IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE SHAMPA DUTT (PAUL)

FMA 777 of 2023
CAN 1 of 2023

Smt. Kalpita Moitra (Chakladar)
Vs.
The State of West Bengal & Ors.

Appearance:

For the Appellants : **Mr. Ekramul Bari, Adv.**
Mr. S. M. Ali, Adv.
Mr. Sk. Imtiyazuddin, Adv.

For the State : **Mr. Supriyo Chottopadhyay, Adv.**
Ms. Iti Dutta, Adv.

Judgment On : **14.11.2024**

Harish Tandon, J.:

The claim for release of the retiral as well as the pensionary benefits at the behest of the writ petitioner/appellant is rejected by the Single Bench which is assailed in the instant appeal. The fact discerned from the respective pleadings of the parties and for the purpose of determination of the point involved in the instant appeal as adumbrated herein below, are more or less undisputed. The petitioner/appellant was appointed as assistant teacher initially in Shyamsukhi Balika Shiksha Niketan, Malda on 1st September, 1981.She was subsequently transferred as assistant teacher in Khadimpur Girls High School, Dakshin Dinajpur on 5th September, 1992. By virtue of seniority and the vacancy arose in the post of Assistant Headmistress, the appellant was considered as eligible candidate and was appointed to the post of Assistant Headmistress on 28th December, 1999 in the said school. Subsequently, on the recommendation of the West Bengal Regional School Service Commission, Western Region, Malda, the appellant was appointed as a headmistress on September 28, 2001. The pay-scale of the appellant was fixed/re-fixed with an additional increment on resuming the charge of the assistant headmistress and headmistress in the said school and was paid the salary in commensurate therewith. The appellant retired in the month of May, 2018 in the post of a headmistress from the said school.

While the appellant was discharging the duties and functions of the headmistress which she assumes on 28th September, 2001, the Memo was issued by the Deputy Director of Accounts, School Education Department, Dakshin Dinajpur to the District Inspector of Schools (SE), Dakshin Dinajpur on 18th June, 2014 regarding the fixation of pay under ROPA, 2009 in respect of her pay-scale. The said Memo was assailed by the appellant in WP 3772 (W) of 2015 before this Court which was subsequently withdrawn as the appellant continued to receive the salary as per the scale of pay so fixed and no steps was taken by the authorities to re-fix the same. After attaining the superannuation, the petitioner was not paid the retiral benefit as well as the pension for which another writ petition being WP 15686 (W) of 2019 was filed before this Court. During the pendency of the said writ petition, the District Inspector of Schools (SE) issued a Memo dated 15.01.2020 and disbursed the provisional pension on the basis of the last pay drawn. The said writ petition was ultimately disposed of on 07.06.2022 directing the DI of Schools (SE), Dakshin Dinajpur to consider the grievance of the petitioner raised in the form of a representation and suitable decision to be taken within a specified time. Pursuant to the order passed in the aforementioned writ petition, the DI of Schools (SE), Dakshin Dinajpur passed an order vide Memo dated 30th June, 2022 directing the appellant as well as the school authorities of Khadimpur Girls High School to comply with the observations of the Deputy Director of Accounts, School Education Department to enable the office of the DI Schools (SE) Dakshin Dinajpur to process the pension papers of the petitioner. For completeness in the facts, the observation of the Deputy Director of Accounts, School Education Department is adumbrated hereinbelow:

> **"(i) PSA is suggested to take necessary action as stated earlier vide this Memo No. D/AC (Edn)-D.D.-52/1/2014 dated 18.06.2014.**
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> **(ii) 20 years benefit as H.M. from the first entry into service may not be allowed in the scale of pay under ROPA-98. Necessary action may be taken in this regard.**
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> **(iii) Photocopy of arrear claim under ROPA-98 of the spouse should be enclosed herewith.**
>
> **(iv) Photocopy of arrear claim under ROPA-90, 98 and 2009 should be enclosed herewith."**

According to the petitioner, she along with the school authority resubmitted all the papers to the DI of Schools (SE), Dakshin Dinajpur immediately thereafter on 24.08.2022. Even thereafter no steps were taken from the ends of the authorities and the writ petition from this impugned order arose, was filed for release of the retiral benefits along with the interests as the authorities have unreasonably and wrongfully detained the said benefits.

This Single Bench directed the State respondent to submit the report in the form of an affidavit disclosing their stand in this regard in order to ascertain whether there was any unjust encroachment upon the legitimate right of the appellant. The report reveals that there was a wrong fixation of the scale of pay at the time when the petitioner was appointed as a headmistress which was detected in the year, 2014 when the letter dated 18th June, 2014 was issued by the authorities. It is further disclosed that knowing fully well that there is a dispute with regard to wrong fixation of pay having detected during the currency of the service and the said letter being challenged by the petitioner to this Court which was subsequently withdrawn, there is no justification in the stand of the appellant that the authorities cannot adjust the over-drawl from the retiral benefits of the appellant.

The argument was advanced by the appellant before the Writ Court to the effect that the Apex Court in catena of decision prevented the authorities from the recovery of an overdrawn amount if the same is paid to the employee voluntarily and not on the commission of fraud committed by the employee. It is further contended that the appellant enjoyed the scale of pay so fixed by the respondent authorities till she attained the age of superannuation and therefore, it is impermissible to recover the alleged amount on account of overdrawn at the behest of the respondent authorities. The Trial Court proceeded to dismiss the writ petition on the ground that the wrong fixation of scale of pay was detected while the appellant was in service and in fact, memos ranging between the year 2012 to 2014 was issued by the authorities. The Trial court was of the view that the moment the Memo dated June 18, 2014 was challenged in a writ petition which was subsequently withdrawn, the petitioner was aware of the stand of the respondent authorities that her scale of pay was wrongly fixed and therefore, not entitled to any immunity from recovery of the over-drawl amount.

Mr. Bari, the learned Advocate appearing for the appellants submits that the issue concerning the recovery of the over-drawl amount from the retiral benefit is a recurring feature prevailing in the country and the Apex Court in catena of decision have rejected the contention of the respondent authorities that it is within their competence to recover as and when the mistake or discrepancies is detected. In support of the aforesaid contention, Mr. Bari relies upon a judgment of the Apex Court in ***State of Punjab &Ors. vs. Rafiq Masih (white Washer) & Ors., reported in (2015) 4SCC 334*** wherein the Apex Court has illustrated few eventualities which rendered such recovery impermissible. According to Mr. Bari, the instant case comes within the ambit of one of such eventualities and therefore, the authorities cannot take a contrary stand to the decision of the Supreme Court which is a law declared by it in exercise of powers enshrined under Article 141 of the Constitution of India. Mr. Bari further submits that the ratio of law declared in ***Rafiq Masih (supra)*** is further reiterated in a subsequent decision of the Supreme court rendered in ***Thomas Daniel vs. State of Kerala & Ors., reported in 2022 SCC Online SC 536.*** Mr. Bari vociferously submits that the aforesaid judgment of the Apex Court was considered by the Division Bench comprising one of us (Harish Tandon, J.)

in ***Union of India & Ors. vs. Samir Kumar Bandyopadhyay & Ors. (WPCT 28 of 2022) reported in 2022 SCC OnLine Cal 2209*** wherein an argument was advanced that the situation contemplated under the ***Rafiq Masih's*** case must be imminent and involved in its entirety and cannot be applied if one of such eventualities/situations is found in the given case. The Division Bench repelled the aforesaid contention and quashed and set aside the decision of the authority in attempting to recover the excess amount paid to the employee, in the event, the same is detected after 5 years from the date of extending such benefit. Mr. Bari thus submits that the authority should be directed to release the pensionary benefits on the basis of scale of pay extended to the appellant and cannot recover the alleged excess amount from the retiral benefit.

Mr. Supriyo Chottopadhyay, the learned advocate appearing for the respondent authorities strenuously submits that immediately after detecting the erroneous fixation of scale of pay for the appellant the authorities raised the issues during the currency of service and therefore, the appellant cannot take advantage of the judgments rendered in ***Rafiq Masih (supra)*** and ***Thomas Daniel (supra)***. It is further submitted that the letter dated 18th June, 2014 by which the authorities detected the discrepancy in fixation of pay was challenged by the appellant before this Court and the writ petition was subsequently withdrawn and therefore it is evident that the appellant was well aware that there is a wrong fixation of scale of pay. It is thus submitted that the mistake committed by the authorities cannot confer any right into the appellant as the said mistake is susceptible to be corrected. Mr. Chottopadhyay thus prays for the dismissal of the instant appeal.

The facts as adumbrated herein before being undisputed, the question begging an answer in the instant appeal is whether the situations/eventualities highlighted in the judgment rendered by the Apex Court in ***Rafiq Masih's*** case may inure to the benefit of the appellant. It is no gainsaying that slew of litigations are pouring in the docket of the Court challenging the action of the respondent authorities contemplating to recover the excess amount paid to the employee on mistaken/wrong fixation of scale of pay. Some of the decisions are to the effect that the recovery of an excess amount as overdrawn when the employee has no role to play in this regard from the retiral benefit is impermissible. The other views are to the effect that the mistake cannot confer any inchoate right in the employee upon detection thereof. The respondent authorities are not denuded of power to recover the excess amount as such mistake does not confer any right into the employee. Ultimately, in ***Rafiq Masih (supra)*** the Apex court succinctly laid down some of the situations which would render the recovery from the retiral benefits impermissible in the following:

> **"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:**
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> **(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."

The ratio of law laid down in ***Rafiq Masih (supra)*** is reiterated in a subsequent decision of the Supreme Court rendered in ***Thomas Daniel (supra)*** in the following:

"14. Coming to the facts of the present case, it is not contended before us that on account of the misrepresentation or fraud played by the appellant, the excess amounts have been paid. The appellant has retired on 31.03.1999. In fact, the case of the respondents is that excess payment was made due to a mistake in interpreting Kerala Service Rules which was subsequently pointed out by the Accountant General.

15. Having regard to the above, we are of the view that an attempt to recover the said increments after passage of ten years of his retirement is unjustified.”

It is thus evident from the law enunciated in the abovementioned report that though the authorities are within their competence to recover the excess amount from the retiral benefit paid on a mistaken fixation of the scale of pay but would render such recovery impermissible, in the event, such recovery is made from an employee belonging to class III and class IV service, the employee who is due to retire within one year, the excess payment is made for a period in excess of five years, employee who was wrongfully required to discharge the duties of higher post even though he should have rightly been required to work in the inferior post and in the event, the Court finds that the recovery would be harsh and arbitrary overweighing the equitable balance of the employees’ right to recover. The fact so unfurled hereinbefore revealed that the appellant was appointed to the post of a Headmistress on the recommendation of the West Bengal Regional School Service Commission, Western Region, Malda, with effect from 28th September, 2001. The scale of pay was re-fixed extending the additional increment and the appellant was paid on the basis of such fixation of scale of pay. In 2014, when the letter dated 18th June, 2014 was issued wherein for the first time the issue relating to wrong fixation of scale of pay was raised yet the petitioner was paid the same scale of pay till her retirement. By the said letter, the direction was passed upon the Deputy Director of Accounts to re-fix the scale of pay yet till the appellant attained superannuation no decision was taken. Probably, for such reason that there was no disruption in payment of the scale of pay extended to the petitioner despite the issuance of letter dated 18th June, 2014, the writ petition challenging the sale letter was ultimately withdrawn. Taking a clue from the facts as narrated herein above, it is apparent therefrom that one of the situations/eventualities which rendered the right of the employer to recover the excess amount impermissible is involved in the instant case. The Apex Court in ***Rafiq Masih (supra)*** laid down the several eventualities one of which relates to a recovery from an employee when an excess payment is made for a period in excess of 5 years before the order of recovery is passed. An argument was advanced in ***Samir Kumar Bandyopadhyay (supra)*** that the situations/eventualities laid down in ***Rafiq Masih (supra)*** should be construed in a stricter sense i.e., the case must involve all such eventualities and not any one of them. The Division Bench overruled the contention of the appellant therein and held that the situations/eventualities highlighted in the ***Rafiq Masih's*** case are some of the illustrative example and has to be construed in a pragmatic manner. It is further held in the event any of such eventualities are involved in a given case which rendered the recovery impermissible; the effect to the judgment has to be given in the following:

> **"19. Based upon the reasoning assigned hereinbefore the law as it stands is that no recovery is permissible if an excess amount is paid by the employer even under mistake from Group C and Group D employees or from retired employees or the employees who are due to retire within a year from the date of the recovery or the excess amount is made in excess of 5 years before the order of recovery is issued. The recovery is not permissible if the employee has been wrongfully required to discharge the duties of**

higher post and paid accordingly when he has a right to receive the amount admissible to an inferior post. There may be another case of hardship which cannot be foresee and, therefore, it is open to the Court to take a decision taking into account the special factors and the facts germinates therefrom. Therefore, the judgment of Rafiq Masih (Supra) cannot be construed as an inflexible and/or inviable declaration of law."

It is thus evident from the facts discerned from the record that the scale of pay was fixed with effect from 28th September, 2001 on assumption of the post of Headmistress in Khadimpur Girls High School and the issue relating to the wrong fixation of the scale of pay was raised for the first time in the year 2014 after a gap of 13 years. We are unable to countenance the stand of the Trial court that the observations made in ***Rafiq Masih (supra)*** are in exercise of powers under Article 142 of the Constitution of India. The Apex Court was considering the seminal point whether the recovery of an excess amount paid to the employee on mistaken fixation of scale of pay is permissible. In determining the aforesaid point, the Apex Court in unequivocal term laid down the eventualities/situations which render such recovery impermissible. The moment the Apex Court has made a categorical observation in pursuit of deciding the pivotal issue raised before it, it cannot be perceived as the decision rendered in exercise of powers under Article 142 of the Constitution of India. The Apex court in categorical terms held that the recovery in such situations is impermissible which is construed as a law declared by the Apex Court under Article 141 of the Constitution of India and therefore, has a binding force.

In view of the law enunciated in the above reports, we are unable to concur with the judgment of the Single Bench. The order impugned in the instant appeal is hereinbelow set aside; as a consequence whereof the writ petition is allowed.

The respondent authorities are directed to issue a pensionary payment order on the basis of the scale of pay lastly drawn without deducting any amount therefrom on account of alleged excess payment due to wrongful and/or mistaken fixation of pay. The entire exercise shall be completed within 4 weeks from the date of communication of this order.

This appeal is thus allowed. The interim application, if there be, any stands disposed of.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with the requisites formalities.

(Harish Tandon, J.)

I agree.

(Shampa Dutt (Paul), J.)