

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

Present:

THE HON'BLE JUSTICE HARISH TANDON

&

THE HON'BLE JUSTICE PRASENJIT BISWAS

MAT 2176 of 2023

CAN 2 of 2024

The State of West Bengal & Ors.

Vs.

Samar Chattopadhyay & Ors.

Appearance:

For the Appellants
AGP.

: **Mr. Tapan Kumar Mukherjee, Ld.**

Mr. Sourav Chowdhury, Adv.

Ms. Sukla Das Chandra, Adv.

For the Petitioner/Respondent

: **Mr. Ekramul Bari, Adv.**

Mr. Sk. Imtiaz Uddin, Adv.

Mr. Alauddin Ahmed, Adv.

Judgment on

: **02.12.2024**

Harish Tandon , J.

At the first blush, when the matter was argued by Mr. Tapan Kumar Mukherjee, learned Additional Government Pleader, we were not convinced

with the initial submissions on the settled proposition of law as of now enunciated by the Apex Court in catena of judgments including the three-Judge Bench decision rendered in ***State of Punjab & Ors. Vs. Rafiq Masih (Whitewasher) reported in (2014) 8 SCC 883*** and subsequent two-Judge Bench decision rendered in the aforesaid case but we subsequently thought to give our anxious consideration to the issue of law when a two-Judge Bench decision of the Apex Court rendered in ***High Court of Punjab and Haryana & Ors. Vs. Jagdev Singh reported in (2016) 14 SCC 267*** was placed before us.

The seminal point involved in the instant appeal is whether the authority can deduct/adjust or raise the demand for refund of the excess amount paid to the employee on erroneous fixation of scale of pay from the retiral benefits or from the future pensionary benefits.

Before we proceed to decide the point as above, salient facts which are more or less undisputed are required to be adumbrated hereinbelow. The petitioner was appointed as a lecturer in Ramkrishna Mission Shilpapitha, Belgharia, Kolkata 700056 on 26.03.1996 and attained superannuation therefrom with effect from 21.12.2013. The petitioner was allowed Career Advancement Scheme (in short, 'CAS') benefit from 26.03.2001 and the second CAS was allowed from 26.03.2006. It is a specific stand of the appellant authorities that at the time of joining the post of the lecturer in the said institute which is a Government sponsored polytechnic, The petitioner did not have the M.Tech. degree which was obtained on

25.03.1996 and therefore, in view of a Government order dated 24.10.2007, he is entitled to a first CAS after successfully completing 6 years of service and accordingly, the second CAS shall be awarded after lapse of further period enshrined therein.

What could be gathered from the respective stands of the parties that entitlement to the benefits under the Career Advancement Scheme by the petitioner is not denied but the effective date of such benefits appears to have been the arena of dispute and the authorities intended to seek the refund of the excess amount paid thereupon to the petitioner for the interregnum period.

The aforesaid points often come up for consideration before the various High Courts and ultimately to the Apex Court to answer whether the authorities can adjust/deduct the excess amount paid to the employee on erroneous fixation of scale of pay from the retiral benefits. In case of ***Chandi Prasad Uniyal & Ors. Vs. State of Uttarakhand & Ors. reported in (2012) 8 SCC 417***, the two-Judge Bench of the Apex Court was of the view that any amount paid to the employee without any authority of law can always be recovered with an exception that if such recovery would cause extreme hardships in such situation, any attempt to deduct/adjust or demand for refund thereof would tantamount to unjust enrichment in the following:

“14. We are concerned with the excess payment of public money which is often described as “taxpayers’ money” which

belongs neither to the officers who have effected overpayment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. The question to be asked is whether excess money has been paid or not, may be due to a bona fide mistake. Possibly, effecting excess payment of public money by the government officers may be due to various reasons like negligence, carelessness, collusion, favouritism, etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.”

Even prior to the *Chandi Prasad Uniyal (supra)* decision, the Apex Court in case of *Shyam Babu Verma & Ors. Vs. Union of India & Ors. reported in (1994) 2 SCC 521* and *Sahib Ram vs. State of Haryana & Ors. reported in 1995 Supp (1) SCC 18* held that the authorities cannot deduct and/or adjust nor can seek for refund of the excess amount paid due to the erroneous fixation of scale of pay from the retiral benefits unless the employee is found to have committed the act of fraud, misrepresentation or of like nature. It was consistently held that in the event the employee does

not have any role to play in fixation of the scale of pay, recovery from the retiral benefits should not ordinarily be allowed.

In a subsequent case relating to ***Rafiq Masih (Whitewasher)*** the Co-ordinate Bench noticed a difference of views expressed in the aforementioned decisions by the Apex Court and referred the matter to the Hon'ble the Chief Justice of India for constituting a three-Judge Bench to adjudicate the aforesaid controversies and to streamline the law in certainty. The Larger Bench consisting of three Hon'ble Judges in ***Rafiq Masih (Whitewasher)*** did not find any conflict between ***Chandi Prasad Uniyal (supra)*** on one hand and ***Shyam Babu Verma (supra)*** and ***Sahib Ram (supra)*** on the other in the following:

“8. In our view, the law laid down in Chandi Prasad Uniyal case, no way conflicts with the observations made by this Court in the other two cases. In those decisions, directions were issued in exercise of the powers of this Court under Article 142 of the Constitution, but in the subsequent decision this Court under Article 136 of the Constitution, in laying down the law had dismissed the petition of the employee. This Court in a number of cases had battled with tracing the contours of the provision in Articles 136 and 142 of the Constitution of India. Distinctively, although the words employed under two aforesaid provisions speak of the powers of this Court, the former vest a plenary jurisdiction in the Supreme Court in the matter of entertaining

and hearing of appeals by granting special leave against any judgment or order made by a court or tribunal in any cause or matter. The powers are plenary to the extent that they are paramount to the limitations under the specific provisions for appeal contained in the Constitution or other laws. Article 142 of the Constitution of India, on the other hand is a step ahead of the powers envisaged under Article 136 of the Constitution of India. It is the exercise of jurisdiction to pass such enforceable decree or order as is necessary for doing “complete justice” in any cause or matter.”

Ultimately, the Larger Bench was of the opinion that there cannot be any difference in the opinion expressed in the aforementioned three decisions as the earlier judgments namely, *Shyam Babu Verma (supra)* and *Sahib Ram (supra)* were decided by exercising the power under Article 142 of the Constitution of India and the decision of *Chandi Prasad Uniyal (supra)* to be regarded as a decision under Article 141 of the Constitution of India and therefore, the reference was unnecessary in the following :

“13. Therefore, in our opinion, the decisions of the Court based on different scales of Article 136 and Article 142 of the Constitution of India cannot be best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion, there is no conflict in the views expressed in the first two judgments and the latter judgment.

14. In that view of the above, we are of the considered opinion that reference was unnecessary. Therefore, without answering the reference, we send back the matters to the Division Bench for their appropriate disposal. Ordered accordingly.”

The Special Bench in *Rafiq Masih (Whitewasher) (supra)* remitted the matter to the Bench to decide the case on its merit which in fact was decided by rendering a judgment on *December 18, 2014 reported in (2015) 4 SCC 334*. As the Bench in *Chandi Prasad Uniyal (supra)* carved out an exception in the nature of extreme hardship causing an unjust enrichment upon the employee, the Bench laid down few illustrations which would come within the ambit of an extreme hardship amounting to an unjust enrichment 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:

- (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."**

Apparently there does not appear any conflict between **Chandi Prasad Uniyal (supra)** and **Rafiq Masih (Whitewasher)** (later judgment), the **Chandi Prasad Uniyal** did not lay down what would come within the folds of extreme hardship causing unjust enrichment and therefore, the law does not put any fetter on the part of later Co-ordinate Bench to streamline by providing illustration which would come within the four corners of the hardship causing undue enrichment. The second illustration appears to have played a pivotal role in deciding the instant case on the parameters of the fact succinctly narrated hereinabove. Admittedly, the appellant allegedly noticed the erroneous fixation of scale of pay by the extending benefit under the Career Advancement Scheme from a relevant date after the respondent

attained the age of superannuation. An argument is sought to be advanced at the behest of the learned Additional Government Pleader that the service book was not forwarded to the authority much before the attainment of superannuation and therefore, the discrepancy which was detected was immediately notified, however, the respondent took a plea that while awarding the second CAS, a meeting was held on 25.01.2008 in presence of an Additional Director of the Department and 'no objection' was raised therein while extending the second CAS benefit.

The entire gamut of dispute arose from the applicability of a Government order dated 24.10.2007 issued by the Joint Secretary of Department of Technical Education and training, Polytechnical Branch, Government of West Bengal wherein the benefit of Career Advancement Scheme was extended in favour of the lecturers in engineering and non-engineering subjects of the Government /Government sponsored Polytechnics of the State with effect from 01.01.1996 in the following manner. The authority have taken shelter under the aforesaid Government order and therefore, it is apposite to quote the same in *extenso* which runs thus:

Government of West Bengal

Deptt, Of Technical Education & Training

Polytechnic Branch

Bikash Bhawan, Salt Lake, Kol-91

No. 926-TET(Poly)/Sp-3/2005

Dated, Kol 24th Oct. 07

From: Smt. N. Basu

Joint Secy. To the Govt. of West Bengal

To: The Director of Technical Edn. & Training, W.B.

**Sub: Extension of benefits of Career Advancement Scheme in
favour**

**of the Lecturers of the Govt. & Govt. Sponsored Polytechnics
in West Bengal.**

**In continuation of this Deptt. C.O. No. 2101-TET (Poly)-5P-
18/98,**

**18/98, dated 11.10.99, the undersigned is directed by order of the
Governor to say that the Governor, in pursuance of the
recommendation of the All India Council for Technical Education as
contained in its communication no. 1-65/CD/NEC/98-99, dated
30.12.1999, has been pleased to accord approval to the extension of
the benefits of Career Advancement Scheme in favour of the lecturers
in Engineering and Non-Engineering subjects of the Govt./ govt.
Sponsored Polytechnics of the State with retrospective effect from
01.01.96 in the following manner:**

A. Lecturers in senior scale of rs. 10,000-325-15,200/-. Eligibility criteria for movement lecturers into lecturers in senior scale will be as follows:

- i) They shall have rendered 6 (six) years of continuous and satisfactory regular service with 2(two) years relaxation for those with pg. D. Degree and one year relaxation for those with M.Phil/M.E./M.Tech. Degree or equivalent Degrees;**
- ii) They shall have to be declared confirmed in the post;**
- iii) They shall have participated in one orientation course/induction training and one refresher course or industrial training of aggregate duration of 8 weeks or have undertaken other appropriate continuing education or training programme of comparable quality and duration as may be specified or approved by the AICTE. Those with Ph. D. Degree would be exempted from these course/training requirements;**

B. Lecturers in selection grade of Rs. 12000-420-18,300/-.

Eligibility criteria for movement of lecturers in senior scale to lecturers in selection grade scale will be as follows:

- i) They shall have put in service for 5 years as lecturers in senior scale;**
- ii) They have acquired Master's Degree with relaxation of those who have recruited prior to 01.01.96;**

iii) They have consistently satisfactory performance appraisal reports;

iv) They have to be selected through the Selection Committee;

Constituted in terms of this Deptt.'s G.O. No. 931-TET (Poly.)/5p-3/05, dated 06.07.05 read with G.O. No. 1015-TET (Poly.)/5p-2/05, dated 22.07.06.

2. The Governor has further been pleased to decide that the lecturers who have put in service for more than 6 years of service but less than 8 years of service as on 31.12.1995 and also more than 11 years of service but less than 16 years of service as on 31.12.1995 will also be entitled to the benefits as noted as 'A' and 'B' above as the case may be with effect from 01.01.1996 subject to fulfillment of other terms and conditions.

3. All orders granting the benefits of Career Advancement Scheme shall be vested with the Govt. in Technical Education & Training Department;

4. All previous orders issued by this Deptt. In this context shall stand cancelled forthwith.

5. This order issues with the concurrence of the Finance Deptt. Vide their U.O. No. 930-Gr. 'P' (Pay), dated 12.10.07.

6. The principal Accountant General (A&E), W.B. and others concerned are being informed.

Sd/-**Joint Secretary****No.926/1(13)-TET (Poly)****Dated, Kol. 24th October, 07**

It is manifest from the aforesaid Government order that the eligibility criteria for movement of lecturers into a lecturers in senior scale shall be given if they have rendered 6 years of continuous and satisfactory regular service with two years relaxation for those with post-doctoral degree and one year relaxation for those with M.Phil./M.E./M.Tech. degree or equivalent degrees. It is not in dispute that the petitioner was appointed as lecturer on 26.03.1996 but was awarded first CAS benefit after completing five years of continuous and satisfactory service for the reason that he had an M-Tech degree and the said clause provides one year relaxation. Similarly, the second CAS was awarded after the continuous and satisfactory service rendered for five years which is sought to be disputed by the appellant. According to the appellant, the lecturer must possess the M.Tech. degree as on 01.01.1996 to avail the relaxation of one year which is conspicuously absent in the instant case as the appellant obtained the M.Tech degree on 25.03.1996 and therefore, is not entitled to a relaxation of one year. Taking into the aforesaid facts as it stands we do not find any justification on the part of the appellant in attempting to recover the excess overdrawal amount from the retiral benefits of the appellant as the case comes within the second illustration laid down in a latter case of **Rafiq Masih (Whitewasher) (supra)**. However, the subsequent judgment of the Apex Court rendered in case of **Jagdev Singh (supra)** was cited for the proposition that the facts

which were unnoticed by the Single Bench stands in parity with the facts involved in the above noted decision.

In ***Jagdev Singh (supra)*** the Apex Court was considering the case relating to a judicial officer in Punjab and Haryana Judicial Service. The respondent therein was appointed as Civil Judge (Jr. Div.) on 16.07.1987 and was subsequently appointed as Additional Civil Judge on 28.08.1997 in the Judicial Service of the State. Subsequently, a Notification dated 28.09.2001 was issued where scale of pay was allowed under the Haryana Civil Service (Judicial Branch) and Haryana Superior Judicial Service Revised Pay Rules, 2001 which requires an undertaking to be given by such judicial officer in the event, any excess payment is made to be refunded to the Government either by way of adjustment from a future payment or otherwise. The said judicial officer furnished an undertaking at the time of availing the revised pay-scale and the selection grade was extended to him. Subsequently, the scale of pay was revised and the excess amount was sought to be recovered in terms of such undertaking. In the backdrop of the above, the Apex Court held that once the person has given an undertaking at the time of availing the scale of pay that the excess amount would be refunded and/or adjusted, the illustration given in ***Rafiq Masih (Whitewasher) (supra)*** does not come in aid to such officer in the following:

“11. The principle enunciated in Proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the

first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.”

Taking advantage of the aforesaid decision the appellant attempted to convince the Bench that the form of option was signed by the respondent which contains a declaration in the form of an undertaking that the excess amount paid on account of erroneous fixation of pay shall be refunded. The said form of option does not form part on the record of the Trial Court. It is sought to be relied before us which appears to have been signed on 04.10.2010 much after the extension of benefit whether first or second under the Career Advancement Scheme. The Notification dated 24.10.2007 does not contain any reference of an option to be exercised and it raises a doubt whether such an option forms part of such notification. Be that as it may even if the contention of the appellant is considered whether the fact parity can be brought to a decision rendered in **Jagdev Singh (supra)**. Admittedly, at the time of extending the benefit under the Career Advancement Scheme no undertaking was given but undertaking appears to have been given at the later point of time. Had there been any option left to the employee to choose whether he would avail the benefit of the Career Advancement Scheme and an undertaking is sought in the manner as done in case of **Jagdev Singh**, there is no hesitation on our part to apply the principles of the law laid down therein. A further undertaking is sought to be relied upon which also do not form part of the record in the Trial Court

that after attaining the age of superannuation was issued by the respondent himself to recover the excess amount from gratuity, the committed value of pension and the arrear pension.

An employee who has rendered services is expected to get the retiral dues admissible to the post as recognition of satisfactory services rendered by him. Withholding of the retiral benefits unreasonably and without any powers having reserved in the Relevant Rules put such employee to an unequal bargaining so as to succumb to the command of the authorities. It is not expected from the litigant to prevaricate it stands at the different stages of the adjudicatory process relying on certain documents without satisfying the legal parameters set forth in this regard. We find the disparity on fact with the **Jagdev Singh's** case and therefore, the ratio laid down therein cannot be applied herein. The decision is what is decided in the perspective of the facts and the circumstances involved in a given case. The ratio is to be culled out upon reading into the context thereof in which it is so decided as a little difference in fact or the additional fact may invite a diametrically opposite decision. Even in **Jagdev Singh's** case, the Apex Court have not doubted the illustrations given for the hardship suffered by an employee but on the facts involved therein held that it does not come within such illustration.

On the conspectus of the facts narrated hereinabove, we do not find that the appellant can take advantage of such undertaking having not given at the time of availing the benefit under the Career Advancement Scheme

and therefore, the judgment of the Single Bench cannot be said to be infirmed and/or illegal.

The appeal is thus dismissed.

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.

(Prasenjit Biswas, J.)