GAHC010229102019

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/7129/2019

NAZIM UDDIN AHMED
S/O. LT. NAYAN ALI SK., R/O. VILL. BAMUNIR BHITA, P.O. KATARIHARA, DIST. GOALPARA, ASSAM.

VERSUS

THE STATE OF ASSAM AND 2 ORS.
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM, EDUCATION (HIGHER) DEPTT., DISPUR, GHY.-06.

2:THE DIRECTOR OF HIGHER EDUCATION

ASSAM
KAHILIPARA
GUWAHATI-19.

3:THE PRINCIPAL OF JALESWAR COLLEGE

TAPOBAN
KATARIHARA
P.O. KATARIHARA
DIST. GOALPARA
ASSAM
PIN-783132

Advocate for the Petitioner : MR. M KHAN

Advocate for the Respondent : SC, HIGHER EDU

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 22.03.2023

Heard Mr. M. Khan, learned counsel for the petitioner, Mr. K. Gogoi, learned standing counsel for the Higher Education Department, representing respondent nos. 1 and 2 and Mr. K.R. Patgiri, learned counsel appearing for respondent no.3.

2. By filing this writ petition under Article 226 of the Constitution of India, the petitioner has assailed the (1) communication no. PC/HE/Misc./77/2019/77 dated 02.08.2019, and (2) letter No. JCT/19/2019 dated 05.09.2019. By the said communications, a sum of Rs.3,35,724/-, allegedly overdrawn by the petitioner, was directed to be recovered in 28 installments of Rs.12000/- per month from his monthly salary.

3. In brief, the case of the petitioner is that he was serving as Senior Assistant in Jaleswar College, Tapoban in Goalpara district and his service was provincialised w.e.f. 01.01.2013. The petitioner was being paid salary as per pay scale in the pay band of Rs.7170/- and other admissible allowances. By the said impugned communication dated 02.08.2019, the Director of Higher Education Department, Assam (respondent no. 2), had informed the Principal of Jaleswar College (respondent no.3) that the pay of the petitioner, Nazim Uddin Ahmed, Senior Assistant should be fixed from 01.01.2013 under R.O.P, 2010 at Rs.8700/- instead of Rs.10,700/- in the scale of pay of Rs.5200-20,200/- with

Grade Pay of Rs.2,900/- as the pay structure is not covered under Clause-2 of the Govt. O.M. No. FPC.14/2010/7 dated 28.07.2010. Accordingly, the respondent no.3 was directed to fix the pay of the petitioner in a correct manner and also to calculate the overdrawal amount in a Form of due and drawn statement and to take necessary steps for adjustment/ refund to the State Exchequer. Consequently, the respondent no.3 by a letter dated 05.09.2019 informed the petitioner that the overdrawal amount of Rs.3,35,724/- shall be recovered/adjusted with 28 installments @ 12,000/- per month from the current month.

4. The learned standing counsel for the Higher Education Department has submitted that as the petitioner had received payment which was not due and payable to him, it was permissible for the employer to recover the excess payment made to the employee. It is submitted that for the purpose of escaping recovery of the excess drawal, the learned counsel for the petitioner had relied on the case of *State of Punjab Vs. Rafiq Masih (White Washer), (2015) 4 SCC 334* (hereinafter referred to as "Rafiq Masih-I"). However, the Court is also required to take notice of the case of *State of Punjab & Ors. v. Rafiq Masih (White Washer), (2014) 8 SCC 883* (hereinafter referred to as "Rafiq Masih-II"), and accordingly, the Court may not like to interfere with the right of the employer to recover excess payment made to the petitioner in terms of directions contained in para-18(iii) of the case of *Rafiq Masih-I (supra)*.

5. From the affidavit-in-opposition filed by the respondent no.3, it appears that the respondent no.3 had admitted that excess drawal was made by the petitioner and therefore, the learned counsel for the respondent no. 3 has

justified the recovery of the overdrawn amount in 28 installments.

6. In this case, the Higher Education Department, i.e. respondent nos. 1 and 2 have not filed their affidavit-in-opposition and therefore, nothing is brought on record to show that the petitioner was permitted to draw excess payment due to his own fault, misrepresentation or fraud, or made in collusion with other employees or staff of the Jaleswar College.

7. In the case of *Rafiq Masih-II (supra)*, the Supreme Court of India, had considered the cases of (i) *Shyam Babu Varma v. Union of India, (1994) 2 SCC 521 (para-11)*, which was decided by a 3-Judge Bench, and (ii) *Sahib Ram v. State of Haryana, 1995 Supp (1) SCC 18 (para-5)*. In both the said cases, directions were issued not to recover the excess amount paid to the employee, as they were receiving the amount due to no fault of theirs. However, by referring to the case of *Chandi Prasad Uniyal v. State of Uttarakhand, (2012) 8 SCC 417 (para-14 and 16)*, approved of the said judgment. Para-7 and 8 of the case of *Rafiq Masih-II (supra)*, is quoted below:-

> ***7**. In Chandi Prasad Uniyal's case (supra), a specific issue was raised and canvassed. The issue was whether the appellant-therein can retain the amount received on the basis of irregular/wrong pay fixation in the absence of any misrepresentation or fraud on his part. The Court after taking into consideration the various decisions of this Court had come to the conclusion that even if by mistake of the employer the amount is paid to the employee and on a later date if the employer after proper determination of the same discovers that the excess payment is made by mistake or negligence, the excess payment so made could be recovered. While holding so this Court observed at paragraphs 14 and 16 as under:*
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> > *"14. We are concerned with the excess payment of public money which is often described as "taxpayers' money" which belongs neither to the officers who have effected overpayment nor to the recipients. We fail to see whey*

the concept of fraud or misrepresentation is being brought in such situations. The question to be asked is whether excess money has been paid or not, may be due to a bona fide mistake. Possibly, effecting excess payment of public money by the government officers may be due to various reason like negligence, carelessness, collusion, favouritism, etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. 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 hardships 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.

* * *

16. The appellant in the appeal will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However we order that excess payment made be recovered from the appellant's salary in 12 equal monthly installments."

***8**. In our view, the law laid down in Chandi Prasad Uniyal's case (supra), no way conflicts with the observations made by this Court in the other two cases. In those decisions, directions were issued in exercise of the powers of this Court under Article 142 of the Constitution, but in the subsequent decision this Court under Article 136 of the Constitution, in laying down the law had dismissed the petition of the employee. This Court in a number of cases had battled with tracing the contours of the provision in Article 136 and 142 of the Constitution of India. Distinctively, although the words employed under the two aforesaid provision speak of the powers of this Court, the former vest a plenary jurisdiction in supreme court in the matter of entertaining and hearing of appeals by granting special leave against any judgment or order made by a Court or Tribunal in any cause or matter. The powers are plenary to the extent that they are paramount to the limitations under the specific provisions for appeal contained in the Constitution or other laws. Article 142 of the Constitution of India, on the other hand is a step ahead of the powers envisaged under Article 136 of the Constitution of India. It is the exercise of jurisdiction to pass such enforceable decree or order as is necessary for doing 'complete justice' in any cause or matter.*

* * *

> ***13**. Therefore, in our opinion, the decisions of the Court based on different scales of Article 136 and Article 142 of the Constitution of India cannot be best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion, there is no conflict in the views expressed in the first two judgments [i.e. Shyam Babu Varma (supra) and Sahib Ram v. State of Haryana (supra)] and the latter judgment [i.e. Chandi Prasad Uniyal (supra)]."*

8. In the case of *Rafiq Masih-I (supra)*, the Supreme Court of India had considered all the cases referred to herein before, i.e. (i) *Shyam Babu Varma (supra)*, (ii) *Sahib Ram v. State of Haryana (supra)*, (iii) *Chandi Prasad Uniyal (supra)*, and (iv) *Rafiq Masih-II (supra)*. It would be relevant to quote para-1, 2, 3, 6, 18 and 19, which is as follows:-

> "***1**. Leave granted. All the private respondents in the present bunch of cases, were given monetary benefits, which were in excess of their entitlement. These benefits flowed to them, consequent upon a mistake committed by the concerned competent authority, in determining the emoluments payable to them. The mistake could have occurred on account of a variety of reasons; including the grant of a status, which the concerned employee was not entitled to; or payment of salary in a higher scale, than in consonance of the right of the concerned employee; or because of a wrongful fixation of salary of the employee, consequent upon the upward revision of pay-scales; or for having been granted allowances, for which the concerned employee was not authorized. The long and short of the matter is, that all the private respondents were beneficiaries of a mistake committed by the employer, and on account of the said unintentional mistake, employees were in receipt of monetary benefits, beyond their due.*
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> ***2**. Another essential factual component in this bunch of cases is, that the respondent-employees were not guilty of furnishing any incorrect information, which had led the concerned competent authority, to commit the mistake of making the higher payment to the employees. The payment of higher dues to the private respondents, in all these cases, was not on account of any misrepresentation made by them, nor was it on account of any fraud committed by them. Any participation of the private respondents, in the mistake committed by the employer, in extending the undeserved monetary benefits to the respondent-employees, is totally ruled out. It would therefore not be incorrect to record, that the private respondents, were as innocent as their employers, in the wrongful*

determination of their inflated emoluments.

***3**. The issue that we have been required to adjudicate is, whether all the private respondents, against whom an order of recovery (of the excess amount) has been made, should be exempted in law, from the reimbursement of the same to the employer For the applicability of the instant order, and the conclusions recorded by us hereinafter, the ingredients depicted in the foregoing two paragraphs are essentially indispensable.*

* * *

***6**. In view of the conclusions extracted hereinabove, it will be our endeavor, to lay down the parameters of fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. In our considered view, the instant benefit cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of employee.*

* * *

***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, summaries the following few situations, wherein recoveries by the employers, would be impermissible in law:*

(i) Recovery from employees belonging to Class-III and Class-IV 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.*
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> ***19**. We are informed by the learned counsel representing the appellant-State of Punjab, that all the cases in this bunch of appeals, would undisputedly fall within the first four categories delineated hereinabove. In the appeals referred to above, therefore, the impugned orders passed by the High Court of Punjab and Haryana (quashing the order of recovery), shall be deemed to have been upheld, for the reasons recorded above*."

9. In the present case in hand, the respondent nos.1 and 2 have not filed any affidavit-in-opposition. Moreover, in the affidavit-in-opposition filed by the respondent no.3, there is no statement to show that the petitioner was the person responsible in drawing excess payment made to him. There is no statement that the petitioner would not be a Grade-III employee of the Jaleswar College, Tapoban. There is also no statement that the amount of Rs.3,35,724/- sought to be recovered from the petitioner was an excess payment made to the petitioner within 5 (five) years from 02.08.2019, i.e. the date of letter written by the Director of Higher Education, Assam (respondent no.2).

10. This writ petition was filed on 17.09.2019, and notice of motion was issued by order dated 20.09.2019. Therefore, the Higher Education Department had availed about $3^1/_2$ years and its officers did not deem fit to file their affidavit-in-opposition. Hence, this is a fit and appropriate case to invoke the doctrine of non-traverse and deem that the respondent nos. 1 and 2 have admitted that the drawal of excess payment to the petitioner was not due to his fault. Though the respondent no.3 had filed its affidavit-in-opposition, but it has not been specifically denied that if the petitioner was paid any excess amount, it

was not because of any misrepresentation or fraud on part of the petitioner and that he had no knowledge that he is being paid an amount to which he is not entitled to. Thus, the respondents have miserably failed to show that this is not a case where the petitioner was responsible for the overdrawal of his salary for that he had committed any fraudulent act which had benefited him in excess drawal of payment. Under such circumstances, the ratio of the case of *Rafiq Masih-II (supra)*, more specifically para-18 (i) and (iii) thereof, squarely covers the case of the petitioner. The interpretation made by the learned standing counsel for Higher Education Department of para-18(iii) of *Rafiq Masih-II (supra)*, to the effect that the said para permits recovery of money up to 5 years prior to the recovery notice is in contradistinction with was conveyed by the said judgment. Hence, the said submissions are negated.

11. Accordingly, the Court is inclined to set aside and quash the impugned (1) communication no. PC/HE/Misc./77/2019/77 dated 02.08.2019 and (2) letter No. JCT/19/2019 dated 05.09.2019 on the ground that no recovery can be made from the petitioner who is not responsible for the overdrawal.

12. Resultantly, the respondent no. 2 shall pass necessary orders within a period of 2 (two) months to make refund to the petitioner, all such sum of money which has been recovered from the salary of the petitioner pursuant to the letter of the said authority bearing No. PC/HE/Misc./77/ 2019/77 dated 02.08.2019.

13. Accordingly, this writ petition stands allowed to the extent as indicated

above.

JUDGE

Comparing Assistant