

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP (C) No.122/2019

Date of Order: 05.03.2024

Smti. Dakanishwapaia Sumer

..... Petitioner

Vs.

1. The State of Meghalaya represented by the Chief Secretary, Government of Meghalaya.
2. The Director of Health Services (MI) Department, Meghalaya, Shillong.
3. The Secretary, Health and Family Welfare Department, Government of Meghalaya, Shillong.
4. The Superintendent of Tura Civil Hospital, Tura, West Garo Hills District, Meghalaya.
5. The Senior Treasury Officer, Tura, West Garo Hills District, Meghalaya.
6. The Accountant, Tura Civil Hospital, Tura West Garo Hills District, Meghalaya.
7. The Chairman, Meghalaya Public Service Commission (MPSC), Shillong.

..... Respondents

Coram:

Hon'ble Mr. Justice S. Vaidyanathan, Chief Justice

Appearance:

For the Petitioner

: Mr. H. Nongkhlaw, Adv

For the Respondents

: Mr. A.H. Kharwanlang, Addl.Sr.GA
Mr. B. Khyriem, Adv for R/7

i) Whether approved for
reporting in Law journals etc.:

Yes

ii) Whether approved for publication
in press:

Yes

ORDER

The present writ petition has been filed challenging the order dated 28.09.2018 in which the pay scale of the petitioner was fixed at Rs.11300-22000/-. Aggrieved by the same, the petitioner is before this Court.

2. Pursuant to the advertisement dated 26.06.2012 for the post of Prosthetist and Orthesist under the Health Department in the pay scale of Rs.14100-27510/-pm, the petitioner had applied for the same and was successful in the selection and on the recommendation of the Meghalaya Public Service Commission (for short MPSC) vide letter dated 03.04.2013, the petitioner was temporarily appointed to the post of Prosthetist and Orthesist at Civil Hospital, Tura in the pay scale of Rs.11300-22000/-. Since the pay scale of the petitioner has been reduced from Rs.14100-27510/- pm to Rs.11300-22000/- pm, the petitioner on 20.08.2013 has submitted a representation to the Respondent No.2 to rectify her pay scale from Rs.11300-22000 pm to Rs.14100-27510 pm as per the advertisement of the MPSC. The respondents, after considering the representation submitted by the petitioner, had issued a Corrigendum stating therein that the scale of pay appearing in the letter dated 24.05.2013 may be read as Rs.14100-27510/- pm instead Rs.11300-22000/- pm.

3. Consequent thereto, the petitioner has been drawing the scale of pay of Rs.14300-27510/- pm from the date of joining i.e. 03.06.2013 till date and the respondents, vide letter dated 28.09.2018, which is impermissible and without notice, directed the petitioner to refund the excess amount of pay drawn w.e.f. the date of her joining in service onwards, as the scale of Prosthetist and Orthotist carries the pay of Rs.11300-22000/- pm as mentioned in her appointment order dated 24.05.2013. The case of the petitioner is that after having successfully selected in the recruitment process and duly appointed, she has been drawing the pay scale of Rs.14100-27510/- pm and after a lapse of five years, the respondent No.2 issued the impugned order dated 20.09.2018 by which her pay scale was reduced to Rs.11300-22000/- pm. According to the petitioner, the Corrigendum issued on 26.08.2013 will bind on her and the internal communication dated 09.08.2012 with regard to wrong fixation of pay was not given effect to even prior to the joining of the petitioner in services. According to the petitioner, the action of the respondents in reducing the pay structure amounts to discrimination and contrary to the advertisement based on which the petitioner has made an application. The arbitrary action of the respondents needs to be interfered with and the petitioner is entitled to pay scale of Rs.14100-27510/- pm and that there shall be no recovery of the excess amount drawn.

4. Learned counsel for the State respondents vehemently contended that it is true that there was an advertisement on 26.06.2012 for the post of Prosthetist and Orthesist mentioning the scale of pay of Rs.14100-27510/- pm and subsequently, though a Corrigendum was issued on 26.08.2013 by fixing the scale of pay as Rs.14100-27510/- pm, such wrong fixation in the scale of pay was modified to Rs.11300-22000/- pm the letter impugned herein. The petitioner has also given an undertaking dated 28.11.2017, stating that the petitioner is willing to return the excess payment received on account of wrong fixation. When the erroneous advertisement was sought to be rectified by means of internal communication dated 09.08.2012, the petitioner would not be entitled to any amount other than the scale of pay applicable to the post of Prosthetist and Orthesist, viz., Rs.11300-22000/- pm and demand of Rs.14100-27510/- pm is illegal. That apart the petitioner has given an undertaking to repay the amount received in excess. The respondents has drawn the attention of this Court to the judgments of the Apex Court in the case of **State of Punjab v. Rafiq Masih (Whitewasher)** reported in **(2015) 4 SCC 334** and **High Court of Punjab and Haryana v. Jagdev Singh** reported in **(2016) 14 SCC 267** in support of the order of recovery. He also relied upon the judgment of the Madras High Court in the case of **V. Geeta v. State of Tamil Nadu** reported in **2017 SCC OnLine Mad 4509**. The Apex Court in the case of **High Court of**

Punjab and Haryana v. Jagdev Singh (supra) held that recovery can be made, if it is not beyond five years. For the sake of convenience, relevant Paragraph No.10 of the said judgment is extracted hereunder:

“10. In State of Punjab and Ors. v. Rafiq Masih (White Washer) (2015) 4 SCC 334 this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer 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 supplied).”

5. A reading of the judgments referred to by the respondents unveils that the recovery can be effected, when there was a wrong fixation at the time of initial entry into service or at the time of fixation of pay while granting promotion or if there is an undertaking or the employee was put on notice of such recovery. Moreover, as per

the dictum laid down, no recovery can be made, if it is within a period of five years. In this case, more than five years have gone by from the date of joining the service, namely, 24.05.2013 and the revised fixation was done only on 28.09.2018, which is beyond five years. Nothing prevented the respondents in fixing the pay at Rs.11300-22000/- pm, when a Corrigendum was issued on 26.08.2013 and no such undertaking was obtained at that point of time. When there was an internal communication dated 09.08.2012 with regard to wrong fixation of pay, the petitioner should have been informed that there is an error crept in and he would be appointed only in the pay scale of Rs.11300-22000/- pm. After the communication dated 09.08.2012 and issuance of Corrigendum dated 26.08.2013, the respondents slept over the matter and allowed the petitioner to draw the pay scale of Rs.14100-27510/- pm and undertaking was obtained only in the year 2017 after much water has flown. Probably, the Officials, in order to escape from their mistake, would have obtained the undertaking. In any event, the decision quoted by the respondents may not be applicable to the case on hand, as the facts are completely different. The Hon'ble Supreme Court in the case of **Padmasundara Rao (Dead) & others vs. State of Tamil Nadu and others**, reported in **(2002) 3 SCC 533** observed that if it is found that the facts of the cited judgment of the Higher Forum totally

differs with the one on hand, then there is no compulsion for the subordinate courts to blindly rely on the same to arrive at a conclusion. It is appropriate to extract the relevant paragraph of the said judgment, which reads as follows:

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in *Herrington vs. British Railways Board* (1972) 2 WLR 537. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

6. In this case, though a wrong fixation was made, there was no undertaking obtained initially. The Apex Court, in *State of Punjab and Ors. v. Rafiq Masih* (supra) categorically held that payment made erroneously Class-III and Class-IV employees cannot be recovered, even though they are not entitled to the excess amount. Therefore, in the light of the judgment of the Supreme Court in **Padmasundara Rao (Dead) & others vs. State of Tamil Nadu and others**, the decision quoted by the respondents is justifiable one and may not be applicable to facts of this case. It does not mean that the recovery cannot be permissible and that the petitioner can endlessly get the scale of pay at Rs.14100-27510/- pm, in view of the fact that the mistake has been subsequently identified and the same has

been informed to the petitioner and that the petitioner has also given an undertaking dated 28.11.2017, expressing her willingness to return back the amount received in excess on account of wrong fixation.

7. For the foregoing discussions, this Court is of the view that there is no infirmity in the action of the respondents in fixing the scale of pay of the petitioner at Rs.11300-22000/- pm. as on the date of joining, namely, 24.05.2013 and she is not entitled to the scale of pay at Rs.14100-27510/- pm, which has been erroneously fixed. Insofar as recovery alone is concerned, an interference is required by this Court and the respondents cannot recover the amount paid excessively. Accordingly, while holding that the order with regard to fixation of pay is perfectly valid, the respondents are directed not to effect any recovery from the petitioner in respect of the amount paid in excess.

8. With the above observation and direction, W.P. (C) No.122 of 2019 is disposed of.

(S.Vaidyanathan)
Chief Justice

Meghalaya
05.03.2024
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