16.04.2024
Sl. No.01
Suman
Ct.No.238

WPA 9882 of 2022

Bratin Ghosh
Vs.
Union of India and Ors.

Mr. Anujit Mookherji
Mr. Prithish Chandra
..for the petitioner

Mr. R. N. Majumder
Mr. S. M. Obaidullah
..for IIT

Mr. Pinaki Bhattacharyya
....for respondent no.6

Mr. Goutam Sardar
Mr. Goutam Malik
..for respondent nos. 1-5

The petitioner is presently serving as a professor at Indian Institute of Technology, Kharagpur (in short, the Institute). By an office order dated February 15, 2022 he was asked to refund an overdrawn amount of Rs.7,15,876/-, to be recovered in twenty four instalments starting from the month of March, 2022 from his salary. Against such deduction, the petitioner made a representation before the Institute by a letter dated March 14, 2022. After taking into consideration the representation, a fresh order of recovery was issued by the Institute by a letter dated April 19, 2022. The overdrawn amount was recalculated to Rs.5,97,702/-.

By filing this writ petition, the writ petitioner has challenged the said order of recovery dated April 19, 2022.

Learned advocate appearing for the petitioner submits that in this case, no recovery was permissible in view of the judgment of the Hon'ble Supreme Court delivered in Rafiq Masih (White Washer) case reported at (2015) 4 SCC 334. He further relies upon two judgments of this Court reported at **State of W.B.-Vs.- Subrata Sankar Roy 2019 SCC OnLine Cal 5991** and **Union of India -Vs.- Samir Kumar Bandyopadhyay** reported at **2022 SCC OnLine Cal 2209.** Reliance is also placed on the judgment passed in **WPA 9999 of 2022 (Srabani Taraphder-Vs.- The Indian Institute of Technology)** by a Co-ordinate Bench of this Court to argue that five years has to be calculated in terms of Rafiq Masih (supra) from the date when the overpayment was detected, not from the date when the order of recovery was made.

The factual backdrop in which the excess payment to the petitioner was made has to be noticed first. The petitioner initially joined the Institute as an Assistant Professor in December 12, 2005. Thereafter, an advertisement was published by the Institute inviting applications from the candidates across the country for the post of Associate Professor. In the said recruitment, the petitioner was selected as an

Associate Professor with effect from June 7, 2011. While the petitioner was holding the position of an Associate Professor, an audit was conducted by the Director General of Audit, Central Kolkata. The audit report detected that the Institute invited applications for filling up the post of faculty through an open advertisement with both internal and external candidates being eligible for appointment to the post. Selection was made through interviews and on the basis of recommendation made by the Selection Committee. Rule 22(I) (a)(1) of the Fundamental Rules (FR) dealing with fixation of initial pay of a government servant appointed to a post carrying duties and responsibilities of greater importance than those attached to the post previously held by him states that, the initial pay fixation for the higher post is to be made after granting one increment in the time scale of post previously held by him. It further provides that the government servant shall have the option to get his pay fixed on the date of appointment to the higher post or on the date of accrual of the next increment in the time scale of the post previously held by him. The provision to opt for the date of pay fixation was, however, not available to the candidates appointed on the basis of direct recruitment. The audit report found that the Institute had allowed newly appointed faculty members selected on the basis of direct recruitment to exercise options regarding the date of fixation of their pay under F.R. 22 (I) (a) (1) at the time of their appointment. Consequently, the pay of the petitioner along with some other faculty members was fixed from the date of accrual of the next increment in the post previously held by them either in the Institute or elsewhere. The audit report was of the view that permitting the newly recruited faculty members to exercise this option had led to fixation of pay at a higher level than the pay that would have been admissible to them on the date of appointment to the new post. Thus, permitting exercise of this option in violation of the Fundamental Rules resulted in irregular fixation of pay along with overpayment. The methodology of allowing option for fixation of pay from the date of the next increment to the newly appointed faculty members selected on the basis of direct recruitment by the Institute was found to be irregular.

Before this Court, the petitioner does not dispute the fact that he was appointed from the post of Assistant Professor to Associate Professor by participating in a selection process initiated through an open advertisement inviting in service candidates of the Institute as well as the outsiders.

In light of the above facts, it cannot be denied that the petitioner was given an additional increment in an irregular way.

The order of recovery, however, sought to recover the overdrawn amount starting from June 6, 2011 to February 1, 2022.

In view of the law laid down in Rafiq Masih (supra), I am of the opinion that such recovery is partially impermissible.

Paragraph 18 of Rafiq Masih (supra) is quoted below:-

> "18.....
> *(i)* *Recovery from employees belonging to Class III and Class IV service (or Group C and Group D service).*
> *(ii)* *Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.*
> *(iii)* *Recovery from 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 harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover. (emphasis supplied)"*

The paragraph quoted above clearly stipulates that recovery from an employee is barred when the excess payment has been made for a period in excess of five years before the order of recovery is issued.

Learned advocate appearing for the petitioner, however, placing reliance upon the judgments reported at **2019 SCC OnLine Cal 5991 (State of West Bengal and Others –Vs.- Subrata Sankar Roy and Another)** and **2022 SCC OnLine Cal 2209 (Union of India and Others –Vs.- Samir Kumar Bandyopadhyay and Others)** to submit that no recovery is permissible from the petitioner. He relies upon the following paragraphs of the judgment passed in **Subrata Sankar Roy** (supra).

> *"13. Mr. Majumder is right in his contention that Rule 140(2) of the DCRB Rules does not prescribe any period of limitation. However, we are of the further opinion that the period of five years has to be read into Rule 140(2) having regard to the decision in Rafiq Masih (supra). The State cannot enjoy unlimited and unfettered power to initiate a process of recovery at any time it wishes. If there has been erroneous fixation of pay, the same has to be detected within five years or else the opportunity to recover could be lost forever.*
>
> *14. Although Jagdev Singh (supra) may not have been placed before the tribunal and, thus, was not considered by it, we are of the view that nothing turns on it and the outcome of this writ petition may not be too different. If indeed the employer is given the right to initiate measures for recovery of excess payment made by it to an employee during any preceding period of five years prior to the date the order of recovery is issued, such a situation*

> *is bound to be iniquitous and the action harsh and arbitrary, thus far outweighing the equitable balance of the employer's right to recover."*

The facts of the case in hand is clearly distinguishable from the aforesaid cases. In those cases, recovery was sought to be made after the retirement of the petitioner, from his retiral dues. Considering the relevant provision of Death-cum-Retirement Benefit Rules, the Division Bench held that recovery in such cases will be iniquitous. In the present case, however, it is found that the Institute has permitted the petitioner to refund the overdrawn amount in twenty four equal instalments of about Rs.25,000/- per month from his monthly salary. Therefore, it cannot be said that the petitioner has been subjected to hardship or iniquity. Equally, in **Samir Kumar Bandyopadhyay** (supra), the recovery was sought to be made after the retirement, from the retiral benefits of the petitioner. In both the cases, the recovery was barred under clause (iii) of paragraph 18 of **Rafiq Masih** (supra). Therefore, I do not find any substance in the submission of the learned advocate for the petitioner that in this case, the entire period of recovery was barred.

In the aforesaid facts, I am of the view that the judgment rendered in **WPA 9999 of 2022** (**Srabani**

Taraphder-Vs.- The Indian Institute of Technology, Kharagpur) should not be followed in toto.

Accordingly, this writ petition is disposed of with the following directions.

The Institute shall be at liberty to recover the excess amount paid to the petitioner from June 6, 2011 to July 1, 2016. The aforesaid recovery shall be adjusted against the sum already refunded by the petitioner. If necessary, the Institute shall allow the petitioner to pay the aforesaid amount in suitable instalments.

Needless to mention that if the petitioner had already refunded the overdrawn amount for the said period, no further recovery shall be made.

Accordingly, **WPA 9882 of 2022** is disposed of.

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

(Kausik Chanda, J.)