

Court No. - 4

Case :- WRIT - A No. - 6044 of 2024

Petitioner :- Harikesh Sharma

Respondent :- State Of U.P. Thru. Addl. Chief Secy. Home Lko And 3 Others

Counsel for Petitioner :- Sanjay Kumar Rao

Counsel for Respondent :- C.S.C.

Hon'ble Rajesh Singh Chauhan,J.

1. Heard Sri Sanjay Kumar Rao, learned counsel for the petitioner and Sri Diwakar Singh, learned Standing Counsel for the State.

2. By means of this petition the petitioner has prayed following relief :

"i. To Issue a writ, order or direction in the nature of Certiorari to quash the the recovery order passed by the opposite party No. 3 while summoning the same from the Opposite party No. 3 for the illegal recovery/ deduction of money amounting Rs. 2,30,928/- (Rs. Two Lakh Thirty Thousand Nine Hundred Twenty Eighty only) from the pension dues..

ii. To Issue a writ, order or direction in the nature of Certiorari to quash the the recovery/deduction order passed by the opposite parties while summoning the same from the Opposite parties for the illegal recovery/ deduction of money amounting Rs. 31,317/ (Rupees Thirty One Thousand Three Hundred Seventeen only) from the pension dues.

iii. To Issue a writ, order or direction in the nature of MANDAMUS commanding the opp. Parties to refund the amount of Rs. 2,30,928/- (Rs. Two Lakh Thirty Thousand Nine Hundred Twenty Eighty only) and Rs. 31,317/- (Rupees Thirty One Thousand Three Hundred Seventeen only) which has been illegally deducted/ recovered from the petitioner from his pension dues in the light of Judgment delivered by the Hon'ble Supreme court in State of Punjab and others Vs. Rafiq Masih (White washer) and other reported in 2015(4)SCC 32.

iv. To Issue a writ, order or direction in the nature of MANDAMUS commanding the opp. Parties thereby directing them to calculate the amount of increment due to the petitioner and further direct them to pay to the petitioner."

3. At the very outset Sri Diwakar Singh, learned Standing Counsel has shown the instructions letter dated 2.8.2024 preferred by the Commandant, 32 Bn. P.A.C., Kanpur Road, Lucknow along with some correspondences. Along with aforesaid instruction one letter dated 9.6.2017 has been enclosed which was preferred by the petitioner to the competent

authority giving reference of employees to whom the benefit of pay scale has been given but such benefit has not been given to the petitioner and has requested that the similar benefit may be provided to the petitioner, same are taken on record.

4. Learned counsel for the petitioner has stated that the petitioner retired from the post of 'Cook' on 30.11.2023 and after his retirement impugned notice dated 4.1.2024 (Annexure no. 2) has been issued by the Commandant, 32 Bn. P.A.C., Lucknow seeking explanation from the petitioner to make recovery of Rs. 2,30,928/- for the reason that he was erroneously given the benefit of pay etc. on 13.2.2017. It has further been stated that the petitioner has not given any undertaking

5. In the aforesaid notice there is no mention to the effect that at the time of providing benefit of pay scale etc. any consent has been taken from the petitioner to the effect that in any case if any excess amount is paid to the petitioner it would be recoverable inasmuch as had any consent been obtained from the petitioner it would have been indicated in the show cause notice but there is no mention of taking consent as has been indicated in the impugned notice.

6. The petitioner submitted the reply of the aforesaid show cause notice on 12.1.2024 (Annexure no. 3) indicating therein that whatever benefit was provided to the petitioner was absolutely appropriate and after his retirement the said recovery would not be proper and would be against the law.

7. Without considering the aforesaid explanation of the petitioner a sum of rs. 2,30,928/- has been recovered from the head of gratuity of the petitioner. Not only the above, a sum of Rs. 31,317/- has also been deducted from the head of gratuity itself. Learned counsel has clarified the aforesaid fact by submitting that earlier amount was deducted from the amount of gratuity which is equivalent to the 90% of the gratuity and the subsequent deduction was made from the remaining amount of the gratuity which is 10% of the gratuity, the recital to this effect has been given in para 10 of the writ petition. Therefore, learned counsel for the petitioner has stated that the petitioner is entitled to get the benefit of para 18 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*, which 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."*

8. In the present case the petitioner retired from Class IV post on 30.11.2023 and after his retirement the impugned recovery has been made in the name of excess amount paid while the petitioner was in service. Since no undertaking was taken from the petitioner, therefore, such recovery is not permissible even in the light of the dictum of Apex Court in re: ***State of Punjab and Others V/s. Jagdev Singh passed in Civil Appeal No.3500/2006.***

9. Learned Standing Counsel tried to justify the impugned orders and impugned in-actions to submit that since the excess amount was paid to the petitioner, therefore, the same has been recovered but on being confronted as to whether any undertaking was taken from the petitioner at the time of making payment of benefit of pay scale etc. in the year 2017, he has stated that he has no specific instructions on that point but the recital to this effect has not been given in the show cause notice.

10. Having heard learned counsel for the parties and having perused the material available on record, I do not find any purpose to keep this petition pending any longer inasmuch as the subject matter in question is no more *res integra* in view of dictum of ***Rafiq Masih (supra)*** and subsequent judgment of ***Jagdev Singh (supra)***.

11. Since the petitioner retired from Class IV post i.e. 'Cook' on 30.11.2023 and impugned show cause notice has been issued on 4.1.2024 after his retirement seeking the recovery of the amount paid to the petitioner in year 2017 and no undertaking was received from the petitioner at the time of making the payment of benefit of pay scale etc.. So far as the letter dated 9.6.2017,

which has been enclosed with the instruction letter is concerned, the aforesaid representation may not be treated as consent being given by the petitioner to make recovery of the excess amount but he had only prayed to make payment of appropriate pay scale in the same manner which has been provided to the similarly placed employees and it is needless to say that on such representation the petitioner would have been paid the benefit after examining the admissibility of the demand of the petitioner, therefore, the impugned orders / in-actions making recovery to the tune of 2,30,928/- and 31,317/- are patently illegal, arbitrary, discriminatory and uncalled for, therefore, the same are set aside / quashed.

12. Accordingly, the competent opposite parties are directed to refund the amount of Rs. 2,30,928/- and Rs. 31,317/- which has already been recovered from the petitioner from his post retiral dues with expedition preferably within a period of one month from the receipt of certified copy of the order of this Court, failing which the petitioner would be entitled for the interest @ 8% on the delayed payment.

13. The petitioner may also be paid his other consequential service benefits, if the same are admissible to him as per law.

14. Writ petition is ***allowed***.

15. No order as to costs.

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[Rajesh Singh Chauhan, J.]

Order Date :- 2.8.2024

Om