

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 7TH DAY OF DECEMBER 2015/16TH AGRAHAYANA, 1937

WP(C).No. 10582 of 2006 (I)

PETITIONER(S) :

M.V. ALOYSIUS, MAMPUZHA,
CHEMBERY POST, KANNUR-670 632, (RETIRED HSA),
DEVA MATHA HIGH SCHOOL, PAISAKARY.

BY ADVS.SRI.P.C.SASIDHARAN
SRI.E.S.ASHRAF

RESPONDENT(S) :

1. THE SECRETARY TO GOVERNMENT,
GENERAL EDUCATION DEPARTMENT, GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM.
2. THE DISTRICT EDUCATIONAL OFFICER,
KANNUR.

R1&R2 BY Sr.GOVERNMENT PLEADER SRI.MUHAMMED SHAFI

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
13.10.2015, THE COURT ON 7.12.2015, DELIVERED THE FOLLOWING:

WP(C).No. 10582 of 2006 (I)

APPENDIX

PETITIONER'S EXHIBITS :

EXT.P1 : TRUE COPY OF THE STATEMENT OF FIXATION APPROVED BY THE D.E.O. KANNUR DATED 22.3.1995.

EXT.P2 : TRUE COPY OF THE AUIT OBJECTION ISSUED BY THE D.E.O., KANNUR.

EXT.P3 : TRUE COPY OF THE LIABILITY CERTIFICATE ISSUED TO THE PETITIONER BY THE HEAD MASTER DEVA MATHA HIGH SCHOOL, 8.11.04.

EXT.P4 : TRUE COPY OF THE PENSION PAYMENT ORDER ISSUED BY THE ACCOUNTANT GENERAL A&E, KERALA, THIRUVANANTHAPURAM, DATED 13.7.04.

EXT.P5 : TRUE COPY OF THE GOVERNMENT ORDER G.O.(Rt)NO.259/06/G1.Edn. DATED 16.1.06.

RESPONDENTS' EXHIBITS :

NIL

//TRUE COPY//

P.A.TO JUDGE

ami/

A.M.SHAFIQUE, J.

W.P.(C)No.10582 of 2006

Dated this the 7th day of December, 2015.

J U D G M E N T

This writ petition has been filed challenging Exts.P2, P3 and P5 and seeking for a declaration that the option exercised by the petitioner and the consequent pay fixation made in terms of Ext.P1 is proper and valid and for a further direction to the respondents to refund an amount of Rs.36,450/- with interest, which was recovered from the DCRG of the petitioner.

2. The short facts in the writ petition would disclose that the petitioner exercised re-option of grade promotion w.e.f. 1.10.1993 which was approved and sanctioned by the District Educational Officer in terms of Ext.P1 dated 22.3.1995. The petitioner retired from service on 31.3.2004. Later the petitioner was informed that an audit objection was raised and an amount of Rs.36,450/- was recovered from the DCRG. Ext.P2 is the audit objection. Ext.P3 is the

liability certificate that had been issued to the petitioner on 8.11.2004. The petitioner later received the pension payment order, wherein it was mentioned that he has only 26 years service. According to him, he had service for 26 years 7 months and 15 days which had to be computed as 27 years. The petitioner submitted a revision petition which came to be disposed of as per the directions issued by this Court in W.P.(C)No.16884/05 as per Ext.P5 Government order dated 16.1.2006. In Ext.P5, it was indicated that the re-option exercised by the petitioner was on the basis of the Government orders dated 9.6.1994 and 23.8.1994. The said Government orders did not allow to challenge the date of option for higher grade which was already granted on or after 1.3.1992, but it only permits to re-opt the grade promotion for 1992 pay revision benefits, on the date of grade which fell due on or after 1.3.1992. It was held that the re-option exercised by the petitioner from 1.10.1993 is inadmissible. Further it was observed that the date of birth

of the petitioner was 15.1.1949 and his date of superannuation is 31.1.2004. He was allowed to continue beyond the date of completion of 55 years, till the end of the academic year, which period will not be computed for pensionary benefits in terms of G.O.(P)No.360/80/Fin. dated 15.9.1986.

3. The petitioner submits that there is no restriction in the Government orders dated 9.6.1994 and 23.8.1994, limiting the scope of re-option to the date of grade promotion wholly ; whereas facility was granted to opt time-bound higher grade which fell due/granted first, on or after 1.3.1992 for pay revision benefits. It was also contended that there was no reason why the recovery should be effected after a considerably long period.

4. The learned counsel for the petitioner also relied upon the judgment of the Supreme Court in **State of Punjab and others Vs. Rafiq Masih (White Washer) and others [(2015)4 Supreme Court Cases 334]**, wherein the

Supreme Court had occasion to consider whether recovery of amount paid in excess can be made. It is held at paragraph 18 that :

"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 hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).

(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from the 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."

5. Counter affidavit has been filed by the 1st respondent inter alia stating that the petitioner exercised re-option of grade promotion and pay revision w.e.f. 1.10.1993. An objection regarding such pay fixation was raised by the Deputy Director of Education as per letter dated 17.12.2003, in connection with checking of fixation of pay of employees who are due to retire during 2004. It was found that there was irregular re-option and pay fixation and he was directed to refund the excess pay drawn. It was further contended that the total qualifying service of the petitioner is only 26 years 5 months and 13 days and therefore the Accountant General was justified in calculating pension for 26 years of qualifying service. It is further stated that the petitioner was eligible to exercise re-option for the grade promotion in the pre-revised scale w.e.f. 20.10.1992 itself and came over to the revised scale on that day as he was already granted the grade promotion in the revised scale on 20.10.1992. In other words, the date of promotion and corresponding pay

revision should be the same date. Thus, there is no provision in the rules to opt different dates for grade promotion and corresponding pay revision. It is further indicated that the Government orders dated 9.6.1994 and 23.8.1994 do not allow to change the date of option for higher grade already granted on or after 1.3.1992 but only permits to re-opt the grade promotion for the 1992 pay revision benefits on the date of grade which fell due on or after 1.3.1992. The Government therefore was justified in the stand taken for recovering the amount from the DCRG.

6. Heard the learned counsel for the petitioner and the learned Government Pleader in the matter.

7. The first issue which requires to be considered is whether an amount of Rs.36,450/- could be recovered from the petitioner. The reason for recovery effected is based on a wrong fixation of pay, based on a re-option exercised by the petitioner. Ext.P1 is the pay fixation order which had been accepted by the competent authorities on 22.3.1995.

Ext.P3 liability certificate had been issued only on 8.11.2004. Of course as per the rules, the liability can be fixed within a period 3 years and can be recovered from the benefits due including gratuity.

8. The only question to be verified is whether such an amount can be recovered after paying the amounts, without raising any objection. The Supreme Court has laid down certain principles in the judgment in Rafiq Masih's case (cited supra), wherein recoveries by the employees are made impermissible under certain circumstances. One of the conditions is, "recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued", and clause (v) further indicates that, where such recovery if made from the employee, would be iniquitous or harsh or arbitrary to an extent, as it would far outweigh the equitable balance of the employer's right to recover.

9. Having regard to the fact that the pay fixation order

has been initially made on 22.3.1995 and the petitioner was being paid until he retired, though they were entitled to correct any pay fixation order, if there is any illegality, I am of the view that, the recovery should not have been made, as the order fixing the pay has been passed prior to five years from the date of superannuation, on the basis of which, the benefits were being paid to the petitioner. Under such circumstances, I am of the view that, the recovery effected in terms of Ext.P3 was inequitable and therefore the said amount is liable to be refunded.

10. The next contention is with reference to the re-fixation made as per Ext.P2. Apparently, the petitioner had opted for pay revision of 1992 w.e.f. 1.3.1992. The pay of the petitioner was revised and fixed at Rs.1,520/- (Rs.1,350-2,200) as on that day. It is stated that his pay was fixed at a higher grade scale of Rs.1,520-2660 w.e.f. 20.10.1992. It was subsequent to the above fixation of pay on the higher grade that the petitioner has exercised re-option of grade

promotion and pay revision w.e.f. 1.10.1993, on the basis of Government orders dated 9.6.1994 and 23.8.1994. It is the contention of the respondent authorities that the re-option of grade promotion w.e.f. 20.10.1992 to 1.10.1993 is not admissible, as teachers are permitted to opt time-bound grade, fell due/granted first on or after 1.3.1992, cancelling the option already exercised in the post held immediately prior to 1.3.1992. Therefore, it is clear that the petitioner is entitled only to get his pay fixed in the pre-revised higher grade which was effected from 20.10.1992 to come to the revised scale on that day itself.

11. Having regard to the aforesaid factual situation, I do not think that the respondent authorities had committed any error in re-fixing the pay of the petitioner in terms of Ext.P2.

12. The next contention is with reference to the total years of service, which is clarified by the respondent authorities, stating that he had only 26 years 5 months and

13 days service and therefore there is justification in treating the qualified service as 26 years.

13. Having regard to the above referred factual findings, this writ petition is allowed in part, as under :

Rs.36,450/- which has been recovered from the petitioner's gratuity has to be refunded to the petitioner within a period of 2 months from the date of receipt of copy of this judgment. However, having regard to the factual situation involved in the matter, the petitioner is not entitled for any interest on the said amount.

Sd/-
A.M.SHAFFIQUE,
JUDGE.

ami/

//True copy//

P.A. to Judge