

**Calcutta High Court
In the Circuit Bench at Jalpaiguri
Appellate Jurisdiction**

W.P.A 1104 of 2022

**Debasish Moitra
-versus
The State of West Bengal & Ors.**

**Mr. Partha Sarkar,
Mr. Abhijit Basu,
Mr. Debajit Kundu.
...For the Petitioner.**

**Mr. Momenur Rahman,
Mr. Hirak Barman.
...For the State.**

The petitioner is serving in the Dhupguri Municipality. He is aggrieved by the direction made in the communication made by the Director of Local Bodies to the Executive Officer of the Municipality on 10th March, 2021 requesting the Municipality to recast his pay and to recover the amount overdrawn by him from subsequent salaries.

The petitioner was appointed in the post of Cashier in the year 2003. His service was approved by the Director of Local Bodies in the year 2003. He was promoted to the post of Head Clerk in the year 2019. His promotion was approved by the Director of Local Bodies in August 2019. On promotion, the petitioner received higher scale of pay. The petitioner has also been given the benefit under the Career Advancement Scheme relying upon the experience gained by him in service. The pay schedule of the petitioner is reflected in the official portal maintained by the Municipality.

By the impugned communication dated 10th March, 2021, the Director of Local Bodies requested the Municipality to recast the scale of pay of the petitioner on the ground that there is no sanctioned post of senior Clerk/UDC in the Municipality. Head Clerk/Cashier/Accountant draws their pay and allowance in the scale of pay of Rs.300-685 subsequently revised to Rs.3350-6325/- under ROPA 1998.

According to the Director of Local Bodies, the pay of the petitioner in the post of Cashier should be fixed in the scale of Rs.3350-6325/- instead of Rs.4000-8850/- and no benefit shall be allowed for promotion to the post of Head Clerk.

The petitioner submits that there is a sanctioned post of Head Clerk in the Municipality. The petitioner has rendered service in the post of Head Clerk from the year 2019 and it is improper for the Director of Local Bodies to direct the Municipality to recast his pay and not to give him the benefit of promotion.

The petitioner relies upon the judgment delivered by the Hon'ble Supreme Court in the matter of ***State of Punjab & Ors. -vs- Rafiq Masih (White Washer) & Ors.*** reported in ***(2015) 4 SCC 334*** especially paragraph 18.

The petitioner also refers to the judgment delivered by the Hon'ble Supreme Court in the matter of ***Thomas Daniel -vs- State of Kerala*** reported in ***2022 (3) CHN (SC) 118*** in support of the submission that recovery from the petitioner at this stage is impermissible in law.

Learned advocate appearing on behalf of the Municipality supports the case of the petitioner. It has been submitted that the Municipality has already written to the Director of Local Bodies in August 2021 to reconsider the case of the petitioner as a special one and to protect his pay in the post of initial appointment of Cashier.

A further reminder was given by the Municipality to the Director of Local Bodies by letter dated 26th October, 2021. The Municipality admits that the petitioner was appointed in the post of Cashier and thereafter promoted to the post of Head Clerk in the sanctioned post.

Learned advocate appearing on behalf of the State respondents and particularly the Director of Local Bodies submits that if the initial pay of the petitioner was wrongly allowed, the petitioner would be liable to refund the overdrawn amount.

It has also been submitted that there is no documents in support of the submission made by the petitioner and the Municipality that there is a sanctioned post of Head Clerk in the Municipality.

I have heard and considered the submissions made on behalf of all the parties.

The document showing creation of posts in the Dhupguri Municipality by the Director of Local Bodies dated 3rd/6th May, 2022 has been placed before this Court. It appears therefrom that there is one post sanctioned for Head Clerk. The petitioner is serving in

the post of Cashier from the year 2003 and, thereafter, from August 2019 in the post of Head Clerk.

The Municipality granted the scale of pay to the petitioner from the initial date of his appointment. The Municipality has already written to the Director of Local Bodies to reconsider the case of the petitioner for protection of his pay in his initial post of Cashier and, thereafter, in the post of Head Clerk.

The Hon'ble Supreme Court in Rafiq Masih (supra) has laid down that recovery in cases where an employee has wrongly 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, is impermissible.

The Court also held that 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 is not permissible.

The same principle has been reiterated by the Hon'ble Supreme Court in the matter of Thomas Daniel (supra).

It appears that in the instant case, the Director of Local Bodies has sought recovery of the excess amount paid to the petitioner from his initial date of joining in the post of Cashier in the year 2003. If that be so, the same will certainly be contrary to the direction passed by the Hon'ble Supreme Court in the matter of Rafiq Masih (Supra).

At the same time, the petitioner has been promoted to work in the higher post of Head Clerk from

2019. After being allowed to discharge duties in the higher post, it will be impermissible to recover the amount paid to him for discharging service in the higher post.

As it appears that the Municipality has already approached the Director of Local Bodies for reconsideration of the case in favour of the petitioner, accordingly, the Director of Local Bodies is directed to reconsider the recasting of pay of the petitioner in light of the decisions laid down by the Hon'ble Supreme Court in the matter of Rafiq Masih (supra) and Thomas Daniel (supra).

A decision shall be taken in the matter at the earliest but positively within a period of eight weeks from the date of communication of this order.

An opportunity of hearing shall be given to the petitioner and the Municipality prior to passing a final order in the matter.

The impugned order of the Director of Local Bodies dated 10th March, 2021 and 4th April, 2022 annexed at pages 42 and 50 of the writ petition shall be kept in abeyance till a fresh order is passed by the Director of Local Bodies.

The writ petition stands disposed of.

Urgent certified photo copy of this order, if applied for, be supplied to the parties expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)