

Court No. - 18

Case :- WRIT - A No. - 4878 of 2015

Petitioner :- Sita Ram Sharma And 24 Ors.

Respondent :- State Of U.P. Through Prin. Secy. Deptt. Of Transport Lko. And

Counsel for Petitioner :- Rahul Srivastava, Ghulam Mohammad Kamil, S.M.K. Chaudhary

Counsel for Respondent :- C.S.C., Chanra Shekhar Pandey, Ratnesh Chandra

Hon'ble Manish Mathur, J.

1. Heard Mr. Rahul Srivastava & Mr. G.M. Kamil, learned counsel for petitioners, learned State Counsel for opposite party no. 1 and Mr. Ratnesh Chandra, learned counsel for opposite parties no. 2 to 4.

2. Petition has been filed seeking challenge to the order dated 12.08.2015 whereby pay protection granted earlier to petitioners vide order dated 05.09.2013 has been withdrawn and recovery in pursuance thereof has been directed. Further prayer for a direction to opposite parties to continue the pay protection granted to petitioners earlier vide order dated 05.09.2013 has also been sought.

3. It has been submitted that petitioners were employed by the Corporation on Class-III post and thereafter in pursuance of Rule 8A of the erstwhile U.P. Government Servants Seniority Rules, 1991, reserved category employees of the Corporation who was junior to petitioners were granted accelerated promotion. It is submitted that due to such accelerated promotion, the consequence was that such juniors to petitioners were provided higher scale of pay than petitioners and in order to remedy the aforesaid situation, the order dated 05.09.2013 was passed by the Corporation granting pay parity to petitioners with such juniors who were getting higher salary due to accelerated promotion. It is submitted that the aforesaid benefits were granted to petitioners in pursuance of the Government orders dated 04.05.2010 and 22.12.2011.

4. Learned counsel for petitioners submits that subsequently due to judgment rendered by Hon'ble Supreme Court in Civil Appeal No. 2608 of 2011, U.P. Power Corporation Limited versus Rajesh Kumar and others, the provision of accelerated promotion under Rule 8A of the Rules of 1991 were declared ultra vires and were quashed due to which the reserved category candidates who had been granted accelerated promotion, were

subsequently reverted to their original post. It is submitted that despite the said reversion, pay protection was granted to the reserved category candidates and the same protection continued with petitioners but has now been withdrawn by passing of the impugned order dated 12.08.2015. It is submitted that initially by means of interim order, this Court had issued directions that no recovery should be effected against petitioners. It is submitted that during pendency of petition, only five petitioners namely Rajesh Kumar Singh, Deepak Verma, Vimlesh Kumar Yadava, Balraj Singh and Ashok Kumar Shukla are remaining in service whereas the other petitioners have already superannuated with some of them also having passed away.

5. Learned counsel for petitioner submits that a bare perusal of the impugned order will make it evident that the same has been passed without issuing any show cause notice to petitioners nor even affording any opportunity of hearing to them and without adverting to any misrepresentation of fraud on the part of petitioners in the pay protection provided to them. He has therefore placed reliance on judgment rendered by Hon'ble Supreme Court in the case of **State of Punjab and others versus Rafiq Masih, (2015) 4 SCC 334** to submit that in such circumstances as indicated in the aforesaid judgment, the same being applicable upon petitioners, no such recovery could have been effected from the salaries and post retiral benefits of petitioners. He has also placed reliance on judgment rendered in the case of **Joint Action Committee of Air Line Pilots' Association of India (Alpai) and others versus Director General of Civil Aviation and others, (2011) 5 SCC 435**.

6. It is submitted that the impugned order has been passed only on the basis of report submitted by the Finance Controller without any independent application of mind by the authority concerned as to the circumstances under which pay protection was accorded to petitioners and also ignoring paragraph 3 of the Government order dated 22.12.2011.

7. Learned counsel appearing for opposite parties have refuted submissions advanced by learned counsel for petitioners with the submission that although initially pay protection was granted to petitioners vide order dated 05.09.2013 but subsequently upon examination of the issue, it was found that petitioners are not entitled for the same since there is no such provision in the Government orders dated 04.05.2010 and 22.12.2011 and therefore the benefit had been wrongly granted to petitioners. It is also submitted that in pursuance of the impugned order, subsequently order dated 02.05.2016 was passed with regard to petitioners indicating their revised pay scale in pursuance of the order dated 12.08.2015 but the said

order dated 02.05.2016 has not been challenged by any of petitioners.

8. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it is evident and admitted that earlier petitioners had been granted pay protection in parity with their juniors who under the reserved category were granted accelerated promotion in view of Rule 8A of the Rules of 1991. Such pay parity which was granted by means of order dated 05.09.2013 places reliance on the Government orders dated 04.05.2010 and 22.12.2011. A perusal of the impugned order will make it evident that the same has been passed only in consideration of reports submitted by the Finance Controller to the effect that petitioners were not entitled for the aforesaid benefit in terms of the Government order dated 22.12.2011. It also appears that impugned order has been passed in pursuance of a meeting by the State Government dated 29.06.2015 under the Chairmanship of the Principal Secretary, Transport Department.

9. However, the impugned order also reveals that the benefits granted to petitioners vide order dated 05.09.2013 have been withdrawn only on the basis of opinion given by the Finance Controller and does not in fact advert to the minutes of the meeting dated 29.06.2015. Since the Chief General Manager (Administration) who has passed the impugned order is admittedly the appointing authority of petitioners, it was incumbent upon such an authority, prior to passing the impugned order, to have applied his mind independently with regard to the issues before him and to have reached a subjective satisfaction that the Government orders were inapplicable in the case of petitioners and as to the reasons for its inapplicability. The impugned order clearly reveals that it has been passed without any such independent application of mind and without even advert to the reasons for granting such benefit to petitioners vide earlier order dated 05.09.2013. The order also while indicating that parity has been granted to petitioners with one Smt. Sudha and Mr. Mahindra Pratap does not advert as to whether such benefits of pay protection granted to such persons were continued or were withdrawn.

10. The aspect of recovery from petitioners salaries and pensionary benefits also appears to be covered by judgment rendered by Hon'ble Supreme Court in the case of **Rafiq Masih** (supra) which is in the following terms:-

"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."

11. In view of aforesaid discussion, it is evident that the impugned order dated 12.08.2015 has been passed without application of mind with regard to applicability of the Government orders and continuance of pay parity to the persons with whom such parity had been granted and without affording any opportunity of hearing to petitioners.

12. In view thereof, the impugned order dated 12.08.2015 is hereby quashed by issuance of a writ in the nature of certiorari granting liberty to opposite parties to pass fresh orders only after affording opportunity of hearing to those persons who are continuing in service. Since the posts are not pensionable therefore an opportunity of hearing to the superannuated persons is not required.

13. In view of aforesaid, it is also directed that no recovery/adjustment shall be made from the post retiral benefits of the superannuated employees in view of judgment rendered in the case of **Rafiq Masih** (supra).

14. The petition consequently stands **allowed**. Parties to bear their own cost.

15. The benefit of this order shall not be applicable upon petitioner no. 15, Chaudhary Manzuryar since appropriate orders have consequently been passed in his case.

Order Date :- 19.7.2024
Satish