

Court No. - 4

Case :- CONTEMPT APPLICATION (CIVIL) No. - 304 of 2023

Applicant :- Sanjay Kumar Saxena

Opposite Party :- Shri Sandeep Kumar, Engineer In Chief, Vikas Evam Head Of Deptt., P.W.D. Lko. And Another

Counsel for Applicant :- Vijai Shankar Tripathi

Hon'ble Rajesh Singh Chauhan,J.

1. Heard Sri Vijai Shankar Tripathi, learned counsel for the petitioner and Sri Mohit Jauhari, learned Standing Counsel for the State.

2. This Court has passed order dated 13.10.2023 which reads as under :

"1. Heard Sri V.S. Tripathi, learned counsel for the petitioner and Sri Mohit Jauhari, learned Standing Counsel.

2. Sri Mohit Jauhari, has filed reply to the objection filed by the learned counsel for the petitioner against the compliance affidavit, same is taken on record.

3. The aforesaid affidavit has been filed on behalf of Sri Arvind Kumar (Jain) presently serving as Engineer-in-Chief (Vikas) evam Head of Department, Public Works Department, U.P., Lucknow.

4. As per Sri Mohit Jauhari the order of the writ court has been complied with and the affidavit of compliance was filed on 4.4.2023 wherein the deponent is Sri Alok Rai, Finance & Accounts Officer, P.W.D.U.P., Lucknow. Sri Jauhari has drawn attention of this Court towards Annexure no. A-3 which is an Office Memo dated 22.3.2023 passed by Sri Alok Rai, Finance & Accounts Officer, P.W.D. whereby all the objections of the petitioner have been considered which were raised by the petitioner during the course of the personal hearing. Sri Jauhari has further drawn attention of this Court towards Annexure A-5 which is Office Memo dated 23.3.2023 passed by the same authority whereby the order of the fresh pay fixation of the petitioner has been issued. As per Sri Jauhari these aforesaid orders have been passed strictly in terms of the order of the writ court by affording opportunity of hearing to the petitioner.

5. Sri Tripathi, learned counsel for the petitioner has filed objection to the aforesaid affidavit of compliance and has categorically indicated that the order of the writ court has not been complied with till date. He has requested that, firstly the order of the writ court may be perused, so that it would be clear that the order of the writ court has not been complied with in its letter and spirit. It would be apt to reproduce the order of the writ court dated 5.12.2022 passed in Writ-A No. 8146 of 2022 which is being reproduced herein below:

"1. Heard Sri Vijai Shankar Tripathi, learned counsel for the petitioner as well as learned Standing counsel for the opposite parties.

2. With the consent of the parties the petition is being decided at the admission stage itself.

3. It has been submitted by learned counsel for the petitioner that the petitioner was initially appointed on the post of Junior Engineer in Public Works Department on adhoc basis on 28.10.1983 and subsequently his services were regularized from the date of his appointment and further confirmed on 1.3.1990.

The petitioner superannuated from the services on 31.3.2020 from the post of Assistant Engineer. Subsequent to his retirement pension was sanctioned and the petitioner was receiving his pension when due to revision of pay scale fresh Pension Payment Order was issued and his pension was accordingly revised.

4. The grievance raised by the petitioner in the present writ petition is that by mans of order dated 18.6.2022 passed by Chief Finance and Accounts Officer, Public Works Department holding that his pay fixation done on 1.10.1998 and 1.10.2002 were erroneous and, hence, from 18.10.1997 his pay has been revised and the amount paid to the petitioner in excess of what he was entitled have also been recovered from his post retiral dues amounting to Rs.10,80,920/-.

5. Learned counsel for the petitioner submits that a bare perusal of the order dated 18.6.2020 would indicate that no opportunity of hearing was provided to the petitioner prior to passing of the said order and even in the said order it is not clear as to what was the mistake sought to be rectified by the respondents. It is abundantly clear that no opportunity of hearing was afforded to the petitioner. Learned counsel for the petitioner has submitted that there are various government orders where the department themselves have barred recovery or recall of orders granting pecuniary benefits after a period of five years. He submits that in case any notice would have been given to the petitioner he would have defended such recall or recovery order in support of his claim but not giving opportunity the respondents have precluded the petitioner from placing his version before the authority concerned before passing the impugned order and accordingly submits that the order is clearly arbitrary and beyond the jurisdiction of the parties to pass the same.

6. Learned Counsel for the petitioner has placed reliance upon the Apex Court judgment in the case of State of Punjab and others Vs. Rafiq Masih (White Washer), 2015 AIR (SC) 696 to submit that his matter is squarely covered by the said judgment.

7. Learned Standing counsel has supported the impugned order but could not dispute the aforesaid facts.

8. Considering the fact that the petitioner has superannuated from service on 31st March, 2020 subsequent to which he was getting his pension regularly and after more than five years of his retirement his salary from 1997 onward has been re-fixed. It is clear that the said exercise of the power cannot be justified as from a perusal of the impugned order why this anomaly could not have been discovered at the time when the petitioner was in service and why it took 25 years for the State to find out the error in fixation of salary of the petitioner. Even otherwise it is noticed that in case there was any error in fixation of the salary of the petitioner the respondents were duty bound to provide the petitioner an opportunity of hearing and by not providing such opportunity rendering the entire proceedings illegal and arbitrary and is liable to be quashed. Further, the case of the petitioner is squarely covered by the aforesaid judgment of the Apex Court in the case of State of Punjab and others Vs. Rafiq Masih (White Washer) (Supra). The relevant portion of the judgment is quoted as under:-

"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."

9. A perusal of the order could not indicate as to whether any notice was sent to the petitioner or any response was sought and, hence, this Court is of considered view that no opportunity was given to the petitioner nor was he associated with it prior to passing of the said order and consequently the same is clearly illegal, arbitrary and violative of Articles 14 and 16 of the Constitution of India. Where the salary which has already been disbursed to an employee, prior to 25 years, is sought to be recovered, then it is mandatory for the State to give an opportunity of hearing to such employee. Salary which has been paid to a person becomes part of his property which are protected under Article 300 A and any order seeking to recover, withdraw or interfere with the same then necessarily the said government servant should have been given opportunity of hearing.

10. In light of the above, the pay fixation order dated 18.6.2020 as well as the order for recovery, as contained in Annexure No.s 1 and 2 respectively to the writ petition, are clearly illegal and arbitrary and are quashed.

11. The matter is remitted back to the competent authority to pass fresh order with regard to pay fixation after giving opportunity of hearing to the petitioner. Let such exercise be concluded expeditiously, say within a period of two months from the date of production of a certified copy of this order before the competent authority. Recovery, if any, shall be made only after passing the fresh order in pursuance of the direction of this Court as stated here-in-above.

12. The writ petition is, thus, allowed."

6. Precisely, the writ court has quashed the pay fixation order dated 18.6.2020 and order of recovery treating those orders as illegal and arbitrary. In that way the earlier pay-fixation order and recovery order have lost its efficacy. The writ court has further directed that if the re-fixation of the pay of the petitioner is necessary, the same exercise may be carried out strictly in accordance with law by affording an opportunity of hearing to the petitioner within a period of two months from the date of production of certified copy of the order of this Court.

7. Therefore, Sri Tripathi has stated that in compliance of the order of the writ court dated 5.12.2022 (supra) the amount, so recovered from the petitioner i.e. 10,80,920/- from his amount of gratuity should have been paid to the petitioner but no such payment has been paid. In any case if the aforesaid amount has not been paid to the petitioner, by means of any fresh order the aforesaid recovery should be justified by the opposite parties but admittedly no specific order has been passed till date justifying the aforesaid recovery.

8. Sri Tripathi has drawn attention of this Court towards para no. 8 of the order of the writ petition wherein the judgment of the Apex Court in re: Rafiq Masih White Washer (Supra) has been referred, para 12 (iii) of the aforesaid order is relevant, which categorically provides that if any excess amount is paid to the employee beyond the period of five years from the date of the recovery order, such recovery may not be executed.

9. Actually, the Hon'ble Apex Court in para 12 of the judgment in re: Rafiq Masih (supra) has indicated some eventuality under which the recovery from employee belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service) may not be executed; recovery from retired employees, or employees who are due to retire within one year, of the order of recovery; 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; 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 and 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. Therefore, the third eventuality / condition in re: the judgment of Rafiq Masih (supra) covers this case inasmuch as the impugned recovery has been done against the petitioner w.e.f. 1.10.1998 whereas he retired from service on 31.3.2020. Therefore, as per Sri Tripathi such recovery may not be executable against the petitioner in the light of the dictum of Apex Court in re: Rafiq Masih (supra).

10. In his objection, so filed by Sri Tripathi on 18.4.2023 he has taken the specific objection in para 8, para 14 and para 21. In para 21 he has categorically and specifically indicated that a sum of Rs. 10,80,920/- which has been recovered from the petitioner in the name of impugned recovery has yet not been refunded till date. While filing reply to the aforesaid paragraphs today, the Engineer-in-Chief has not disputed the aforesaid contention of the petitioner in para 9, 14 and 15 of the aforesaid reply, meaning thereby the authority concerned has got no plausible explanation on that point.

11. Therefore, I am in agreement with the submission of Sri Tripathi that the order of the writ court has not been complied with in its letter and spirit till date and in the name of compliance a sham compliance has been done which may not be accepted.

12. List this case on 21.11.2023.

13. On that date Sri Arvind Kumar (Jain) presently serving as Engineer-in-Chief (Vikas) evam Head of Department, Public Works Department, U.P., Lucknow shall appear in person.

14. On that date he shall file explanation as to why the order of the writ court has not been complied in its letter and spirit. If the proper explanation is not filed by the next date of listing, the charges may be framed against the authority on the next date."

3. In compliance of the aforesaid order Sri Arvind Kumar (Jain) presently serving as Engineer-in-Chief (Vikas) evam Head of Department, Public Works Department, U.P., Lucknow is present in person along with affidavit of compliance, same is taken on record.

4. Sri Mohit Jauhari on the basis of instructions, so received, stated that the order of the writ court has been complied with in its letter and spirit inasmuch as the attention has been drawn towards para 5 and 6 of the aforesaid affidavit of the compliance wherein it has been categorically indicated that the amount so deducted from the petitioner i.e. a sum of Rs. 10,80,920/- the recovery from the petitioner has been released to the petitioner on 10.11.2023. Further, attention has been drawn towards para 6 of the affidavit wherein it has been indicated that in lieu of the letter dated 10.11.2023 the Additional Director, Treasury and Pension Directorate, U.P. issued amended P.P.O. dated 16.11.2023 and the payment of recovered amount shall be received by the petitioner in due course of time. Sri Jauhari has stated that the amount in question has been credited in the account of the petitioner. Sri Jauhari has also drawn attention of this Court towards the

earlier affidavit of compliance dated 4.4.2023 of one Sri Alok Rai, the then Finance and Accounts Officer, Public Works Department showing Annexure no. A-3 whereby in terms of the order of the writ court the petitioner has been afforded ample opportunity of hearing for pay-fixation and a fresh order of pay-fixation has been passed on 23.3.2023 by the Senior Finance & Accounts Officer, P.W.D., Lucknow (Annexure no. 5).

5. Sri Mohit Jauhari has, therefore, drawn attention of the Court towards the operative portion of the order of the writ court dated 5.12.2022 wherein the direction was issued to the authority concerned to pass a fresh order with regard to pay-fixation after giving opportunity of hearing to the petitioner, has submitted that the order has been passed in terms of the aforesaid direction. He has also drawn attention of towards para 10 of the operative portion of the order of the writ court whereby the writ court was pleased to quash the recovery order and in compliance of that order the amount in question has been refunded to the petitioner, therefore, he has stated that the present contempt petition may be dismissed.

6. Sri Tripathi, learned counsel for the petitioner has stated that, however, the amount in question has been refunded to the petitioner and the order has been passed after affording an opportunity of hearing to the petitioner but while passing the order the authority concerned has not re-fixed the salary of the petitioner properly as in the light of the order of the dictum of Apex Court in re: ***State of Punjab and Ors. vs. Rafiq Masih (White Washerman) reported in (2015) 4 SCC page 334*** the order was not sustainable in the eyes of law then the entire service period of the petitioner should have been counted and the fixation of salary of the petitioner should be done properly.

7. Heard learned counsel for the petitioner and Sri Mohit Jauhari, learned Standing Counsel for the State.

8. For convenience, it would be pertinent to indicate para 10 and 11 of the order of the writ court dated 5.12.2022 herein below :

"10. In light of the above, the pay fixation order dated 18.6.2020 as well as the order for recovery, as contained in Annexure No.s 1 and 2 respectively to the writ petition, are clearly illegal and arbitrary and are quashed.

11. The matter is remitted back to the competent authority to pass fresh order with regard to pay fixation after giving opportunity of hearing to the petitioner. Let such exercise be concluded expeditiously, say within a period of two months from the date of production of a certified copy of this order before the competent authority. Recovery, if any, shall be made only after passing the fresh order in pursuance of the direction of this Court as stated here-in-above."

9. In compliance of the aforesaid order the amount, so recovered from the petitioner, should have been refunded to the petitioner and the same has been refunded to the petitioner.

10. A fresh order has been passed after affording an opportunity of hearing to the petitioner, as considered above. If while passing the fresh order of pay-fixation any irregularity or illegality has been committed by the authority concerned by not counting the entire service of the petitioner, the same may be assailed by him by filing appropriate petition before the appropriate court of law.

11. Since the learned counsel for the petitioner has stated that the recovered amount has been paid to the petitioner when this Court permitted the opposite parties then the petitioner is entitled for interest. On the aforesaid submission learned counsel for the petitioner may claim the same before the competent authority and if his grievance is not satisfied he may approach the competent court of law.

12. In the wake of the aforesaid nothing remains to be adjudicated in this contempt petition by this Court.

13. Accordingly, the contempt petition is **dismissed**.

14. Notices discharged.

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[Rajesh Singh Chauhan, J.]

Order Date :- 21.11.2023

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