
IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No.10508 of 2013

Date of decision: 15.3.2016

Shiv Kumar

...Petitioner

Versus

State of Punjab and others

...Respondents

CORAM: HON'BLE MR.JUSTICE G.S.SANDHAWALIA

Present: Mr. V.K.Shukla, Advocate for the petitioner

Mr. Avinit Avasthi, Assistant Advocate General, Punjab

G.S.SANDHAWALIA, J (Oral)

The petitioner seeks quashing of order dated 31.12.2009 (Annexure P/2) whereby his pay has been refixed and order of recovery (Annexure P/3) whereby a sum of ₹ 80,112/- was ordered to be deducted from his pay.

The pleaded case of the petitioner is that he was serving as Pharmacist with the respondents and retired on 31.8.2012. He had been granted benefits of proficiency step up with effect from 13.11.1993 and he continued to enjoy the same till passing of the impugned order whereby his pay was refixed and order of recovery was passed. It is submitted that there was never any opportunity of hearing afforded to the petitioner and there was neither any misrepresentation or fraud played on his part.

Counsel for the petitioner submits that he would be satisfied if the order of recovery is set aside and amount recovered is refunded and he would not agitate the matter regarding refixation of pay.

The defence of the State is that the petitioner's salary was refixed and he had given a consent that he would not initiate any type of

proceeding in future and therefore, the petition was being filed after long delay of 5 years was time barred. The refixation had been done according to the rules and regulations and therefore, no fault can be found in the same.

Counsel for the State submits that in view of the consent given by the petitioner on 25.5.2009 (Annexure R/1), the petitioner can not now turn around and claim the refixation. The consent reads as under:-

“To

The Senior Medical Officer,
PHC, Patto Hira Singh.
Distt. Moga.

Sub: Regarding deduction of amount of recovery.

Sir,

It is respectfully prayed that as per your letter No.1739 dated 31.12.2008 the amount of recovery can be deducted from my salary from the month of 06/2009 @ Rs.5000/- per month. I will not file any court case and documentary proceedings regarding the same. Myself will be responsible for the same.

Dated : 25.5.2009

Yours faithfully,

Sd/ Shiv Kumar Chief Pharmacist
PHC Patto Hira Singh,
District Moga.”

From the above facts, it is not disputed that the petitioner was enjoying the said benefit for almost 16 years before the said refixation of his pay. It is also not a case of the State that the pay as such had been fixed on account of misrepresentation and fraud played on the part of the petitioner. The Full Bench judgment of this Court in **Budh Ram Vs. State of Haryana, 2009(3) SCT 333** laid down that in the absence of any misrepresentation and fraud played, recovery cannot be effected.

Recently, the Apex Court in **State of Punjab Vs. Rafiq Masih**

etc. (2014) 8 SCC 883 has laid down the principle that in case where the payment has been received for over a period of 5 years, recovery cannot be effected. The observations of the Apex Court and principles laid down in ***Rafiq Masih's case (supra)*** read as under:-

“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.”

Coming to the 2nd issue as to whether the petitioner's waiver can be held against him on account of consent given by the petitioner and whether he is not entitled for refund of the amount recovered.

Counsel for the petitioner has relied upon the judgment in **LPA**

No. 1361 of 2010-Surinder Kaur Vs. State of Punjab and others

decided on 9.12.2010. The Division Bench decided the issue that whether by giving such an undertaking, waiver could be held against the employees on account of affidavit filed by them. Accordingly, it was held that it was against the public policy and by taking such affidavits legal right of the employees were being curtailed and the appeal filed was accordingly accepted and the order of the learned Single Bench was set aside. The relevant portion reads as under:-

“12. The next question which fell for consideration is whether a recovery which could not be legally effected would become available merely because the appellants filed an affidavit. It is well settled that any arbitrary action by the respondents could stand scrutiny of the Courts if there is no misrepresentation, fraud or deception played by the appellants then it would be violative of Articles 14 and 16(1) of the Constitution. It is equally well settled that there cannot be any waiver of fundamental rights as has been held by Constitution Bench of Hon'ble the Supreme Court in the case of Basheshar Nath Vs. Commissioner of Income-tax, AIR 1959 SC 149. Such a waiver would be against public policy. In paras 32 to 82 of the judgment it has been held that it is not open to a citizen to waive his fundamental rights acquired by Part-III of the Constitution and Hon'ble Supreme Court is the bulwark of the fundamental rights which have been for the first time enacted in the Constitution. It would be a sacrilege to whittle down those rights. The view expressed by the Constitution Bench has also been followed and applied by another Constitution Bench in the case of Delhi Transport Corporation V. D.T.C. Mazdoor Congress, AIR 1991 SC 101. Therefore, the affidavit filed by the appellants would not constitute a basis for depriving them the benefits already paid, enjoyed and consumed. There is no room for the observations which have been made by the learned Single Judge in para 25 of the judgment that the appellants were aware that the benefit might be withdrawn from them and they should have cut their coat according to their cloth

Such a phrase would not apply to the facts of the present set of cases. The benefits have already been paid, spent and consumed. Accordingly, the coat stood cut according to the cloth then available.

13. As a sequel to the above discussion these appeals succeed. The view taken by the learned Single Judge is set aside. The order dated 17.11.2008 (P-8) is quashed. The appellants are under no obligation to refund the amount annual grade increments which have already been paid and consumed by them.

14. The appeals stand disposed of in the above terms. A photocopy of this order be placed on the files of connected appeals.”

On the issue of limitation, the pay of the petitioner has been refixed therefore the same would be a recurring cause of action, which the petitioner could always challenge as his pension would also have to be accordingly fixed. Even otherwise it is settled principle that State can not raise such technical pleas of limitation to defend unsustainable orders.

Resultantly, keeping in view the above stated position, the present petition is allowed to the extent that amount of recovery effected from the petitioner shall be refunded to him along with interest at the rate of 7% per annum from the date of recovery till its realization.

March 15, 2016
Pka

(G.S.SANDHAWALIA)
Judge