

**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. 1045 of 2014 :
BIRESWAR DEY – V. STATE OF WEST BENGAL & ORS.

Case No. : O.A. 1046 of 2014 :
JAYPRAKASH MUDI – V. STATE OF WEST BENGAL & ORS.

Case No. : O.A. 1047 of 2014 :
NARENDRA NATH MAHATA – V. STATE OF WEST BENGAL &
ORS.

For the Applicants (in all applications) :-

Mrs. S. Mitra,
Learned Advocate.

For the State Respondents :-

Mr. S. Bhattacharyya,
Mr. A. Dutta,
Departmental Representatives.

For A.G. (A & E), W.B. :

Mr. B. Mitra,
Departmental Representative.

Judgment delivered on : August 20, 2018.

JUDGEMENT

The common question involved in three (3) original applications no. 1045 of 2014, 1046 of 2014 and 1047 of 2014 is whether the respondents are justified in deducting Rs.67,008/- from the retiring gratuity of each of the petitioners long after their retirement. Accordingly, all three (3) original applications are heard together and disposed of by this common judgment.

2. The petitioner of OA No. 1045 of 2014 retired on November 30, 2008 while he was working in the post of Upper Division Clerk (UDC) under the respondent No. 3, District Land and Land Reforms Officer, Paschim Medinipur. The petitioner of OA No. 1046 of 2014 retired on October 31, 2009 while he was working in the post of Upper Division Clerk (UDC) under the respondent No. 3, District Land and Land Reforms Officer, Paschim Medinipur. The petitioner of OA No. 1047 of 2014 retired on May 31, 2009 while he was working in the post of Upper Division Clerk (UDC) under the respondent No. 3, District Land and Land Reforms Officer, Paschim Medinipur. The Accounts Officer of the Office of Accountant General (A & E), West Bengal detected overdrawal of pay and allowances by the petitioners during the period from July 1, 1989 to June 30, 2001 at the time of calculation of retiring gratuity of the petitioners. By virtue of the authority given by the Sub-Divisional Land and Land Reforms Officer, Jhargram in the district of Paschim Medinipur, an amount of Rs.67,008/- was deducted from the retiring gratuity of each of the petitioners after their retirement. The grievance of the petitioners is that overdrawal of pay and allowances, if any, done by the petitioners during the period from July 1, 1989 to June 30, 2001 cannot be due to any fraud or misrepresentation on the part of the petitioners. Accordingly, the petitioners have prayed for direction upon the respondents to refund Rs.67,008/- to each of the petitioners as the said amount was illegally deducted from the retiring gratuity of the petitioners without any fault on the part of the petitioners during the career of their service.

3. The respondents No. 3 and 4 have contested the claim of the petitioners by filing reply wherefrom it appears that the State respondents

have authority to deduct over payment of pay and allowances from retiring gratuity as per provisions of Rule 140 (2) of West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971 (hereinafter referred to as “DCRB Rules of 1971”). The stand taken by the State respondents is that the financial benefit given to the petitioners for their initial appointment as “Junch Mohurrirs” to Grade I scale was withdrawn w.e.f. July 1, 1989 due to redesignation of their post as Lower Division Clerk (LDC) under G.O. No. 836-GB-III dated February 12, 1999 issued by the Assistant Secretary to the Government of West Bengal, Department of Land and Land Reforms (Annexure R-1 to the reply of respondents No. 3 and 4 in OA No. 1047 of 2014).

4. With the above factual matrix, Mrs. S. Mitra, Learned Counsel appearing on behalf of the petitioners contends that the State respondents have no authority under the law to deduct any amount from retiring gratuity after retirement of the petitioners from the service. She has relied upon (i) “Col. B J Akkara V. Government of India and Others” reported in (2006) 11 SCC 709, (ii) “Syed Abdul Qadir V. State of Bihar” reported in (2009) 3 SCC 475, (iii) “Chandi Prasad Uniyal V. State of Uttarakhand” reported in (2012) 8 SCC 417 and (iv) “State of Punjab V. Rafiq Masih” reported in (2015) 4 SCC 334 in support of her above contention.

5. On the other hand, Mr. S. Bhattacharyya, the Departmental Representative of respondents No. 3 and 4 contends that the State respondents can always deduct over payment from retiring gratuity of any Government employee when the fact of over payment is within the knowledge of the said Government employee. He further submits that Rule 140 (2) of the DCRB Rules of 1971 empowers the State respondents to recover over payment of pay and allowances from retiring gratuity of any Government employee before sanction of pension. He has relied on (i) “State of West Bengal V. Subal Chandra Das” reported in (1996) 7 SCC 191, and (ii) “State of Punjab V. Rafiq Masih” reported in (2014) 8 SCC 883 in support of his above contention.

6. The question which calls for determination is whether the State respondents are justified in deducting Rs.67,008/- from retiring gratuity of each of the petitioners after their retirement. For the purpose of deciding the issue involved in these original applications, we would like to consider the decisions of the Hon'ble Supreme Court of India cited on behalf of both the parties.

7. In "Col. B J Akkara V. Government of India and Others" reported in (2006) 11 SCC 709, two Judge Bench of the Hon'ble Supreme Court dealt with the issue of recovery of excess payment of pension. In this reported case, the Army Medical Officers used to get more pay and pension than the pay and pension of Non-Medical Officers of the same rank due to availing of Non-Practising Allowance (NPA) which was treated as pay. This disparity in pension was removed by stepping up pension of Non-Medical Officers by Circular dated June 7, 1999. The excess payment of pension was made due to wrong interpretation of the Circular dated June 7, 1999, but the same was clarified subsequently by issuing another Circular dated September 11, 2001. The question which arose before the Apex Court is whether the excess payment made on account of wrong interpretation of the Circular dated June 7, 1999 will be recovered. It is held by the Hon'ble Supreme Court that the respondents will not recover excess payment of pension disbursed due to wrong interpretation of Circular dated June 7, 1999 during the period from June 7, 1999 till September 11, 2001. However, it is also held that the Union of India will be entitled to recover the excess payment of pension after September 11, 2001 when the clarificatory Circular was issued and the officers were put on notice with regard to wrong calculation made earlier. Relying on "Sahib Ram V. State of Haryana" reported in (1995) Supp (1) SCC 18, "Shyam Babu Verma V. Union of India" reported in (1994) 2 SCC 521, "Union of India V. M. Bhaskar" reported in (1996) 4 SCC 416" and V. Gangaram V. Regional Joint Director" reported in (1997) 6 SCC 139, the Apex Court has granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled :

(i) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

(ii) The excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance which is subsequently found to be erroneous.

8. In “Syed Abdul Qadir V. State of Bihar and Others” reported in (2009) 3 SCC 475, three Judge Bench of the Hon’ble Supreme Court dealt with the issue of refund of excess payment recovered from the teachers of Government schools. In this reported case, the State of Bihar issued Circular for fixation of pay of Assistant Teachers on promotion in nationalised schools under FR 22C, which was not in existence when the Circular was issued. The Central Government issued Notification dated August 30, 1989 by which FR 22(1)(a)(1) and 22(1)(a)(2) were substituted in place of FR 22C. While benefit of additional increment was available under FR 22C in every case of promotion, the benefit of additional increment was not made available under FR 22(1)(a)(2) in cases of promotion which did not involve greater responsibility. The benefit of additional increment was made available under FR 22(1)(a)(1), if promotion involved duties and responsibilities of greater importance. The Hon’ble Supreme Court held that pay fixation of teachers of nationalised schools on promotion will be done according to FR 22(1)(a)(2). The excess payment made to the teachers was the result of wrong interpretation of the rule that was applicable to them, for which the teachers cannot be held responsible. In view of the fact that majority of the beneficiaries have either retired or on the verge of retirement, the Apex Court prohibited the State of Bihar from making recovery of excess payment made to the teachers. The Apex Court also directed for refund of excess amount recovered from teachers concerned. It is relevant to quote paragraph 58 of the judgment, which is as follows :

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

9. In “Chandi Prasad Uniyal V. State of Uttarakhand” reported in (2012) 8 SCC 417, the question that arose before two Judge Bench of the Hon’ble Supreme Court is whether over payment of amount due to wrong fixation of pay can be recovered from the recipients who were serving as teachers. By upholding the order of recovery of excess payment, the Hon’ble Supreme Court passed order for recovery of excess payment from the salary in 12 equal monthly instalments. It is held by the Supreme Court in paragraph 16 of the Judgment that there was a stipulation in pay fixation order that in the condition of irregular/wrong pay fixation, the Institution in which the employees were working, would be responsible for recovery of the amount received in excess from the salary/pension. It is relevant to quote paragraphs 13 and 14 of the Judgment, which are as follows :

“13. We are not convinced that this Court in various Judgments referred to hereinabove has laid down any provision of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinabove turned on the peculiar facts and circumstances of those cases either because the recipients had retired or were on the verge of retirement or were occupying lower post in the administrative hierarchy.

14..... Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardship, 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.”

10. In “State of Punjab V. Rafiq Masih” reported in (2014) 8 SCC 883, the issue pertaining to recovery of excess payment from the pensionary benefit of the employee was referred to three Judge Bench by the Hon’ble Chief Justice of India due to apparent difference of opinion expressed on the one hand in “Shyam Babu Verma V. Union of India” reported in (1994) 2 SCC 521 and “Sahib Ram V. State of Haryana” reported in 1995 Supp (1)

SCC 18 and on the other hand, in “Chndi Prasad Uniyal V. State of Uttarakhand” reported in (2012) 8 SCC 417.

11. In “Shyam Babu Verma” (supra), the Hon’ble Supreme Court held that the higher scale of pay was given for no fault of the employees and the same was detected after 10 years and as such recovery of excess payment was not justified. In “Sahib Ram’s” case (supra), the employee was granted revised scale of pay, although he did not possess required educational qualification, which was subsequently detected and the Supreme Court directed not to recover the excess payment. It is held by the Hon’ble Supreme Court in paragraph 8 of the Judgment that the directions in the above two cases were issued in exercise of the powers of the Court under Article 142 of the Constitution of India, but in the subsequent decision of “Chandi Prasad Uniyal” (supra), the Hon’ble Supreme Court laid down the law under Article 136 of the Constitution of India.

12. In “Chandi Prasad Uniyal” (supra), the Hon’ble Supreme Court held that the excess payment made to the employee can be recovered when the excess payment made due to mistake or negligence of the employer in making wrong fixation of pay is detected at a latter date. Relying on the previous decisions of the Hon’ble Supreme Court, it is held in paragraph 12 of the Judgment of “Rafiq Masih” (supra) that *“the directions issued under Article 142 (of the Constitution of India) do not constitute a binding precedent unlike Article 141 of the Constitution of India. They are directions issued to do proper justice and exercise of such power, cannot be considered as law laid down by the Supreme Court under Article 141 of the Constitution of India..... The directions of the Court under Article 142 of the Constitution, while moulding the relief, that relax the application of law or exempt the case in hand from the rigour of the law in view of the particular facts and circumstances do not comprise the ratio decidendi and, therefore, lose its basic premise of making it a binding precedent.”*

13. Accordingly, the Hon’ble Supreme Court did not find any conflict in the views expressed in the first set of Judgments on the one hand and the latter Judgment on the other hand. The reference was, thus, returned with the view that there was no conflict of decision.

14. Ultimately, in “State of Punjab V. Rafiq Masih” reported in (2015) 4 SCC 334, two Judge Bench of the Hon’ble Supreme Court was called upon to decide whether all the employees against whom order of recovery is made for excess payment should be exempted from reimbursement of the same to the employer. Relying on “State of Punjab V. Rafiq Masih” reported in (2014) 8 SCC 883, “Chandi Prasad Uniyal V. State of Uttarakhand” reported in (2012) 8 SCC 417, “Syed Abdul Qadir V. State of Bihar” reported in (2009) 3 SCC 475 and “Col. B J Akkara V. Government of India” reported in (2006) 11 SCC 709, two Judge Bench of the Hon’ble Supreme Court dealt with facts of the case where the employees received monetary benefits in excess of their entitlement due to mistake committed by the authority in determining emoluments. The employees were not guilty of furnishing any incorrect information which led the competent authority to commit the mistake of giving higher payment to the employees. It is held by the Hon’ble Supreme Court that recovery of monetary benefits wrongly extended to the employees can be interfered with, where such recovery would result in a hardship of a nature, which would far outweigh the equitable balance of the employer’s right to recover. The Hon’ble Supreme Court has summarised the following situations in paragraph 18 of the Judgment, wherein recovery of excess payment by the employer 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.”*

15. We do not find any relevance of the case “State of West Bengal and Others V. Subal Chandra Das” reported in (1996) 7 SCC 191, wherein the Hon’ble Supreme Court dealt with the issue of fixation of higher pay by giving protection of the same as special pay due to merger of feeder post and promotional post by formation of a single cadre. This case is not relevant for deciding the issue involved in the present original applications.

16. By following the proposition of law laid down by the Hon’ble Supreme Court of India in the decisions referred to hereinabove, we find that the Tribunal can interfere with the order of recovery of monetary benefits wrongly extended to the Government employee, where such recovery would result in hardship of a nature, which would far outweigh the equitable balance of the right of the employer to recover. By virtue of the above decisions of the Apex Court, the recovery of excess payment by the employer is not permissible after retirement of the Government employee or when the employee is due to retire within one year of the order of recovery, irrespective of the service to which the employee belongs. In the instant case, the petitioners retired as UDC either in the last part of the year 2008 or in the year 2009. The stand taken by the State respondents is that the petitioners got financial benefit for their initial appointment as “Junch Mohurrirs”, which was subsequently withdrawn w.e.f. July 1, 1989 due to redesignation of their post as LDC under G.O. issued on February 12, 1999 by the Department of Land and Land Reforms, Government of West Bengal. The petitioners were in service for nine (9) to ten (10) years after issuance of G.O. dated February 12, 1999 by the Department of Land and Land Reforms, Government of West Bengal. The pay of the petitioners could have been refixed on the basis of the said G.O. dated December 12, 1999 by the Controlling Officer or the Appointing Authority of the petitioners after giving the petitioners an opportunity of hearing, but the said procedure was not adopted for long nine to ten years after the date of issuance of the said G.O. and they were allowed to retire from service. Can the State respondents resort to the procedure laid down in Rule 140 of DCRB Rules of 1971 for deduction of the amount of over payment from retiring gratuity of the petitioners after long lapse of nine to ten years ? It is

relevant to quote the provisions of Rule 140 of the DCRB Rules, which is as follows :

“R.140. Recovery of Government dues - (1) It shall be the duty of every retiring Government servant to clear all Government dues before the date of his retirement.

(2) Where a retiring Government servant does not clear Government dues and these are ascertainable an equivalent cash deposit may be taken from him, or, out of the gratuity payable to him an amount equal to that recoverable on account of ascertainable Government dues, such as, balance of house building or conveyance advance, arrears of rent and other charges pertaining to occupation of Government accommodation, over payment of pay and allowances and arrears of Income Tax deductible at source under the Income Tax Act, 1961, shall be deducted therefrom.”

17. On perusal of Rule 140(2) of the DCRB Rules of 1971, we find that over payment of pay and allowances may be recovered from the retiring gratuity of Government employee. The above rule for recovery of over payment of pay and allowances from retiring gratuity of the Government employee must be construed and interpreted in the light of principle of law laid down by the Hon’ble Supreme Court of India in the decisions referred to hereinabove. By following the mandate of the Hon’ble Supreme Court in “State of Punjab V. Rafiq Masih” (supra), we are of the view that the State respondents cannot be invoke the provisions of Rule 140 (2) of the DCRB Rules of 1971 for recovery of excess payment of pay and allowances from the retiring gratuity of the petitioners for the following reasons :

(i) Over payment was received by the petitioners with the authority of law and without having any role of the petitioners in receiving the amount in excess of their pay and allowances,

(ii) The Appointing Authority/Controlling Officer of the petitioners did not re-fix the pay to which the petitioners were entitled on the basis of G.O. dated February 12, 1999 during long nine to ten years of service before their superannuation,

(iii) The recovery of over payment from retiring gratuity after almost nine to ten years from the date on which the said recovery would have been effected will definitely cause hardship to the petitioners to such an extent, which will

outweigh equitable balance of the right of the Government to recover the same.

18. By following the decision of the Hon'ble Supreme Court in "State of Punjab V. Rafiq Masih" (supra), we are constrained to hold that the State respondents have no authority to recover Rs.67,008/- from retiring gratuity of the petitioners. The said amount of money which have already been deducted from the retiring gratuity of the petitioners must be refunded to the petitioners along with interest during the period for which the said amount was illegally withheld. By taking into account the interest paid on the amount of GPF and PPF and interest paid on long term fixed deposit by the nationalized bank, we would like to hold that the rate of interest should be fixed at 8% p.a. On consideration of the date of retirement of the petitioner of OA 1045 of 2014 on November 30, 2008, petitioner of OA 1046 of 2014 on October 31, 2009 and the petitioner of OA 1047 of 2014 on May 31, 2009, the period for calculation of interest will be from the date of payment of gratuity after deduction of the said amount till the last date of the month preceeding the month on which the said amount will be actually refunded to the respective petitioners.

19. Accordingly, Respondent no. 3, District Land and Land Reforms Officer, Paschim Medinipur is directed to refund the amount of Rs.67,008/- to each of the petitioners along with interest on the said amount of money @8% p.a. during the period from the date of payment of gratuity after deduction of the said amount till the month preceeding the month on which payment will be actually made to each of the petitioners within a period of 12 weeks from the date of communication of this order. With the above direction, all three original applications are disposed of.

20. Let urgent Xerox certified copy of the judgment and order be supplied to the parties, if applied for, on priority basis after observance of all necessary formalities.

(Dr. Subesh Kumar Das)
MEMBER(A)

(Ranjit Kumar Bag)
MEMBER (J)

