law and, therefore, the same is liable to be quashed.

27. In the result,

- (i) The writ petition is allowed.
- (ii) The impugned order dated 10.8.2016 issued by the Additional District Judge, 3rd Court, Burdwan is quashed.
- (iii) No costs.

(M. V. Muralidaran, J.)