

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble **Justice Harish Tandon**

And

The Hon'ble **Justice Prasenjit Biswas**

MAT 1002 of 2022

With

CAN 1 of 2022

The State of West Bengal & Anr.

-Versus-

Sri Kali Sadhan Bhattacharjee @ Bhattacharyya & Ors.

For the Appellants/State : **Mr. Sanjib Das.**

For the Respondent Nol. 1 : **Mr. Gourav Das,
Mr. Jayanta Kr. Das,
Ms. Madhumati Das.**

Hearing Concluded on : **04.11.2024**

Delivered on : **03.12.2024**

Prasenjit Biswas, J:-

1. This appeal is directed against the impugned order dated 22.06.2021 passed by the learned Single Bench of this Court in connection with W.P.A. 22066 of 2017.

2. The writ petitioner was retired as a headmaster from the school on June 30, 2017. At the time of joining of the petitioner in that school, the said school was a 10-Class High School which was subsequently upgraded to 10+2 Higher Secondary School with effect from July 01, 2012. The pay of the writ petitioner was fixed at Rs. 32,710/- in the pay Band-4, Rs. 9000/- - Rs. 40,500 with Grade Pay of Rs. 5,600/- by the Additional Districts Inspector of Schools in pursuant to the memo issued by the Director of Accounts, Government of West Bengal, School Education Department. Pay fixation of headmaster of schools which was upgraded to Higher Secondary School after February 27, 2009 was done by allowing one increment at the rate of 3% of the existing basic pay along with an additional grade pay of Rs. 200/- in terms of the memo issued by the Director of Accounts, Government of West Bengal, School Education Department. The retiral benefits of the petitioner were withheld on the ground of inadmissibility of one increment at the rate of 3% of the existing basic pay of the petitioner. As the retiral benefit was not issued in favour of the writ petitioner he preferred a writ application before this Court and this appellant as respondent entered their appearance in this writ proceeding and filed their affidavit annexing the documents wherein they firstly revealed that the District

Inspector of Schools by a memo no. 56 S/Pen(O) dated June 29, 2017 raised objection regarding one increment at the rate of 3% of the existing basic pay of the petitioner and it was stated in the memo issued by the District Inspector of Schools that unless the service book of the writ petitioner was rectified and overdrawn amount was deposited the retiral benefits of the petitioner shall not be disbursed.

3. The pay fixation in respect of the writ petitioner/private respondent was neither a mistake nor it was granted at the request of the writ petitioner. Enquiries were made by the Director of Accounts, Paschim Medinipore upon the upgradation of the schools and asked for modalities of fixation of pay of headmasters of high schools which were upgraded to a Higher Secondary School after February 27, 2009. The increment of 3% of the existing basic pay along with additional grade pay of Rs. 200/- was granted after enquiries made by the Joint Director of Accounts, Paschim Mednipore. The payment was made with increment and grade pay to the writ petitioner from the date of upgradation of the schools to a Higher Secondary Schools and there was no whisper of such giving excess payment till the retirement of the writ petitioner. This fact came into the light when the authority refused to disburse the retiral benefits and for such refusal to disburse the retiral benefits the petitioner came up with the writ application and for the first time in the said writ petition the authorities disclosed the reasons for non disbursement of the retiral benefits to the petitioner. On the verge of retirement of the writ petitioner, the Joint Secretary, School Education Department, Secondary Branch by issuing a

general circular informed the Director, School Education Department that one increment of 3% of the existing basic pay would not be allowed to the Headmasters of schools which were upgraded to 10+2 after February 27, 2009. The only point of objection raised on behalf of this appellant that this writ petitioner had signed a proforma thereby undertaking to refund any excess amount that may have been paid to him by erroneous fixation of pay scale as soon as the fact of such excess drawal would be brought to his notice. Thus on the basis of such undertaking the appellants would be justified in not disbursing the retiral benefits to the writ petitioner unless and until the erroneous fixation of pay scale was rectified, the service book was corrected and the over drawn amount was recovered.

4. In **State of Punjab and Others Etc. Vs. Rafiq Masih (White Washer) etc.** reported in **(2015) 4 SCC 334** the Hon'ble Apex Court examined the validity of an order passed by the State to recover the monetary gains wrongly extended to the beneficiaries to the employees in excess of their entitlements without any fault or misrepresentation at the behest of the recipient. The Apex Court in that report considered the situation 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. It was held thus at paragraph 8 and 12 of the said report-

“8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the

issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the concerned employee. If the effect of the recovery from the concerned employee would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.

12. 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 herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

- (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 arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”

The Judgment of the Apex Court in **Rafiq Masih** (Supra) is not confined to cases where there is wrong fixation of salary and as a result whereof some excess amount was paid to an employee. The larger issue was whether an employer is entitled to recover monetary benefits mistakenly given to the employee and the same was decided by the Apex Court in that case. It was held by the Apex Court that the mistake could have occurred on account of a variety of reasons, including the grant of a status, which the concerned employee was not entitled to, or payment of salary in a higher scale, than in conscious of the right of the concerned employee or because of a wrongful fixation of salary of the employee, consequent upon the upward revision of pay-scales or for having been granted allowance, for which the concerned employee

was not authorised. It has further been held by the Apex Court that in all such cases the employer would not recover the amount provided the excess payment was not attributable to any fraud or misrepresentation by the employee. The categories wherein recoveries by the employers, would be impermissible in law has been delineated by the Supreme Court in the said report.

5. It is admitted position that the writ petitioner was not responsible for the pay fixation and no fraud or misstatement has been made by the writ petitioner. Moreover, there is nothing on record to show that there was an error, miscalculation or mistake. The Additional District Inspector of Schools in pursuant to the memo issued by the Director of Accounts, Government of West Bengal, School Education Department fixed the pay of the writ petitioner. In terms of the memo issued by the Director of Accounts, Government of West Bengal, School Education pay fixation of Headmasters of Schools upgraded to a Higher Secondary after February 27, 2009 was to be done by allowing one increment at the rate of 3% of the existing basic pay along with an additional grade pay of Rs. 200/-. Thereafter more than 5 years had elapsed since the writ petitioner had been enjoying the pay scale in terms of the order of the Director of Accounts, School Education Department, Government of West Bengal. The said order of Director of Accounts, West Bengal, Education Department by which the pay of the writ petitioner was fixed neither withdrawn or cancelled by the subsequent order of the Joint Director and is operative in the field. The State appellants failed to show that the fixation of pay of the petitioner was made at the instance or request of the petitioner. This

writ petitioner was not responsible for such pay fixation, on the other hand such pay fixation of the petitioner was made in terms of specific direction/order issued by the Director of Accounts, Government of West Bengal, School Education Department, dated August 06, 2014 wherein modalities were made indicating how to pay in respect of Headmasters of Schools upgraded to 10+2 class after February 27, 2009 would be fixed. Such conscious decision as made by the State appellant cannot be said to be as an erroneous pay fixation. No objection was raised on behalf of the State Appellant prior to the retirement of the writ petitioner. The higher pay has been given to the writ petitioner for over a period of 5 years on the basis of conscious decision of the School Education Department through the Director of Accounts. So, the order of recovery a day prior to the retirement of the writ petitioner is not acceptable in view of decision rendered by the Hon'ble Apex Court in case of **Rafiq Masih** (Supra).

6. It is profitable to quote the observations of the Hon'ble Apex Court in case of **Thomas Denial Vs. State of Kerala** reported in **2022 0 AIR(SC) 2153** wherein the Hon'ble Apex Court interalia held at paragraph 9-

“This Court in a catena of decisions has consistently 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. This relief against the recovery is granted not because of any right of the employees but in equity, exercising judicial discretion to provide relief to the employees from the hardship that will be caused if the recovery is ordered. This Court has further held that if in a given case, it is proved that an employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, the courts may on the facts and circumstances of any particular case order for recovery of amount paid in excess.”

7. We have already held that the State authority allowed one increment of 3% of the existing basic pay along with additional grade pay of Rs. 200/- to the writ petitioner after taking conscious decision and which was paid to the writ petitioner over a period of 5 years that is from the date of upgradation to a 10th class High School to 10+2 Higher Secondary School. The writ petitioner received the salary till the last month of his service on the basis of pay fixed by the Additional District Inspector of Schools in pursuant to the order issued by the Director of Accounts, Government of West Bengal, School Education Department.

8. In view of the forgoing discussions and especially in view of paragraph 12 of the judgment of Hon’ble Apex Court passed in case of **Rafiq Masih (Supra)**

this Court is of the firm opinion that an objection with regard to inadmissibility of the one increment at the rate of 3% of the existing basic pay of the writ petitioner is bad in the eyes of law. The case of the writ petitioner/private respondent is squarely covered by clause II and III of **Rafiq Masih** (Supra). The District Inspector of School by memo no. 56 S/Pen(O) dated June 29, 2017 raised objection with regard to inadmissibility of one increment at the rate of 3% of the existing basic pay of the petitioner unilaterally. Once the Apex Court has laid down law in case of **Rafiq Masih** (Supra) and provided that recovery of any amount may be made subject to conditions laid down in that decisions, the objection regarding inadmissibility of one increment at the rate of 3% to the writ petitioner who has already retired from services is contrary to the law declared by the Apex Court and therefore, it is unenforceable. In view of above we find that there is no merit in the present appeal and as such it is liable to be dismissed.

9. Accordingly, the appeal being no. MAT 1002 of 2022 is hereby dismissed but without any order as to costs.

10. Connected applications if any are also dismissed accordingly.

11. Urgent Photostat certified copy of this order, if applied for, be given to the parties on payment of requisite fees.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)