(2009) 05 CAL CK 0014

Calcutta High Court

Case No: M.A.T. No. 781 of 2008

The State of West Bengal and Others		APPELLANT
	Vs	
Sri Harekrishna Sardar and Another		RESPONDENT

Date of Decision: May 11, 2009

Hon'ble Judges: Surinder Singh Nijjar, C.J; Biswanath Somadder, J

Bench: Division Bench

Advocate: Kamal Lal Samanta, for the Appellant; Subir Sanyal, Sakti Pada Jana, Subhrangsu Panda, for the Respondent

Final Decision: Allowed

Judgement

The Judgment of the Court was as follows:

Re: An appln. for Condonation of delay (CAN 608/09)

1. Considering the averments made in the application for condonation of delay, we are satisfied that sufficient grounds have been shown for condoning the delay of 17 days in preferring the appeal. Accordingly the delay is condoned and the application for condonation of delay is allowed.

Re:- An appln. for Stay (CAN 650/09)

2. This appeal has been filed by the State of West Bengal against the order passed by the learned Single Judge on 18th of July, 2008 whereby directions had been issued for refund of an amount of Rs. 94,342/- which had been deducted from the gratuity of the petitioner after retirement.

3. The writ petitioner was appointed as assistant teacher on 1.1.1967. His appointment was duly approved on 29th of July, 1974. His basic pay was fixed at Rs. 300/- on 1.1.1967. Subsequently, with effect from 3rd April, 1981 the basic pay was revised by virtue of Government Order No. 372-Edn.(B) dated 31th of July, 1981

issued under Revision of Pay and Allowance (hereinafter referred to ROPA), 1981 at Rs. 520/- per month. From time to time the scale of pay of the petitioner was revised under the ROPA Rules of 1990 and 1998. On 1st April, 1999, the scale of pay was fixed at Rs. 9175/- with additional increment. The fixation of pay of the writ petitioner was duly recorded in the service book from time to time. It was also approved by the District Inspector of Schools (herein after referred to DIS). On the date of retirement, i.e., 31st August, 2005, the salary of the petitioner was Rs. 10,675/-. The school authority submitted all the papers and documents of the petitioner for the purpose of sanctioning pensionary benefits including gratuity to the DIS. It appears that the school authorities also informed the DIS that a sum of Rs. 94,342/- had been overpaid to the petitioner as his pay had been mistakenly fixed at Rs. 359.52/- instead of Rs. 345/- on 1.1.1976. This mistake had continued in the subsequent revisions of the pay also. Relying on the aforesaid statement of the school authority, the DIS deducted the sum of Rs. 94,342/- from the gratuity of the petitioner. This deduction was challenged by the petitioner in the writ petition. Before the learned Single Judge the State was duly represented.

4. After hearing the learned counsel for the parties the writ petition has been allowed. Learned counsel appearing on behalf of the petitioner submitted that since the scales of pay were granted so long with the approval of the DIS, such deduction is uncalled for and illegal. It was also submitted that the deduction is made against the principles of natural justice as no hearing was granted. Learned counsel for the petitioner had relied on a judgment of the Division Bench of this Court dated 7th of September, 2007 in F.M.A No. 342 of 2007, Abdul Kalam Md. Abdul Jalil vs The State of West Bengal & Ors., in support of his contentions. On the other hand, learned counsel appearing for the State of West Bengal had submitted that the mistake was detected by the audit department in the fixation of pay of the petitioner as per ROPA 1981, 1990 and 1998 Rules. The authorities are competent to recover the sum from the pension or gratuity or both within four years after the date of retirement under Chapter XI of the West Bengal Recognised Non-Government Educational Institution Employees (Death-cum-Retirement Benefit) Scheme, 1981. According to the learned counsel this scheme stipulates that in respect of matters for which provision has not been made in the scheme the relevant provisions in the West Bengal Services (Death-cum-Retirement Benefit), Rules 1971 shall apply mutatis mutandis subject to the approval of the State Government. Learned counsel had also made a reference to the judgment of the Supreme Court in the case of Laxman Prasad Vs. Prodigy Electronics Ltd. and Another, and Secretary to Government of Agriculture and Cooperation Government of A.P. & Ors. vs K. Keshabhulu, 2007(8) Supreme 683 : (2008) 1 SCC 641, in support of his submissions that a mistake does not confer any right to any party and can be corrected. Therefore, since the audit department had pointed out mistakes, the State is well within its rights to rectify the same by making deduction. Upon consideration of the entire issues the learned Single Judge had concluded that the deduction amount of Rs. 94,342/- is illegal as the same had been

deducted without giving an opportunity of hearing to the petitioner. Therefore, the order has been passed in breach of rules of natural justice. The learned Single Judge has also concluded that the State has failed to plead necessary particulars regarding the fact of alleged overdrawal by the petitioner in the affidavit-in-opposition. In support of the aforesaid conclusions, the learned Single Judge has recorded the following reasons which we may quote :-

".....The issues which come under consideration are : first, whether deduction can be made without giving the retiree an opportunity of hearing and secondly whether the affidavit filed by the State contains necessary particulars regarding the fact of alleged overdrawal by the petitioner. With regard to the first issue whether natural justice is to be complied or not, in my view, since the action of deduction involves consequences detrimental to the petitioner it was incumbent upon the State to afford the affected party an opportunity to present his case. Any unilateral decision, as has happened in this case, calls for intervention by issuing appropriate order. In the instant case as admittedly no hearing was granted, the action of deducting a sum of Rs. 94,342/- cannot be sustained. So far as the second issue is concerned though it has been stated in the affidavit in opposition that the fixation of pay as per ROPA 1981, ROPA 1990 and ROPA 1998 was mistakenly done and hence, the State is entitled to recover, no particulars with reference to the Service Book or government records have been furnished in support of such contention. The affidavit filed after extensions of time is totally bereft of particulars. Except some bald submissions on legal aspects nothing is there in the affidavit. In this regard reference may be made to paragraph 10 of the affidavit where a statement has been made that "my office duly intimated about the overdrawal amount to the Headmaster". However, there is no reference to the date of intimation and no annexation of the copies of the relevant records in support of the statement. In fact the affidavit in opposition filed on behalf of the District Inspector of Schools (S.E) Sough 24 Parganas is of no assistance. In short the assertions made in the petition have virtually gone uncontroverted. It is least expected from the concerned District Inspector of Schools, since the matter was adjourned to enable him to file affidavit controverting the statements in the writ petition which in my opinion the said respondent has woefully failed to do. Rather the statements made in the affidavit in opposition is a tell tale amount of how the efficiency of the respondent No. 3 has reached its nadir. Hence, the action of the respondents, a sheer harassment to a person in his twilight years, is highhanded, arbitrary, mala fide and illegal. Thus, the deduction of Rs. 94,342/- as evident from the P.P.O. dated 2nd February, 2006 cannot be sustained and is set aside and quashed. The writ petition is allowed....."

5. Thereafter, the learned Single Judge has directed the concerned Treasury Officer to refund the amount within a fortnight along with interest at the rate of Rs. 10% per annum. The respondents have also been directed to re-fix the pension on the basis of the last pay drawn, also within a fortnight from the date of the presentation

of copy of the order. The writ petitioner is also being allowed with costs of Rs. 5,100/- to be paid by the District Inspector of Schools (S.E.), South 24 Parganas.

6. Learned counsel submitted that the learned Single Judge has failed to consider the relevant records. The deduction has been made on the basis of the audit objection and the information supplied by the school authority with regard to the overpayment to the petitioner by mistake. Therefore, the learned Single Judge wrongly concluded that the deduction has been made unilaterally. The learned Single Judge also failed to consider that the petitioner had given an undertaking in Annexure-"VII" (Form of Option) under ROPA, 1998 to the effect that he will refund the Government any amount which may be overdrawn by him in excess of what is admissible to him on account of erroneous fixation of pay. In case of any doubt, the Trial Court ought to have called the record from the school authority to ascertain as to whether the writ petitioner had been given information relating to overdrawl of pay. Since necessary papers had been forwarded by the school authorities, question of giving any further opportunity of hearing to the petitioner did not arise. Learned Single Judge also erred in law in concluding that relevant particulars had not been supplied with regard to the overpayment. The school authority had calculated the overdrawn amount and the same was rectified by the competent authority, i.e., Accounts Officer in the office of the pension sanctioning authority and the audit officer (Director Pension, Provident Fund and Group Insurance), the expert authority of the State Government. Therefore, it could not be said that material particulars had not been given in the affidavit-in-opposition. It is submitted that the learned Single Judge erred in law in imposing costs upon the District Inspector of Schools (S.E.), South 24 Parganas as he had only acted in accordance with law. The appellants were entitled to recovery under Chapter XI of the West Bengal Recognised Non- Government Educational Institution Employees (Death-cum-Retirement Benefit) Scheme, 1981 and West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971.

7. We have considered the submissions made by the learned counsel.

8. We are of the considered opinion that the judgment in the case of Laxman Prasad (supra) is not applicable in the facts of the present case. The question with regard to the breach of rules of natural justice was not under the consideration of the Supreme Court. The Supreme Court in the case of State of Orissa vs. Dr. Miss Binapani Dey (AIR 1957 SC 1269) laid down a salutary principle which has been reiterated and approved by the Supreme Court on numerous occasions; that even an administrative order which causes civil consequences must be passed after due observance of the rules of natural justice. In the aforesaid case the Supreme Court has observed as follows:-

".....It is true that the order is administrative in character, but even an administrative order which involves civil consequences, as already stated, must be made consistently with the rules of natural justice after informing the first

respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the firs5t respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken, the High Court was, in our judgment, right in setting aside the order of the State."

9. The judgment was subsequently approved by the Supreme Court by a Constitution Bench in the case of A.K. Kraipak and Others Vs. Union of India (UOI) and Others,). In this judgment the Supreme Court considered the question as to whether the rules of natural justice needed to be observed even whilst administrative bodies exercise administrative powers. The Supreme Court has clearly concluded that "concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously".

10. In paragraph 19 of the judgment the principle laid down in Dr. Binapani Dey''s case (supra) was quoted verbatim.

11. In view of the above we have no manner of doubt that the impugned order challenged by the writ petitioner was illegal and arbitrary and has been appropriately set aside by the Learned Single Judge.

12. The judgment in the case of Keshabhulu (supra) is not at all applicable in the facts and circumstances of this case.

13. It is not disputed before us that the writ petitioner came into service on 1.1.1967. It is also not disputed before us that his appointment was duly recognized by the competent authority. It is also not disputed that the writ petitioner has been drawing salary that is fixed by the respondent. He has been given revisions in pay scale along with all other employees on the basis of a series of amendments in the pay fixation rules. Ultimately, he was drawing a salary of Rs. 10,675/- at the time of superannuation. He retired from service on 31st of August, 2005. The deduction from his gratuity was made known to the writ petitioner from the Pension Payment Order (PPO) dated 2nd of February, 2006. It is further not disputed before us that the petitioner was not given any opportunity of hearing by the DIS. No show-cause was issued to him at any stage. No explanation was ever sought. He has been merely informed that his pay had been wrongly fixed many years ago and he is liable to pay back a huge amount from his gratuity. In our opinion, the learned Single Judge has very appropriately observed, in the circumstances, that the action of the authority is sheer harassment to a person in his twilight years. Hence, the deduction has been held to be highhanded, arbitrary, mala fide and illegal. It is a settled proposition of law that any order which causes civil consequences can only be passed after observing rules of natural justice. In the present case, the appellants have quite candidly stated that it is not necessary for the State authorities to give any opportunity of hearing to the writ petitioner as the overpayment had been

pointed out by the school authority which had also been approved by the Accounts Officer and the audit department. We are unable to approve that such a course would be a substitute for observance of rules of natural justice. This apart, in our opinion, the appellants have miserably failed to satisfy the Court that there has actually been any overpayment to the writ petitioner. The only material relied on in support of the submission is the statement of "overdrawn amount" prepared by the school authority which had been supplied to the DIS in response to his direction. In our opinion, such a statement has been rightly ignored by the learned Single Judge as it does not set out the factual or legal basis of such tabulation. The petitioner was entitled to an opportunity to show that his pay had been correctly fixed in accordance with the relevant rules. Such an opportunity was totally denied to the writ petitioners.

We are, therefore, of the opinion that the conclusions reached by the learned Single Judge do not call for any interference, factually or in law.