IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-19532-2013 (O&M)
Date of decision: 15.07.2016

Pawan Kumar

…..Petitioner

versus

State of Punjab and others **……Respondents**

CWP-19539-2013 (O&M)

Nand Lal

…..Petitioner

versus

State of Punjab and others

……Respondents

CWP-19541-2013 (O&M)

Sukhminder Singh

…..Petitioner

versus

State of Punjab and others

……Respondents

CWP-22532-2013 (O&M)

Nirmala Devi

…..Petitioner

versus

State of Punjab and others

……Respondents

CWP-23553-2013 (O&M)

Urmila Devi

…..Petitioner

versus

State of Punjab and others

……Respondents

CORAM: Hon'ble Mr.Justice Kuldip Singh

Present:- Ms.Jagdeep Bains, Advocate for the petitioner(s)
in CWP Nos.19539, 19532, 19541 and 22532 of 2013
Mr.Lalit Pathak, Advocate for the petitioner
in CWP No.23553 of 2013
Mr.Rajat Bansal, AAG Punjab
Ms.Munish Jolly, Advocate for the respondent No.6

1. *Whether Reporters of Local Newspapers may be allowed to see the judgment ?* ***Yes***
2. *To be referred to the Reporters or not ?* ***Yes***
3. *Whether the judgment should be reported in the Digest?* ***Yes***

Kuldip Singh, J.

By this common judgment, I shall dispose of CWP Nos.19532

19539, 19541, 22532 and 23553 of 2013. Pawan Kumar, retired Branch Manager, Nand Lal retired Senior Clerk, Sukhminder Singh retired Branch Manager, Nirmala Devi wife of deceased Surinder Pal ex-Daftri and Urmila Devi retired Assistant Accountant of the Mandi Gobindgarh Cooperative House Building Society Limited, Mandi Gobindgarh (for short, 'the Society) have filed these writ petitions.

The facts of the case are extracted from CWP No.19532 of 2013 filed by Pawan Kumar.

It is stated that the Society is registered under the Punjab Cooperative Societies Act, 1961 (in short, 'the Act') and governed by the provisions of the Punjab Cooperative Societies Rules, 1963 (in short, 'the Rules) and the by-laws framed there under. There are approximately 5500 members of the Society and there have been 14-15 employees in the Society. There are no statutory rules governing the service conditions of the employees of the Society. As the Society has no subscribed capital share of the government, hence it is not mandatory for the Society to adopt statutory service rules of Housefed which governs the service conditions of the employees of Punjab State Federation of Cooperative House Building Societies Limited (Housefed). The service conditions of the employees of the Housefed have been framed under Section 85 of the Act read with Rule 28 of the Rules. In fact under Section 84-A of the Act, the Common Cadre Rules of several apex Socities have been framed. While making reference to Rule 28 of the Rules and Section 84-A of the Act, it was pleaded that Registrar, Cooperative Societies, Punjab has framed the service rules of various class of Cooperative Societies for example (1) the Punjab Cooperative Agricultural Services Societies, Service Rules, 1997 for the employees of Cooperative Agricultural Service Society (2) Punjab Cooperative Marketing Societies Service Rules for employees of Marketing Societies (3) The Markfed Common Cadre Rules, 1990 for employees of Markfed (4) The Punjab Cooperative Financing Institution Service Rules, 1971 for employees of Central Cooperative Banks etc. By-laws 36 is the only clause which contains the provisions governing the service conditions of the employees of the Society, which is reproduced as under:-

> *"to appoint, suspend, dismiss or punish employees subject to any conditions laid down by the Registrar from time to time and to take proper securities from them as determined by the Registrar."*

To provide security of service to the employees of the Society, the draft service rules of the Society were prepared in the year 1998 and sent to the Registrar for approval containing the provisions regarding Mode of appointment, service conditions, pay scale, disciplinary action etc. (Annexure P1). Despite several reminders by the Managing Committee, Registrar did not pass any order on the said approval, whereas under Rule 28 of the Rules and Section 84(A) of the Act, the rules are to be framed by the Registrar. Therefore, the employees of the Society filed CWP No.1953 of 2005 seeking direction to the official respondents to take a decision on the service rules. Vide order dated 4.4.2005, respondent No.2 rejected the the proposed draft rules submitted by the Society. It is also claimed by the petitioner that the Society is running in profit for the years from 2009-2010 to 2012-2013. Vide resolution dated 10.2.1998, in the draft service rules, the age of retirement was fixed at 60 years. There are previous communications by respondent No.2 Registrar where the previous employees of the

Cooperative Societies have been allowed to work upto the age of 65 years. A copy of the one such letter dated 2.12.1970, issued by respondent No.2 Registrar is Annexure P4. There are 15 employees in the service of the Society as on 31.3.2010 (Annexure P5). The employees filed a petition before respondent No.2 Registrar Cooperative Societies for fixing the retirement age. Consequently, vide order dated 13.7.2010, the Registrar directed the Joint Registrar, Cooperative Societies, Patiala to decide the representation of the petitioners as per law.

The Joint Registrar, Cooperative Societies, while staying the operation of certain letters, ultimately decided the matter on 1.7.2011 and held that retirement age is 60 years. The order dated 1.7.2011 (Annexure P8) was never challenged by the Society or by any other authority before the higher authority and attained finality. The petitioners accordingly worked on the respective posts and retired on attaining the age of 60 years, except in the case of Urmila Devi, who was working as Assistant Accountant and was retired from service on 1.9.2010 on attaining age of 58 years i.e. before passing of order dated 1.7.2011 (Annexure P8) by the Joint Registrar, Cooperative Societies. She challenged her order of retirement dated 1.9.2010 before the Court of Deputy Registrar Cooperative Societies, Fatehgarh Sahib, who vide order dated 4.4.2012, rejected the appeal filed by Urmila Devi and directed that she should approach the concerned authority for implementation of order dated 1.7.2011. Urmila Devi accordingly filed an execution application before the Joint Registrar, who vide order dated 25.9.2012 held that she had already crossed the extended date of retirement on 31.8.2012. Hence, the petition was dismissed vide order Annexure P12. Urmila Devi then moved the Court of Additional Registrar – respondent

No.3, challenging the order dated 25.9.2012. The Additional Registrar vide order dated 26.3.2013 (Annexure P13) not only upheld the order dated 25.9.2012 (Annexure P12), passed by the Deputy Registrar but also set aside the order dated 1.7.2011, passed by the Joint Registrar. The petitioner was shocked to receive a notice dated 18.7.2013, seeking refund and recovery of an amount of Rs.13,97,219/- pertaining to period of two years of service put in by the petitioner, after attaining the age of 58 years. Similar notices were also issued to the other petitioners except Urmila Devi, claiming refund of the amount paid to them after attaining age of 58 years. The petitioners claimed that the Additional Registrar could not set aside the order dated 1.7.2011 (Annexure P8) when no appeal was filed against the said order and the said order had already attained finality. The Society was within its right to retire its employees at the age of 60 years in the absence of any service rules governing the service conditions of the employees. Hence, the petitioners prayed that the order dated 26.3.2012 (Annexure P13) passed by the Additional Registrar – respondent No.3 should be set aside. They also seek the quashing of the recovery notices issued to them.

It is added here that in case of Surinder Pal ex-Daftri, he died while in service and had rendered 3 months and 6 days service after attaining the age of 58 years. His wife has now filed the writ petition seeking relief as claimed by other employees. In the case of Urmila Devi, she has claimed that she was wrongly retired at the age of 58 years. She seeks the quashing of the order dated 25.9.2012 (Annexure P12) , passed by the Joint Registrar, whereby her execution application was dismissed and also the order passed by the Additional Registrar, dismissing her petition vide order dated 26.3.2013 (Annexure P13). She claimed that she is entitled to retiral benefits along with interest from 1.9.2010 to 31.8.2012 when she would have attained the age of 60 years. It also comes out that during the pendency of the petition, the pensionary benefits to Urmila Devi were released as calculated upto date of her retirement and she has filed CM No.16191 of 2015 claiming 18% interest on the delayed payment of retiral benefits i.e. gratuity and leave encashment amounting to Rs.10,32,255/- w.e.f. 31.3.2010 till realization.

In the reply, the respondents took the plea that the Additional Registrar and Joint Registrar passed the orders Annexure P13 and Annexure P8 exercising the quasi judicial authority. It was admitted that there are no statutory rules governing the service conditions of the employees of the Society and that no rules have been framed by the Registrar under the powers vested in him under Rule 28 of the Rules. It was also admitted that the service rules of Housefed do no govern the service conditions of the petitioners. It was also admitted that the draft service rules were sent to the Registrar of the Society and the same were not approved by the Registrar. The filing of previous Civil Writ Petitions was also not denied. It was pleaded that since the draft service rules wherein retirement age 60 years was prescribed have been rejected, therefore, Joint Registrar, Cooperative Societies, Patiala was not competent to pass the order Annexure P8, fixing the age of retirement as 60 years. The order was rightly set aside by the Additional Registrar, Cooperative Societies.

I have heard learned counsel for the parties and have also carefully gone through the file.

Admittedly and unluckily, no service rules of the employees of the respondent Society have been framed. The Registrar is empowered under Rule 28 of the Rules to frame such rules. Undisputedly, the draft rules were sent to him in pursuance to the orders passed by this Court in CWP No.1953 of 2005. It is also not disputed that the Registrar vide order dated 4.4.2005 rejected the said draft rules. The net result is that there are no service rules governing services of petitioners. It comes out that Registrar had issued a letter dated 2.12.2007 noticing that there is no age limit for superannuation of the Secretaries of the Cooperative Society and that in some cases they are working even at the age of 70 years or above. Therefore, exercising the powers under Rules 28 of the Rules, the Registrar determined the maximum age limit of service of the Secretaries at 63 years and in exceptional cases it can be extended upto 65 years with the prior approval of the Deputy Registrar Incharge of the Cooperative Societies Incharge of the Circle. A copy of the draft rules is produced before this Court, which shows that among others, it provided for the method of recruitment, qualifications, commencement of service, seniority, probation, training, suspension, imposition of minor and major penalties, leave, resignation, security, provident fund and travelling allowance. The qualifications of the various employees were also prescribed in the rules. I am of the view that when 14-15 employees are working in the Society, even if Registrar did not agree with the draft rules, he should have exercised the powers Rule Section 28 of the Rules to frame service Rules. The non-framing of the Rules resulted in the void which gave wide discretion to the concerned authorities to employ anybody and treat the employees regarding service matters, including the retirement at their whims and fancy. Therefore, there is an urgent need for framing of the service rules of the respondent Society.

It also comes out that Pawan Kumar, Branch Manager and others, Nand Lal, Senior Clerk, Surinder Pal, Daftri, Harjeevan Singh, Junior Assistant, Urmila Devi, Junior Accountant and Sukhminder Singh, Junior Assistant filed a petition before the Registrar, Cooperative Societies, Punjab, Chandigarh, who transferred the same to Joint Registrar for disposal. In the said petition, the Society as well as Deputy Registrar, Fatehgarh Sahib were the parties. They had prayed for fixing the retirement age of the employees of the House Building Society at 60 years in place of 58 years. The Joint Registrar, Cooperative Societies, Patiala allowed the petition and held that the age of the retirement of the employees is kept at 60 years at par with the other Societies. The order dated 1.7.2011 (Annexure P8) was never challenged before any authority and became final and accordingly, it appears that the Society followed said order and started retiring the employees at the age of 60 years. However, before that Urmila Devi had already retired on 31.8.2010. Therefore, she could not get the benefit of the order dated 1.7.2011 passed by the Joint Registrar. It appears that when Urmila Devi came to know about the said order, she challenged the order of her retirement before the Deputy Registrar, which is an authority lower than Joint Registrar, stating that she was wrongly retired at the age of 58 years. The Deputy Registrar dismissed her appeal vide order dated 4.4.2012 (Annexure P11). Urmila Devi then filed an execution application before the Joint Registrar under Section 63 of the Act for implementing the order dated 1.7.2011 qua her. The Joint Registrar vide order Annexure P12 dismissed her petition. Urmila Devi then approached the Additional Registrar Cooperative Societies, Punjab in the revision. The Additional Registrar vide order dated 26.3.2013 (Annexure P13) also dismissed the revision filed by Urmila Devi, holding that she was to retire at the age of 58 years. While taking notice of the order dated 1.7.2011 passed by the Joint Registrar, it was held that during the hearing Joint Registrar did not apply the mind and scrutinized the record properly. Therefore, these orders have no value in the eyes of law and the said order is null and void ab initio. Therefore, the order dated 1.7.2011, passed by the Joint Registrar fixing the retirement age as 60 years was set aside. It was further held that Joint Registrar, Patiala will examine the record of the respondent Society with particular reference to such employees who might not have been retired after attaining the age of 58 years consequent to the said order dated 1.7.2011 passed by the Joint Registrar, Patiala and initiate recovery of emoluments etc. if any, paid to such employees after following due procedure. Relevant portion of the order of the Additional Registrar is reproduced as under:-

> *"In the light of the above, I am of the considered view that the JRCS while passing the orders dated 1.7.11 did not apply his mind at all and scrutinize the record properly or analyze the facts brought before him during the hearing of the case. Thus, these orders do not have any value in the eyes of the law and they are null and void ab initio. Therefore, the JRCS orders dated 1.7.11 vide which the retirement age of the employees was illegally enhanced to 60 years are set-aside and further more the JRCS orders dated 25.9.2012 vide which the execution application of the petitioner for implementation of orders dated 1.7.11 was dismissed, are modified to extend that the JRCS, Patiala will examine the record of the respondent*

Society with particular reference to such employees who might not have been retired after achieving the age of 58 years consequent to the said orders dated 1.7.2011 of the JRCS, Patiala and initiate recovery of emoluments etc., if any, paid to such employees, after following due process of law. The order which was kept reserved on 29.1.2013 has been recorded today i.e. 26.3.2013."

In the said case only the Cooperative Society and Joint Registrar were the parties.

Learned counsel for the Cooperative Societies authorities have vehemently argued that the order dated 1.7.2011 was obtained by the petitioners by fraud and is void ab initio and could be set aside by the Additional Registrar. It is stated that the filing of the writ petition No. 1593 was not brought to the notice of the Joint Registrar. It was also not brought to the notice of the Joint Registrar that the Registrar had already rejected the draft service rules whereby age of retirement was sought to be fixed at 60 years. Therefore, Joint Registrar could not enhance the age to 60 years. For this purpose, reliance has been placed on the authorities *Indian Bank vs Satyam Fibres (India) Pvt. Ltd. (1996) 5 Supreme Court Cases and S.P. Changalvaraya Naidu (dead) vs. Jagannath (dead) by L.Rs. 1994 (1) RRR 253.*

Admittedly, if some order is obtained by fraud, same is void ab initio. Now first of all, it is to be examined whether the order obtained from the Joint Registrar was by fraud? It is clear that under rule 28 of the Rules, the Registrar is competent to frame the Rules governing the Society, including the service Rules of the employees. The order Annexure P8 clearly shows that the petition was initially filed before Registrar, Cooperative Societies, Punjab for enhancing the age from 58 years to 60 years at par with the employees of the other Cooperative Societies. The Registrar was competent to frame said rules or pass such order. The Registrar in place of deciding the matter himself, transferred the same to Joint Registrar, Patiala, thereby delegating his powers to Joint Registrar, to pass appropriate order. The Joint Registrar accordingly passed the impugned order. The mere fact that the draft rules were rejected by the Registrar, did not debar the passing of quasi judicial order to fix the age of retirement, in the absence of any service rules. Therefore, I am of the considered view that no fraud was committed in obtaining order dated 1.7.2011 (Annexure P8). The said order was never challenged by any authority before any superior authority and had become final. When this order was passed, Urmila Devi had already retired at the age of 58 years and therefore, after her retirement, she could not be extended the benefit of said order dated 1.7.2011 (Annexure P8). Therefore, I hold that Urmila Devi was rightly retired at the age of 58 years before passing of the order dated 1.7.2011 (Annexure P8) wherein the retirement age was enhanced from 58 years to 60 years at par with the employees of other Cooperative Societies. Admittedly, the appeal filed by Urmila Devi was rejected by the Deputy Registrar and execution filed in this regard was also rejected by the Joint Registrar.

Now, this Court is to examine whether Additional Registrar Cooperative Societies was competent to pass the impugned order setting aside the order dated 1.7.2011, passed by the Joint Registrar without it being challenged by the respondent before the Additional Registrar?.

Further whether the Additional Registrar could order the initiation of recovery of emoluments received by the employees after attaining the age of 58 years without they being the party and without being heard by him?

After carefully examining the order passed by the Additional Registrar dated 26.3.2013 (Annexure P13), I am of the view that the Additional Registrar erred in passing the said order. The revision was filed by Urmila Devi claiming that she should have been retired at the age of 60 years and accordingly she claimed the benefits. She nowhere claimed that order dated 1.7.2011 passed by the Joint Registrar should be set aside nor the respondents before Joint Registrar challenged the said order. It is also not there that the Additional Registrar suo moto took cognizance of the matter and issued notice to the concerned parties to examine legality of the order dated 1.7.2011. It was merely on the revision petition of Urmila Devi such order was passed. It is to be noted that the petition for enhancement of age was initially filed before the Registrar of the Cooperative Societies for fixing the age of retirement at 60 years at par with the employees of other Societies. Registrar was competent to pass order under Rule 28 of the Rules. However, he decided to entrust the petition to the Joint Registrar for decision. The Joint Registrar accordingly passed the order which was not challenged before any authority and had become final. Revision before Additional Registrar was filed in the year 2012. Therefore, I am of the view that without the order dated 1.7.2011 passed by the Joint Registrar being actually challenged before any higher authority, the Additional Registrar could not set aside the same. The said order dated 1.7.2011 is not null and void ab initio as held by the Additional Registrar, since the Registrar before whom the initially petition was filed was competent to pass such order and he decided to entrust the said petition to Joint Registrar to pass appropriate order, thereby rightly or wrongly empowering him to do so. No fraud was practiced on the Joint Registrar. Therefore, order dated 1.7.2011 could not be set aside by the Additional Registrar. Further, the Additional Registrar without hearing the affected parties could not hold that recovery proceedings should be initiated against the employees who retired after the age of 58 years. Consequently, the order dated 26.3.2013 (Annexure P13), so far as setting aside the order dated 1.7.2011 (Annexure P8), passed by the Joint Registrar and ordering the initiation of recovery proceedings against the employees who retired after the age of 58 years, alongwith impugned notices of recovery, is hereby set aside.

It is to be further noticed that the employees who had worked after the age of 58 years had actually rendered the services under a quasi judicial order passed by the Joint Registrar which had not been set aside at that time. Therefore, for the services rendered by them they could not be made liable to refund emoluments received by them.

In *State of Punjab and others etc. Vs Rafiq Masih (White Washer) etc.* *2015 AIR (SC) 696*, the Apex Court while examining the recovery from the employees which was mistakenly made in excess of the entitlement, had held that such recovery cannot be made even if made in excess by mistake. The Apex Court has referred to the authority *Sayed Abdul Qadir vs State of Bihar* *2009(1) SCT 611*, and relied upon the following observations:-

> *"59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was*

more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the Rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."

(emphasis is ours)

The Apex Court also observed as under:-

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.*

The preset case is at better footing. Here the payments on account of emoluments were not made by mistake but made on the basis of services rendered by them and on the strength of quasi judicial order passed by the Joint Registrar which had become final. Therefore, no recovery could be made from the employees for having served beyond the age of 58 years. Consequently, recovery proceedings initiated against the petitioners Pawan Kumar, retired Branch Manager, Nand Lal retired Senior Clerk, Sukhminder Singh retired Branch Manager and Nirmala Devi wife of deceased Surinder Pal ex-Daftri are accordingly quashed.

So far the case of Urmila Devi retired Assistant Accountant is concerned, she had already retired before the passing of order dated 1.7.2011. Therefore, she could not claim the benefit of said order. She has already been paid her arrears upto the age of 58 years and a CM is pending for granting the interest on the delayed payment. Since she was entitled to gratuity and other pensionary benefits till date of retirement at the age of 58 years and the same were delayed after her retirement on 1.9.2010 and paid only on 28.7.2015, therefore, Urmila Devi shall be entitled to interest @ 9% per annum w.e.f. the three months of her retirement i.e. 1.12.2010 till 28.7.2015 when the payment of gratuity and leave encashment amounting to Rs.10,32,255/-was actually released to her. CM is accordingly allowed.

As a result of the foregoing discussions, CWP Nos.19532

19539, 19541 and 22532 of 2013 filed by Pawan Kumar, retired Branch Manager, Nand Lal retired Senior Clerk, Sukhminder Singh retired Branch Manager and Nirmala Devi wife of deceased Surinder Pal ex-Daftri are accordingly allowed and CWP No. 23553 of 2013 filed by Urmila Devi retired Assistant Accountant, claiming arrears upto age of 60 years stands dismissed, while observing that the pensionary benefits upto the age of 58 years have already been released to her along with the interest, as ordered above.

Before parting with the judgment, this Court considered it in the interest of justice that an appropriate direction should be issued to the Registrar, Cooperative Societies – respondent to frame the rules governing among others the method of recruitment, qualifications, commencement of service, pay scales, seniority, probation, training, suspension, imposition of minor and major penalties, leave, resignation, security etc. as he deem fit within three months from the date of receipt of a certified copy of this judgment, which will govern the services of the employees of the Society in future.

A copy of the order be placed on the connected files.

15.07.2016 **(Kuldip Singh)**
gk **Judge**