

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.8443 of 2016

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Girindra Mohan Kumar Son of lae Bishwamohan Kumar Resident of 183, MIGH,
Lohia Nagar Kankarbagh, Opposite Doctors Colony, P.S.- Kankarbagh, in the town
and District Patna.

.... Petitioners

Versus

1. The State of Bihar.
2. The Principal Secretary, Health Medical Education and family Welfare
Department, Government of Bihar, Patna.
3. The Principal Secretary, Finance Department, Government of Bihar, Patna.
4. The Superintendent, Patna Medical College& Hospital Patna.

.... Respondents

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Appearance :

For the Petitioner/s : Mr. Jitendra Singh, Sr.Adv.
Mr. Piyush Lall, Adv.

For the Respondent/s : Mr. Sunil Kumar, AC to GP-11

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

ORAL JUDGMENT

Date: 07-12-2017

Heard Mr. Jitendra Singh, learned Senior Counsel, who
appears with Mr. Piyush Lall, Advocate on record for the petitioner
and Mr. Sunil Kumar, learned AC to GP-11, for the State.

With the consent of the parties the writ petition has been
heard with a view to final disposal at the stage of admission itself.

The petitioner has prayed for issuance of a writ in the nature
of certiorari for quashing the order bearing Memo No. 15851 dated
10.9.2015, a copy of which is placed at Annexure 3 to the writ
petition, to the extent it directs recovery of the excess amount drawn
by the petitioner as a consequence of issuance of incorrect pay
fixation order. It is while the writ petition is pending that a second
fixation order has been passed bearing Memo No. 1877 dated



22.2.2017, and which again stipulates recovery of the excess amount. The petitioner seeks leave to question the fixation order dated 22.2.2017 by filing I.A.No. 4620/2017 which encloses the order at Annexure 14 and considering that it is in consequence of the fixation order dated 10.9.2015 which is put to challenge at Annexure 3, the prayer is allowed. Leave is granted to the petitioner to question the same in the present proceedings.

To briefly put the facts on record, the petitioner was appointed as a Dietician with the Nalanda Medical College & Hospital, Patna on which post he joined on 28.11.1983 and whereafter he has been transferred to Patna Medical College & Hospital, Patna ('PMCH for the sake of brevity) under the administrative control of the Superintendent, 'PMCH', Patna. The petitioner was granted Junior Selection Grade with effect from 28.11.1989 vide order bearing Memo No. 769 dated 12.1.2010, a copy of which is on record at Annexure 1. He was granted 1st ACP with effect from 9.8.1999 on completion of 12 years as manifest from Annexure 1 and 2nd ACP with effect from 28.11.2007 on completion of 24 years of service vide Memo No. 8598 dated 26.7.2011, which is at Annexure 2. It is following the order aforementioned that the petitioner started drawing salary in the pay-band 15600-39100/- with grade pay of Rs.7600/- when all of a sudden he received the impugned refixation order bearing Memo No. 15851 dated 10.9.2015 issued under the signature



of the Superintendent, 'PMCH', whereby while pointing infirmity in the earlier fixation order, a refixation is carried out which also stipulates recovery of the excess amount drawn by the petitioner. This aggrieved the petitioner, who after filing the representation before the Superintendent, 'PMCH' on 21.3.2016 has come before this Court by filing the present writ petition on 10.5.2016 and while the matter is pending has superannuated on 31.5.2016.

As I have mentioned above, it is while the matter is pending consideration before this Court that a second fixation has taken place which has been impugned at Annexure 14 to the interlocutory application and the petitioner has been permitted to question the same in the present proceedings to the extent it orders for recovery.

It is under the orders of this Court passed on 6.9.2017 that a supplementary counter affidavit has been filed by respondent no.4, the Superintendent, 'PMCH' giving a calculation of the excess amount drawn by the petitioner which comes to about Rs.16,62,892/-. It is not in dispute that a recovery had already initiated under the impugned orders at the rate of 30,000/- rupees per month from the salary of the petitioner but has since stopped on his superannuation. Since the petitioner has questioned the refixation order only to the extent it stipulates a recovery and while making such prayer the petitioner has also prayed to restrain the respondents not to act in furtherance of the order dated 22.2.2017, even after retirement. A prayer for refund of



the amount deducted is also made.

Mr. Singh, learned Senior Counsel for the petitioner, has focused his argument on the right, if any, of the respondents to effect recovery more particularly in the background that the petitioner was neither a Drawing cum Disbursing authority nor the pay fixation so taken place was on his representation or misrepresentation of facts. Relying heavily on the judgment of the Supreme Court rendered in the case of **State of Punjab and ors. v. Rafiq Masih & ors.**, since reported in (2015)4 SCC 334, it is the argument of Mr. Singh that in view of legal position settled in paragraph 18(ii) of the judgment which specifically prohibits any recovery from a retired employee or an employee retiring within a year of such order, the respondents would not have affected a recovery and since their action is contrary to the legal position so settled under the judgment the petitioner is also entitled to a refund.

The argument has been contested by Mr. Sunil Kumar, AC to GP-11, learned counsel appearing for the State, who in reference to the undertaking given by the petitioner, a copy of which has been placed on record at Annexure 'G' to the supplementary counter affidavit, which is a representation of the petitioner dated 19.5.2015 praying for fixation of his pay scale in the light of Notification No. 419(17) dated 26.3.2012 and for payment of differential amount, if any, as well as for recovery of any excess amount, submits that since



it was the own undertaking of the petitioner for recovery of any excess amount drawn by him by virtue of such fixation, neither the petitioner can object to the recovery proceeding nor he is entitled to a refund.

I have heard learned counsel for the parties and have perused the records and since learned Senior Counsel has chosen to concentrate exclusively on the recovery part present in the order(s) impugned, without questioning the refixation order(s) on its merit, I shall not be delving into the merit or otherwise correctness of the refixation order impugned at Annexures 3 and 14 to the proceedings. Proceeding herefrom, the only issue which requires consideration in view of the inter party contest raised herein is, whether the respondents could have effected recovery of 'admittedly' excess amount drawn by the petitioner. I have used the word 'admittedly' because of the reason that the petitioner has not chosen to question the correctness of refixation order rather while representing for such refixation vide Annexure 'G', has given liberty to the respondents to effect such recovery. The chart at Annexure 'E' enclosed with the supplementary counter affidavit shows that of the excess amount drawn by the petitioner of Rs.16,62,892/- as until his superannuation a sum of Rs. 2,50,000/- has been recovered. It remains unanswered as to why the petitioner never objected to such recovery at any stage of the proceedings and it is practically at the end of his service career which



resulted on 31.5.2016 that he chose to move this Court on 10.5.2016 much after the recovery from the salary has already taken place. In such view of the matter and where the petitioner has allowed recovery to take place without raising any voice of protest rather having surrendered to the same through his representation at Annexure 'G' I do not feel the necessity to examine the validity of the recovery at this stage for it apparently confirms a voluntary act.

The next issue which falls for consideration is whether the respondents having effected recovery from the salary of the petitioner, can they continue with the same, post his retirement.

I am afraid in view of the directions present in the judgment of the Supreme Court in the case of **Rafiq Masih** (supra) which prohibits a recovery after a long lapse as also within a year of a superannuating employee, once such power has been withdrawn from the employees by the Supreme Court, a mere circumstance that a recovery has been effected, would not give a certificate to the respondents to continue any further with the recovery, from the retiral dues of the petitioner, even if he has not chosen to question the correctness of refixation order. The mandamus issued at paragraph 18(ii) of the judgment in the case of **Rafiq Masih** (supra) clearly prohibits an employer from effecting any such recovery.

This would bring this Court to the third issue raised by Mr. Singh, who has ventured to ask for a refund. In my opinion, neither



any such relief has been granted to an incumbent in the judgment relied upon by Mr. Singh nor the principles of equity could be stretched to an extent where it explodes beyond the seams. Apart therefrom, where the petitioner himself has not chosen to question the correctness of the order of refixation nor raised protest to the recovery, it certainly would not entitle him to claim refund of the amount, which has been found paid in excess and by reason of an incorrect fixation. The matter as it stands is that whatever has been recovered by the respondents from the petitioner cannot be refunded nor the respondents can be permitted to carry out any further recovery in view of law laid down by the Supreme Court in the case of **Rafiq Masih** (supra) as discussed above.

The writ petition is allowed with the directions aforementioned.

(Jyoti Saran, J)

Surendra/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	22.12.2017
Transmission Date	NA

