

Court No. - 34

Case :- WRIT - A No. - 9608 of 2023

Petitioner :- Batukeshwar Rai

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

Counsel for Petitioner :- Ramesh Chandra Tiwari

Counsel for Respondent :- C.S.C.

Hon'ble Ajit Kumar,J.

1. Despite the opportunities given in the past and the stop order in that regard passed on 31.10.2023, no counter affidavit has been filed, meaning thereby the State does not want to defend the order of recovery and concedes to the relief prayed for.

2. Petitioner, who has retired from the post of Head Constable from the Police establishment has been visited with the order of recovery dated 10.04.2023 for the alleged access payment made to him on account of wrongful fixation of pay.

3. Learned counsel for the petitioner submits that neither at the time of pay fixation, nor in the relevant financial year when the pay fixation was done, any undertaking was obtained from the petitioner for refund of such amount if the fixation was found faulty/ erroneous. Averments to this effect has been made in para 17 of the writ petition thus:

"17. That, it is respectfully submitted here that the Petitioner has not given any undertaking regarding the amendment in salary and recovery of difference amount."

4. He submits that before passing the order impugned direction for recovery for a sum of Rs. 5,48,810/- no notice was issued to the petitioner and straightaway direction was issued for recovery.

5. Learned counsel for the petitioner has relied upon the judgment of Supreme Court in the case of **State of Punjab & Others v. Rafiq Masih (White Washer) etc., 2014 Law Suit (SC) 1075** followed by **Thomas Daniel v. State of Kerala & Ors, AIR 2022 SC 2153**.

6. Learned Standing Counsel sought to defend the order only for the reason assigned in the order impugned but could not dispute the legal position enunciated by the Supreme Court in the case of **Rafiq Masih (supra)** in which vide para 12 following directions

have been issued:

"12. 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."

7. In view of the above, since neither the show cause notice was issued to the petitioner nor the petitioner was required to furnish any affidavit or undertaking at the time of pay fixation, I do not find the order to be sustainable in law. Accordingly, the order impugned dated 10.04.2023 is hereby quashed to the extent the recover has been directed from the post retirement dues of the petitioner. Regarding pay fixation, the order would stand and the authority would be entitled to revise the pension and other emoluments accordingly for the purposes of payment of post retirement dues.

8. Petition thus stands **allowed** in above terms.

Order Date :- 7.12.2023

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