

**IN THE WEST BENGAL ADMINISTRATIVE TRIBUNAL
BIKASH BHAVAN, SALT LAKE CITY
K O L K A T A – 7 0 0 0 9 1**

Present :-

Hon'ble Justice Ranjit Kumar Bag,
Judicial Member

-AND-

Hon'ble Dr. Subesh Kumar Das,
Administrative Member

J U D G M E N T

-of-

**Case No. : O.A. 401 of 2019 : Debtosh Bose
[MA-227 of 2019]**

..... Applicant.

-Versus-

State of West Bengal & Others.

..... Respondents.

For the Applicant:-

**Mr. S. Ghosh,
Mr. R.K. Mondal,**
Learned Advocates.

For the State Respondents:-

Mr. M.N. Roy,
Learned Advocate.

For the AG (A&E), WB :-

Mr. B. Mitra,
Departmental Representative.

Argument concluded on : February 20, 2020.

Judgment delivered on : July 08, 2020.

JUDGMENT

The applicant in OA-401 of 2019 and MA-227 of 2019 arising out of OA-401 of 2019 is a retired State Government employee. He was appointed as a "Tracer" on April 26, 1965 and thereafter as "Draftsman" on April 17, 1969 in the Irrigation & Waterways Directorate, Government of West Bengal. On October 07, 1974, the applicant was appointed to the post of Sub-Assistant Engineer (SAE) in the same

Directorate. In the post of Draftsman, he was initially drawing pay @ Rs.150/- pm and subsequently the same was revised to Rs.360/- in the scale of pay of Rs.300-600/- and he was drawing the same pay prior to his appointment in the post of Sub-Assistant Engineer. In the post of Sub-Assistant Engineer, his pay was fixed at Rs.370/- per month with effect from October 07, 1974 in the scale of pay of Rs.300-10-420-15-600/- vide order no. 824-IE dated June 1, 1984 in terms of Rule 42(1)(i) of the WBSR, Part-I. The pay of the applicant was ultimately fixed at Rs.610/- in the revised scale of pay of Rs.425-15-470-20-670-25-820-30-910-35-1050/- w.e.f. April 1, 1981. The applicant was allowed to move to the next higher scale of pay as he completed 10 years of continuous and satisfactory services without getting any promotion vide order dated September 18, 1991. He was promoted to the post of Assistant Engineer w.e.f. September 9, 1997 in the scale of pay of Rs.8000-275-13500/- and his pay was fixed at Rs.10,200/- in terms of Rule 42(1)(i) of the WBSR, Part-I.

2. The applicant retired from service as Assistant Engineer on February 28, 2003. The office of the Accountant General (A&E), West Bengal vide its letter dated January 7, 2004 held that the pay of the applicant should have been fixed at Rs.590/- on April 1, 1981 in place of Rs.610/- and accordingly asked the respondent authority to re-fix the pay of the applicant and to resubmit the pension papers. The Executive Engineer, Salt Lake Construction Division vide Memo. No. 450(3) dated February 17, 2004 and Memo. No. 2523(3) dated November 30, 2004 re-fixed the pay of the applicant as per observation of the Accountant General (A&E), West Bengal and ultimately vide Memo. No. 2314 dated October 21, 2005 calculated a sum of Rs.86,565/- as overdrawn amount and asked the office of the Accountant General (A&E), West Bengal to deduct the same from the gratuity of the applicant. The office of the Accountant General (A&E), West Bengal issued the Gratuity Payment Order on January 12, 2006 by which overdrawal of pay and allowances of Rs.86,565/- was deducted from the amount of gratuity.

3. The applicant has prayed for setting aside the communication of the office of the Accountant General (A&E), West Bengal dated January 7, 2004 and the orders issued by the Executive Engineer, Salt Lake Construction Division, Urban Development Department, West Bengal dated November 30, 2004 and October 21, 2005 whereby pay of the applicant was re-fixed for the period from April 1, 1981 to February 28, 2003. He has prayed for direction upon the state respondents to re-fix

his pay at Rs.610/- pm as on April 1, 1981 after setting aside the orders mentioned above. The applicant has also prayed for direction upon the state respondents to refund the alleged overdrawn amount of Rs.86,565/-, which was deducted from his gratuity after his retirement from service.

4. In MA-227 of 2019 arising out of OA-401 of 2019, the applicant has prayed for condonation of the delay of 15 years in filing the OA-401 of 2019.

5. Appearing on behalf of the applicant Mr. S. Ghosh, Learned Counsel submitted that the Tribunal granted liberty for filing application under section 21(3) of the Administrative Tribunals Act, 1985 for condoning the delay in filing the original application being OA-401 of 2019. The delay in filing the original application should be allowed owing to his serious illness and serious illness of his family members. Learned Counsel further submitted that the Hon'ble Supreme Court in the case of "M.R. Gupta v. Union of India and Others" reported in (1995) 5 SCC 628 has observed that the principles of continuing wrong and recurring wrongs would give rise to recurring cause of action each time when the incumbent is paid salary or pension which was not computed in accordance with rules.

6. Learned Counsel for the applicant submitted that as per order no. 825-IE dated June 1, 1984, the pay of the applicant was fixed at Rs.610/- w.e.f. April 1, 1981 when the applicant was appointed as Sub-Assistant Engineer from his old post of Draftsman in the same Directorate. The pay of the applicant was fixed at a stage next higher than the pay drawn by him as Draftsman in the identical scale of pay w.e.f. October 7, 1974 in terms of Rule 42(1)(i) of the WBSR, Part-I as his appointment in the post of SAE from the post of Draftsman involved responsibilities of greater importance than those attached to his old post of Draftsman. The respondent authorities failed to consider the fact that the applicant was serving in the post of Draftsman and consequent upon his appointment in the post of SAE in the same scale of pay, his pay should be fixed at a stage above the pay of the previous post for discharging higher responsibility and as a result the order for fixation of pay at higher stage issued on June 1, 1984 was correct. The office of the Accountant General (A&E), West Bengal was wrong in proposing fixation of his pay at Rs.590/- pm on April 1, 1981 in place of Rs. 610/- pm and the Executive Engineer, Sale Lake Construction Division, Urban Development Department was wrong in fixing pay of the applicant at Rs.590/- pm in place of Rs.610/- pm on April 1, 1981.

7. Appearing on behalf of the state respondents, Mr. M.N. Roy, Learned Counsel submitted that the application under section 21(3) of the Administrative Tribunals Act, 1985 for condoning the delay of 15 years should be dismissed. The ratio of the judgment of the Apex Court in the case of "M.R. Gupta v. Union of India and Others" (supra) cannot be applied in this case as the applicant has already retired and cannot claim that there has been continuing wrong after his retirement from the service.

8. Learned Counsel for the state respondents also submitted that the pay of the applicant was wrongly fixed w.e.f. April 1, 1981 when the applicant was appointed as SAE vide order dated June 1, 1984. This was corrected vide order bearing Memo. no. 450 dated February 17, 2004. The appointment of the applicant was fresh appointment and it was not a case of promotion from the post of Draftsman to Sub-Assistant Engineer and the applicant is not entitled to get the benefits of Rule 42 (1) (i) of the WBSR, Part-I.

9. Having heard Learned Counsel for both the parties, we would like to first examine whether the MA-227 of 2019 being application under section 21(3) of the Administrative Tribunals Act, 1985 should be allowed or not. Learned Counsel for the applicant has submitted that the ratio of the judgment of the Hon'ble Supreme Court in "M.R. Gupta v. Union of India and Others" (supra) is applicable in this case. In this referred case, a Railway employee submitted an original application challenging pay fixation after lapse of 11 years since the initial pay fixation. The application was dismissed by the Administrative Tribunal as time barred without going into merits of applicant's claim for proper pay fixation. Hon'ble Apex Court in this referred case held that the application for proper pay fixation was not time barred as it was a case of continuing wrong giving rise to a recurring cause of action every month on the occasion of payment of salary although the applicant's claim for consequential arrears of salary would be subject to the law of limitation. An extract of the judgment is placed below:

"5. Having heard both sides, we are satisfied that the Tribunal has missed the real point and overlooked the crux of the matter. The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of

action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc. would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1-8-1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation the application cannot be treated as time barred since it is based on a recurring cause of action."

In our view, the ratio of the referred judgment is applicable in the present case. Accordingly, the application MA-227 of 2019 is allowed with the condition that if the applicant's claim for re-fixation of pay w.e.f. April 1, 1981 succeeds then there will be a revision of his pension, but there would be no payment of any arrear pension. In view of such findings, we would now like to examine claims of the applicant in the original application.

10. We now examine whether the prayer of the applicant to re-fix his pay @ Rs.610/- pm as on April 1, 1981 should be allowed. His pay was fixed at Rs.370/- per month in the scale of pay of Rs.300-10-420-15-600/- vide order dated June 1, 1984 in terms of Rule 42 (1) (i) of WBSR, Part-I and it was fixed at Rs.610/- per month in the revised scale of pay of Rs.425-15-470-20-670-25-820-30-910-35-

1050/- w.e.f. April 1, 1981. The pay of the applicant was re-fixed at Rs.590/- on April 1, 1981 in place of Rs.610/- vide Memo. No. 2523(3) dated November 30, 2004 on the ground that he was not entitled to pay fixation in terms of Rule 42 (1) (i) of WBSR, Part-I. The relevant provision of Rule 42 (1) (i) of WBSR, Part-I is reproduced below:

“42. The initial substantive pay of the Government employee who is appointed substantively to a post on a time-scale of pay is regulated as follows:

(1) If he holds a lien on a permanent post, other than a tenure post, or would hold a lien on such a post had his lien not been suspended

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(i) when appointed to the new post involves the assumption of duties or responsibilities of greater importance (as interpreted for the purposes of rule 54) than those attaching to such permanent post, he will draw as initial pay the stage of the time-scale next above his substantive pay in respect of the old post;”

11. It appears that when appointment of a Government employee to a new post involves the assumption of duties or responsibilities of greater importance than those in the old permanent post, he will draw initial pay at the stage of the time-scale next above his substantive pay in respect of the old post. In the instant case, the applicant was appointed in the post of Sub-Assistant Engineer on October 7, 1974 on fresh appointment. His appointment in the post of Sub-Assistant Engineer was a fresh appointment and under such circumstances, he is not entitled to get benefit of Rule 42 (1) (i) of WBSR, Part-I. In view of such findings, we are unable to pass any order in favour of the applicant for re-fixation of his pay or pension as prayed for.

12. The applicant has also prayed for direction upon the respondents for refund of an amount of Rs.86,565/- which was recovered from the retiring Gratuity of the applicant on the ground of excess payment of pay and allowances due to wrong fixation of pay. It appears from the Gratuity Payment Order dated January 12, 2006 that the applicant was entitled to receive Rs. 2,50,000/- as retiring Gratuity and an amount of Rs.86,565/- was deducted from the amount of Gratuity on the ground of excess payment of salary due to wrong fixation of pay. However, this wrong fixation of pay was detected and order of recovery of excess payment from retiring gratuity was made after retirement of the applicant from service. The Hon'ble Supreme

Court has summarised the following situations in paragraph 18 of the judgment of “State of Punjab v Rafiq Masih” reported in (2015) 4 SCC 334, when recovery of excess payment by the state respondents would not be permissible 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 5 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.”

13. We have laid down in the case of “Bireswar Dey v State of West Bengal & Ors.” (OA-1045 of 2014 decided on August 20, 2018), that state respondents cannot invoke the provisions of Rule 140(2) of the West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971 for recovery of excess payment of pay and allowances from the retiring Gratuity of the Government employee, particularly when the recovery of over payment from retiring gratuity is done after prolonged period from the date on which the said recovery would have been effected and thereby causing hardship to the applicant to such an extent, which will outweigh equitable balance of the right of the Government to recover the same.

14. By following the decision of the Hon’ble Supreme Court in the case of “State of Punjab v Rafiq Masih” (Supra) and the decision of “Bireswar Dey v State of West Bengal & Ors.” (Supra), we are of the view that the state respondents are bound to refund an amount of Rs.86,565/- to the applicant. On consideration of the materials

on record, we find that the applicant enjoyed a sum of Rs. 86,565/- while he was in service in spite of the fact that the applicant was not entitled to the said amount of money and as such, we would like to hold that the applicant is not entitled to get any interest on the said amount of money.

15. In view of our above findings, the respondent no. 5, the Executive Engineer, Salt Lake Construction Division, Department of Urban Development & Municipal Affairs is directed to refund Rs.86,565/- to the applicant within a period of 12 (twelve) weeks from the date of communication of the order.

16. Both the Original Application and the Miscellaneous Application are, thus, **disposed of.**

17. The delay in delivery of judgment is due to intervention of the lock down of the entire country to prevent outbreak of Covid-19 and consequential non-functioning of the Tribunal.

18. The urgent xerox certified copy of the judgment and order may be supplied to the parties on priority basis, if applied for, subject to compliance of necessary formalities.

(Dr. Subesh Kumar Das)
MEMBER(A)

(Ranjit Kumar Bag)
MEMBER (J).