

Court No. - 34

Case :- WRIT - A No. - 1009 of 2022

Petitioner :- Anil Kumar Surya

Respondent :- State Of U.P. And 6 Others

Counsel for Petitioner :- Awadhesh Kumar Sharma, Shesh Nath Bhatt

Counsel for Respondent :- C.S.C.

Hon'ble Ajit Kumar, J.

1. The petitioner who retired as Chief Pharmacist from the office of Chief Medical Superintendent, District Hospital (Male), Muzaffarnagar on 28th February, 2021 was paid retirement dues after withholding the amount of Rs. 4,03,124/- issuing a final pension payment and payment of gratuity order. Petitioner then protested with the Chief Medical Officer vide representation dated 15.11.2021 that deductions made from the gratuity amount be refunded, the Chief Medical Superintendent, District Hospital (Male) Muzaffarnagar came to pass order on 29.07.2021 rejecting his representation to be baseless and thus thereby affirming the action of recovery. This order has been impugned in the present petition.

2. Two fold arguments has been advanced by learned counsel for the petitioner:

(i). No opportunity of hearing was ever afforded to the petitioner prior to recovering amount from the gratuity of the petitioner; and

(ii) no recovery could have been made of an excess amount from the retired employee as petitioner was not in any manner responsible for any kind of pay fixation.

3. Learned Advocate has placed relied upon the judgment of Supreme Court in the case of **State of Punjab v. Rafiq Masih, 2015 (4) SCC 334**, later on followed by **Thomas Daniel v. State of Kerala and Others, AIR 2022 SC 2153**.

4. Learned Standing Counsel on the contrary has relied upon judgment in the case of **High Court of Panjab and Haryana and Others v. Jagdev Singh (2016) 14 SCC 267** and submits that every fixation is done by taking consent from the employee if wrongful pay fixation is detected later and then excess payment would be liable to be recovered.

5. In reply, learned counsel for the petitioner submitted that the case of High Court of Panjab and Haryana and Others v. Jagdev Singh's case (*supra*) would not be appellable as neither petitioner committed any fraud or misrepresentation for getting monetary benefit by way of fixation of salary, nor was required at any point of time to furnish any undertaking in that regard.

6. Having heard learned counsel for the respective parties and having perused

the records, I find that except the order dated 29.11.2021, there was no order issuing show cause notice to the petitioner or any other order directing for recovery. All that can be gathered from the recitals contained in the order impugned that petitioner's service book was sent to the Finance Controller on 2nd September, 2021 and as per letter of Finance Controller, Medical Health Services dated 30th September, 2021 fixation of pay as Rs. 77700/- as on 1st July, 2020 was correct fixation and accordingly pension and other dues have been paid, resultantly the order records that any excess payment made for clerical error in the past for wrongful pay fixation, recovery of the excess amount is inevitable.

7. Learned counsel for the petitioner further submits that show cause notice has been issued to the petitioner, nor opportunity of hearing was afforded to the petitioner and straightway recovery has been done at the time of preparation of finalization of his post retirement dues.

8. In so far as other argument regarding any misrepresentation or fraud at the end of the petitioner which could have entitled the respondents to proceed for recovery, I find that the order impugned does not refer to any such undertaking ever taken from the petitioner, nor does it record that the clerical error was on account of petitioner's misleading leading the authority. Thus, fact of the matter is that is the respondents who had committed clerical error in pay fixation, which resulted in excess payment of the salary to the petitioner in the past.

9. Under the circumstances, the petitioner cannot be held guilty for either *suggestio falsi or suppressio veri*. In the case of Rafiq Masih (*supra*) vide paragraph 18, clear guidelines have been given and I find that petitioner's case stands covered under the guidelines. Even otherwise in the given facts and circumstances I am of the view that such recovery was totally unwarranted at the stage of preparation of finalization of the post retiral dues or the principle as enunciated in the case of Rafiq Masih (*supra*). Relevant paragraph no. 18 reads 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 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."

(Emphasis added)

10. It is true that the in Jagdev Singh's case (*supra*) court has carved out exception in respect of those cases in which undertakings have been taken from the employees but I find that the order impugned is absolutely silent in that regard. Even in the counter affidavit no such stand has been taken that petitioner ever furnished any such undertaking or in any manner responsible for such pay fixation .

11. In view of above, therefore, I do not find principle of law laid down by the Supreme Court in the case of Jagdev Singh (*supra*) is at all attracted to the facts or present case.

12. It is pertinent to mention here that ignorance of law is not excuse. In the case of **Swadeshi Cotton Mill Company Limited vs. Government of U.P. and others, (1975) 4 SCC 378** the Supreme Court vide paragraph 3 has held thus that "*every individual is deemed to know the law*"

13. Admittedly Rafiq Masih case (*supra*) has been delivered wayback in the year 2014 and order impugned of recovery has been passed in the year 2021, without taking into consideration of law laid down by the Supreme Court and in view of above, not only petitioner is entitled for the refund of amount recovered from his gratuity but also interest thereupon.

14. In view of above, writ petition succeeds and is allowed. The order dated 29.11.2021 is hereby quashed. The amount to the tune of Rs. 4,03,124/ as recovered from the gratuity fund of the petitioner shall be paid back to him alongwith interest @ 8 per cent within two months from the date of presentation of certified copy of this order.

Order date: 2.11.2023

Sanjeev