

Court No. - 4

Case :- WRIT - A No. - 66368 of 2005

Petitioner :- Umesh Chandra

Respondent :- State of U.P. and Others

Counsel for Petitioner :- P.K. Dwivedi,Virendra Singh

Counsel for Respondent :- C.S.C.,J.K. Khanna

Hon'ble Ajit Kumar,J.

Heard Sri Virendra Singh, learned counsel for the petitioner and learned Additional Chief Standing Counsel representing State respondents.

By means of present petition filed under Article 226 of the Constitution, petitioner has challenged the order dated 13th July, 2005 providing for refixation of pay of the petitioner w.e.f. 1.7.1985 as the pay fixation in the payscale of Rs. 450-720 w.e.f. 1.7.1985 has been cancelled. The consequential order passed in that behalf on 27th September, 2005 providing for recovery of excess amount paid to the petitioner by way of salary passed by Superintendent Engineer has also been challenged and so also final consequential order passed by Executive Engineer dated 30th September, 2005 directing for recovery has been challenged.

The basic argument advanced to assail the orders is that petitioner having retired on 30th June, 2005 from post of junior clerk, no such pay refixation could have been order w.e.f on 1st July, 1985 and that too without any notice and opportunity of hearing to him. Yet another argument advanced is that subsequently the State Government itself has released a Government Order that such correction in pay fixation beyond period of 34 weeks prior to the date of retirement, to be bad. It is, therefore, argued that this being beneficial piece of subordinate legislation, its scope and ambit can be made effective in so far as its applicability is concerned, though on principles. It is also submitted that at no point of time petitioner had made any misrepresentation for particular pay fixation and

hence petitioner cannot be saddled with liability for recovery on the principle of *Suggestio falsi*" or "*suppressio veri*"

It is also submitted on behalf of the petitioner that case of the petitioner stands squarely covered with the judgment in the case of **State of Panjab and Others v. Rafiq Masih (White Washer) (2015) 4 SCC 334**. Vide paragraph 12, the Court has held thus:

"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."

Learned counsel for the petitioner states that respondents in the counter affidavit having failed to demonstrate that petitioner at any point of time had given any undertaking for recovery of such pay fixation, for any wrongful pay fixation, corrections cannot be enforced by way of recovery of the excess payment .

Meeting the submissions so advanced by learned counsel for the petitioner, Learned Additional Chief Standing Counsel sought to urge that pay fixation correction is not bad for the reason that petitioner could not have been given benefit of 10 years service w.e.f. 1985. He further argues that the Government Order brought in the year 2007 cannot be given retrospective effect unless and until Government Order so provides. However, on the point of non

compliance of principles of natural justice, he has placed only reliance upon reply given in paragraph 13 of the counter affidavit that as per relevant service records, such correction was accorded. Thus, it is not denied that petitioner was not afforded any opportunity of hearing before passing of the order for correction of re-fixation.

Having heard learned counsel for the respective parties and having perused the records, what I find from the perusal of the order of pay fixation is that, it can be undisputedly concluded that petitioner was not put to notice prior to passing of the order. Justification is sought to be given that certain investigation was carried out in the matter of pay fixation as such and queries were put, but such internal departmental communication cannot have bearing upon the rights of an employee if he is not afforded opportunity to offer his explanation. Thus on the principles of natural justice, the order dated 13th July, 2005 directing for re-fixation w.e.f on 1st January, 1985 cannot be sustained and on this ground alone, the order deserves to be set aside and so also consequential orders of recovery.

Since order dated 13th July, 2005 is unjustified are all consequential orders being date 27th September, 2005 and 13th September, 2005 passed by Superintending Engineer Minor Irrigation, Gorakhpur and the Executive Engineer Minor Irrigation, Gorakhpur respectively are liable to be held unsustainable.

On the point of recovery were to be made or not, the legal position stands crystalized in the judgment of the Supreme Court in the case of State of Panjab v. Rafiq Masih (*supra*) wherein the Court has clearly laid down that no such recovery can be enforced against retired class III and IV employees after their retirement for any correction of pay fixation. Admittedly petitioner had attained the age of superannuation on 30th June, 2005, and therefore, such recovery could not have been proceeded with. This legal principle though came to be enunciated by Supreme Court in its judgment passed in the year 2014, but the object and that was kept in mind and the

principle behind the *ratio* if applied to the present case, then legal position shall remain same. It is also settled law that enforcement of common law means law made by the Judge/Court of Law and enforcement of such law is always taken to be on the principle that law laid down always stood there unless the Court makes it prospective.

In view of above, therefore, recovery is held to be bad as a consequence to the order of pay fixation dated 13th July, 2005. This Court is also of the considered view that such correction in pay fixation should be within a reasonable period and that too where employee has retired. In service jurisprudence, the legal position has been that employer employee relationship exists so long as an employee is working in the establishment as once an employee attains the age of superannuation, this relationship comes to an end. This is the reason why for continuation of disciplinary proceedings drawn prior to an employee attaining the age of superannuation, the law had to be made by State Government giving special power to Governor to be exercised in such cases. In such circumstances, the said principle if borrowed here, then no such action ought to have been taken without sanction of the State Government even in the matter of pay fixation. In order to arrest this situation, State Government brought into force the Government Order in on 16th January, 2007, which has been interpreted by the Supreme Court in the case of **Sushil Kumar Singhal Vs. Pramukh Sachiv Irrigation Department and others, 2014 (16) SCC 444**. Hence, I consider it appropriate to apply those principles in the present case as well to hold that such fixation beyond reasonable period was certainly bad and hence the order dated 13th July, 2005 is equally liable to be held bad on this ground.

In view of above, this writ petition succeeds and is allowed. The order dated 13th July, 2005 directing for re-fixation of the petitioner w.e.f. 1.1.2005 and consequential recovery dated 27th September, 2005 passed by Superintendent Engineer, Minor Irrigation, Gorakhpur as well as Consequential Order of recovery

passed by Executive Engineer Minor Irrigation Division Gorakhpur dated 13th September, 2005 are hereby quashed.

Respondent concerned is directed to re-fix the pension and post retirement dues of the petitioner on the basis of last pay drawn on the date of his retirement i.e. dated 30th June, 2005. Revised pension and post retirement dues shall be paid to the petitioner and recovered amount made shall also be replaced to the petitioner within next two months' time.

Entire computation shall be done accordingly in terms of order passed by this Court and the amount liable to be refunded to the petitioner shall be credited into account within the same period. Difference of arrears of pension and other retirement dues on account of orders impugned if set aside shall also be calculated and the amount shall also be credited into account of the petitioner within the same period.

It is made clear that if order remains uncomplied with, the respondent shall be liable to be payable interest @ 8 percent over and above amount to be paid to the petitioner upon expiry of period of two months till actual payment is made.

Order Date :- 12.8.2025

Sanjeev