IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.21210 of 2013
Decided on : 11.04.2016

Jarnail Singh

... Petitioner

Versus

Punjab Road Transport Corporation & others ... Respondents

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

Present : Mr.Naresh Chander, Advocate, for
Mr.R.S.Chauhan, Advocate, for the petitioner.

Mr.Anupam Singla, Advocate, for the respondents.

G.S. Sandhawalia, J. (Oral)

Petitioner seeks quashing of the order dated 29.04.2013 (Annexure P2) whereby recovery to the tune of Rs.2,05,968/- has been ordered to be effected from his gratuity, after a period of almost 3 months from the date of his superannuation, i.e., 31.01.2013.

As per the impugned order, the petitioner who was working as an Inspector with the respondent-Corporation and his pay had been fixed w.e.f. 01.01.2006. But some discrepancies were found w.e.f. 01.03.2008 and resultantly, on account of refixation, the said recovery has been ordered to be deducted. The pleaded case of the petitioner is that the said order was passed without notice to the petitioner and without affording any opportunity of being heard. The petitioner was not instrumental of getting the benefit of the revision of the pay-scale and there was no mis-representation by him.

In the written statement filed, the defence taken by the respondent-Corporation is that the pay of the petitioner was wrongly fixed at Rs.15,710/- and he was entitled to pay of Rs.13,760/- and therefore, he continued to draw higher pay w.e.f. 01.03.2008 till his retirement. At the time of retirement, the pay of the petitioner was sought to be refixed on account of which recovery order has been passed. Reliance has been placed upon the condition put in the retirement order dated 31.01.2013 wherein it is stated that if any amount was found to be due, the same was to be deducted from his gratuity. Resultantly, a self-declaration has also been taken from the petitioner (Annexure R2), at the time of his retirement, on the basis of which, the said action is defended.

In the opinion of this Court, the matter is squarely covered by the judgment of the Apex Court in ***State of Punjab & others Vs. Rafiq Masih (White Washer) & others 2015 (1) RSJ 177***. It is not disputed that the recovery has been effected after the retirement. Similarly, petitioner has been drawing the excess payment from the year 2008 and therefore, is also covered under Clause (iii) of the principles laid down in the judgment whereby the excess payment was made for a period of 5 years before the order was issued. The principles read 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."

In LPA-1361-2010 titled *Surinder Kaur Vs. State of Punjab & others* decided on 09.12.2010, the Division Bench of this Court had occasion to consider the issue of the affidavit which was taken from the employer. Accordingly, it was held that giving the affidavit would not be a bar to challenge the recovery. Relevant portion of the judgment 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 a 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."

In such circumstances, apart from the fact that the order dated 29.04.2013 (Annexure P2) also suffers from the infirmity being violative of the principles of natural justice and keeping in view the above principles, the same is quashed. The amount recovered be refunded to the petitioner within a period of 2 months from the receipt of the certified copy of this order.

Writ petition stands allowed in the above-said terms.

(G.S. SANDHAWALIA)
JUDGE

APRIL 11, 2016
sailesh