

HIGH COURT OF TRIPURA
A_G_A_R_T_A_L_A
IA No.01 of 2023 IN Review Petition No.44 of 2023

Md. Mufazzul Hussain and others

..... Applicant(s)

V E R S U S

The State of Tripura and others

.....Respondent(s)

For Applicant(s) : Mr. A. Bhowmik, Advocate,
Mr. S. Dey, Advocate.

For Respondent(s) : Mr. D. Sharma, Addl. G.A.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE T. AMARNATH GOUD

_O_R_D_E_R_

21/08/2023

The instant review petition is directed against the impugned judgment dated 16.11.2021 passed by the Coordinate Bench of this Court in WA No.256 of 2021 which reads as under :

“[1] By means of filing this writ appeal, appellants have challenged the judgment dated 26.02.2021 passed by the learned Single Judge in WP(C) No.1266 of 2019.

[2] Factual background of the case is as under: By an office order dated 09.11.1987 appellants were appointed in the post of Khalasi in Public Works Department (PWD), Government of Tripura which carried a pay scale of Rs.370/-650/- plus admissible allowances under Tripura Civil Services(revised pay)Rules, 1982(“ROP,1988”) which were introduced w.e.f. 01.01.1996. Subsequent to their joining the service, the said post of Khalasi was redesignated as Sr. Helper which carried the pre-revised scale of Rs.400/- 775/- plus admissible allowances which upon revision was fitted in grade scale No.12 with revised scale of Rs.850/-2,130/-. The pay of the appellants was accordingly fixed, relying on the clarification issued by the State Government from time to time, by first placing them in the pre revised scale of Rs.400/-775/- meant for the senior helper and thereafter granting them corresponding scale in the revised scale of pay.

[3] Pursuant to government policy, the appellants were given the benefits of Assured Career Progression (ACP) and in the course of WA256 of 2021 time they were given 3rd ACP on 01.01.2014 and placed in the scale of pay of Rs.4,530/-13,000/- with a grade pay of Rs.1,700/-. Subsequently by the impugned office orders dated 14.12.2018 and 06.08.2019, this benefit of 3rd ACP was withdrawn by the State Government. Since the appellants had

retired since then, recoveries of the excess pay and allowances were ordered to be made from their pension.

[4] The appellants being petitioners challenged the said recovery orders by filing WP(C) 1266 contending that they were rightly given the benefit which was arbitrarily withdrawn by the State Government without affording any opportunity of hearing to them. In the said writ petition they claimed the following reliefs:

“i. Issue Rule upon the Respondents to show cause as to why a writ in the nature of Mandamus and / or order/ orders and / or direction / directions of like nature shall not be issued quashing the Office Order, dated, 06.08.2019, issued by the Engineering Officer to the Chief Engineer, PWD(R&B), Agartala, Tripura.

ii. Issue Rule upon the Respondents to show cause as to why a writ in the nature of Mandamus and / or order/ orders and / or direction / directions of like nature shall not be issued quashing the Office Order, dated, 14.12.2018, issued by the Executive Engineer, Internal Electrification Division, PWD, Udaipur, Tripura.

iii. Issue Rule upon the Respondents to show cause as to why a writ in the nature of Mandamus and / or order/ orders and / or direction / directions of like nature shall not be issued directing the respondents to release the pensionary benefits of the Petitioners including regular monthly pension, gratuity etc. with interest.

iv. Issue Rule upon the Respondents to show cause as to why a writ in the nature of Mandamus and / or order/ orders and / or direction / directions of like nature shall not be issued directing the Respondents to determine the pensionary benefit of the petitioners ignoring the Office order, dated 06.08.2019, issued by the Engineering Officer to the Chief Engineer, PWD(R&B), Agartala, Tripura and Office order dated 14.12.2018 issued by the Executive Engineer, Internal Electrification Division, PWD, Udaipur , Tripura.

v. Issue Rule upon the Respondents to show cause as to why a writ in the nature of Mandamus and / or order/ orders and / or direction / directions of like nature shall not be issued directing the Respondents to refund Rs.1,01,294/-, illegally recovered from the salary of the Petitioner No.02 in terms of Office order dated 14.12.2018 issued by the Executive Engineer, Internal Electrification Division, PWD, Udaipur , Tripura.

vi. Issue Rule upon the Respondents to show cause as to why a writ in the nature of Mandamus and/or order/ orders and/or direction/ directions of like nature shall not be issued quashing the letter No.F.1(4)-FIN(PC)/09,dated 07.08.2009 issued by the Dy. Secretary to the Govt. of Tripura, Finance Department.”

[5] In their counter affidavit the State respondents pleaded that after availing the revised pay scale corresponding to the pre revised pay WA256 of 2021 of Rs.2,900/--5,660/-, petitioners (appellants herein) were not entitled to any further financial benefit. The department due to bonafide mistake granted higher pay scale to them and therefore, by the impugned office orders they were reinstated in the pre revised scale of pay of Rs.2,900/-- 5,660/- and order was passed for recovery of excess pay and allowances from them.

[6] In the given factual context, the learned Single Judge held that upon re-designation of their post from Khalasi to Senior Helper the petitioners (appellants herein) clearly availed a scale advancement and if including that

upward move, the petitioners had already availed 03 scale advancements, they did not have a right for further ACP benefits. The relevant extract of the judgment of the learned Single Judge is as under :

“[5] Having heard learned counsel for the parties and having perused documents on record, I do not find any error in the view of the Government. As noted, at the time of introduction of ROP 1988, the post of Khalasi carried a prerevised scale of Rs.370-650/-. This scale would have been revised as provided under the ROP, 1988 and without the aid of upgradation, the incumbents would be placed in the revised scale of Rs.800-1,520/-. However, the department desired to upgrade the entire cadre and therefore, redesignated the post as Senior Helper which carried the prerevised scale of Rs.400-775/- corresponding revised scale of this pre-revised scale was Rs.850-2,130/-. This in clear terms was a scale upgradation. We may also refer to a clarification of Finance Department dated 30th November, 1988 in which it has been provided that on account of re-designation of the post of Khalasi as Senior Helpers, the pay of improvements WA256 of 2021 will be first notionally fixed in the modified scale of Rs.400- 775/- and then to the revised scale of Rs.850-2,130/-.

[6] Under ROP 1999, Assured Career Progression Scheme has been framed by the Rule 10 which essentially provides that a State Government employee will have scale advancement by way of promotion, failing which by time bound movement in a higher scale after entry into service in whole service life after 10 years, 7 years and 7 years of continuous and satisfactory service unless he gets promoted to a post of higher scale before such period. The proviso (i) of the said Rule provides that if scale advancement takes place by way of promotion prior to the period mentioned above, no further advancement would be admissible at the end of the appropriate stage.

[7] The movement of the petitioners from a pre-revised scale of Rs.370-650/- to 400-775/- at the time of implementation of ROP 1988 upon re-designation of their post from Khalasi to Sr. Helper, was thus clearly an availment of scale advancement. If, including such upward movement the petitioners had already availed 3 scale advancements by the time ROP 1999 were promulgated, they did not have a right for further ACP benefit under ROP 1999.”

[7] Viewing thus, the learned Single Judge dismissed the Writ Petition which has been challenged in this appeal.

[8] Appearing for the petitioners Mr. S.Bhattacharjee, learned advocate contends that the learned Single Judge should not have treated the re-designation of the appellants from the post of Khalasi to Senior Helper as career advancement and therefore, finding of the learned Single Judge that including said re-designation of the post they already availed 03 career advancements is unfounded. Counsel submits that they were rightly given the benefit of 3rd ACP which were arbitrarily recalled by the State Government without affording any opportunity of hearing to the appellants. Counsel contends that the appellants were poor paid employees and recovery of excess pay and allowances from them caused serious hardship to them. Counsel therefore, urged for allowing the appeal.

[9] Mr. D.Bhattacharjee, learned GA, on the other hand, contended that the appellants had already availed 03(three) career advancements including the

upward move consequent to the redesignation of their post and due to bonafide mistake, the benefit of 3rd ACP was given to them beyond their entitlement and there was no wrong in the action of the State respondent in issuing recovery order for recovery of the excess pay and allowances.

[10] We have perused the entire record and considered the submissions made at the bar. We agree with the findings of the learned Single Judge that upon re-designation of the post from Khalasi to senior helper, the appellants moved to a higher scale of pay which clearly amounted to their availing of a scale advancement. Therefore, the learned Single Judge rightly held that if including such upward move, the appellants had already availed 03 scale advancements by the time WA256 of 2021 ROP, 1999 were promulgated, they were not entitled to further ACP benefit under ROP, 1999.

[11] But insofar as the recovery of excess pay and allowances is concerned, we are of the view that such recovery would be improper and unfair. It will cause serious hardship to the appellants all of whom are stated to have retired from Group-D posts. In the case of STATE OF PUNJAB AND OTHERS VS. RAFIQ MASIH (WHITE WASHER) AND OTHERS reported in (2015) 4 SCC 334, the Apex Court examined similar issue where the employees were beneficiaries of a mistake committed by their employer and on account of such unintentional mistake, the employees were in receipt of some monetary benefits beyond their due. After examining the earlier decisions rendered on the said issue, the following parameters were laid down by the Apex Court which would govern the issue of recovery where payments have mistakenly been made by the employer. Observation of the Apex Court in paragraph 18 of the judgment is as under :

“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 herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law: (i) Recovery from employees belonging to Class-III and ClassIV service (or Group 'C' and Group 'D' service). (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery. (iii) Recovery from 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.”

[12] We have considered the instant case in the light of the said judgment of the Apex Court and in our considered view, the impugned order for recovery of excess pay and allowances mistakenly paid to the appellants would amount to a harsh and arbitrary action against the appellants who are stated to have retired from Group-D posts and therefore the impugned order of recovery is hereby quashed. Amount already recovered from the appellants under the said order, shall be refunded to them within a period of 03 months from today and further recovery, if any, shall be stopped. It is however, made clear that their pension and other retiral benefits shall be calculated on the basis of the pay they were actually entitled to at the time of their retirement. In other words, the pay mistakenly granted to them shall not be taken as the basis for determination of their pension and retiral benefits.

In terms of the above, the Writ Appeal is disposed of.
Pending application(s), if any, shall also stand disposed of.”

The instant review petition suffers from a delay of 416 days for condonation of which IA No.01 of 2023 has been preferred. Petitioner has furnished the following explanation for condonation of delay.

It is submitted by learned counsel for the petitioners that the impugned judgment was delivered on 16.11.2021. Petitioners got informed regarding dismissal of the appeal from their earlier appointed counsel in the first week of December, 2021 but the petitioners came to know that this Court was on winter vacation at the relevant point of time. Thereafter, the petitioners discussed the issue with their family members and came to know that after dismissal of the appeal by the Division Bench of this Court, the only remedy available to them was to approach the Hon’ble Apex Court. Due to financial constraints, petitioners could not approach the Apex Court and took some time to think about availing the next legal recourse. Petitioners came to know that the learned Single Judge of this Court has allowed the writ petition filed by Sri Dwijen Debnath in WP(C) No.442 of 2020. In the month of July, 2022 the petitioner also came to know that the respondent has complied with the judgment and order dated 30.11.2021 passed in WP(C) No.442 of 2020. Petitioner engaged his counsel but at the relevant point of time this Court was on Puja vacation. Thereafter, the petitioner met his engaged counsel who advised him that before availing the next legal remedy the entire case records need to be perused. Accordingly, the petitioner contacted their previously engaged counsel in the month of

January, 2023 and the petitioners were informed that the case file is in the Chamber of one senior counsel who will be contesting the Assembly Elections and the petitioners were asked to contact in the month of April, 2023. During this period there was assembly election in the State of Tripura and the petitioners could not contact his engaged counsel. The remaining period was consumed in drafting the review petition along with the interlocutory application. It is further submitted that the petitioner is entitled to the exclusion of period of limitation till 28.02.2022 in view of the order passed by the Apex Court in *suo motu* WP(C) No.03 of 2020. It is further submitted that in the meanwhile, the applicant handed over the entire brief to his engaged counsel who took some time to peruse the case record. Thereafter, the said matter was brought to the notice of his engaged counsel who took some time to verify the facts and gather information. It is also submitted that the petitioner had applied for the certified copy of the judgment and order dated 16.11.2021 on 11.04.2023 and the same was supplied to them on 17.04.2023. Therefore, 07 days were consumed in obtaining the certified copy of the judgment and order dated 16.11.2021. Therefore, there was a *bona fide* delay of 416 days. It is submitted that the delay is not intentional. Further, since the learned Single Bench has granted relief in similar circumstances after passing of the Division Bench judgment of this Court in WA No.256 of 2021 from which the instant review petition arises, therefore, the impugned judgment requires review. Delay may be condoned in the interest of justice.

Learned counsel for the State Mr. D. Sharma has strongly opposed the prayer. He submits that the delay is inordinate and unexplained.

Moreover, the petitioner cannot take the plea that the impugned judgment rendered by Division Bench of this Court in WA No.256 of 2021 dated 16.11.2021 is per-incuriam as a later judgment was delivered by the learned Single Bench of this Court by granting relief in similar circumstances to another employee. It appears that the impugned judgment of this Court was perhaps not pointed out to the learned Writ Court where he delivered the judgment on 30.11.2021. In any case, the petitioner cannot seek review of the impugned judgment on those grounds. As such, both on grounds of delay and merits, the petition deserve to be dismissed.

We have considered the submissions of learned counsel for the parties and taken note of the explanation urged by the petitioner for condonation of delay of 416 days in preferring the instant memo of appeal. The chronology of facts and events narrated by the petitioner in support of his explanation need not be repeated. It appears that the impugned judgment passed by the Coordinate Bench of this Court is of 16.11.2021. Even excluding the Covid delay as per the order of the Apex Court in *suo motu* WP(C) No.03 of 2020 till 28.06.2022, the review petition has been filed only on 20.07.2023 i.e. after a delay of 416 days for which there is no plausible explanation as such. The petitioner seems to have been taking leisurely time in briefing his counsel, obtaining documents, compliance order etc. little conscious of the huge delay that continued to accrue to his detriment all along. In such circumstances, this Court is of the view that no sufficient cause has been shown on the part of the petitioner for seeking a review of the impugned judgment. It also appears that the basic plea raised by the

petitioner in interlocutory application also is of a later judgment of the Single Bench of this Court in WP(C) No.442 of 2020 dated 30.11.2021 said to be in case of a similarly situated employee for seeking review of the judgment of the Division Bench of this Court in WA No.256 of 2021 passed on 16.11.2021. This can't be a ground for review.

In such circumstances, since this present review petition suffers from inordinate and unexplained delay, we are not inclined to allow the application for condonation of delay. Accordingly, the same is dismissed. Consequently, the Review Petition No.44 of 2023 is also dismissed.

(T. AMARNATH GOUD) J

(APARESH KUMAR SINGH) CJ

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