

\$~R-10A

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Dated: 3rd January, 2017

+ W.P.(C) 5660/2002

SUNIL SACHDEVA AND ORS

..... Petitioners

Through : Ms. Anisha Upadhyay, Mr. Rajesh
Chhetri, Mr. Rajeev Chhetri and Ms.
Meenakshi Rawat, Advocates

versus

UOI AND ANR

..... Respondents

Through : Ms. Rashmi Malhotra, Mr. Shailender
Saini and Mr. Himanshu Kaushik,
Advocates

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE VINOD GOEL

G.S.SISTANI, J. (ORAL)

1. Rule DB was issued in this matter on 06.09.2002.
2. Challenge in this writ petition is to the orders dated 23.04.2002 and 12.08.2002 passed by the Central Administrative Tribunal (hereinafter the '*Tribunal*') in O.A. No. 507/1998, whereby the application filed by the petitioners herein have been dismissed.
3. The petitioners had approached the Tribunal challenging a notice to show cause dated 23.02.1998 whereby the proforma promotion extended to the petitioners vide letter dated 13.03.1996 was sought to be withdrawn. During the pendency of the application before the Tribunal, the final order has been passed on 22.03.1999 withdrawing the benefit of proforma promotion, subject to the final outcome of the OA. Subsequently, the OA was dismissed.

4. Brief facts to be noticed for the disposal of the writ petition are that the petitioners were working as 'Special Ticket Examiners' when a notification dated 20.04.1988 was issued by the Divisional Railway Manager Office for selection to the post of Head TCR/ Head TTE. Pursuant to the notification, the petitioners appeared in the written test and the viva-voce, but the result was not declared. Owing to anomalies in the selection process and pursuant to investigation, the selection process was scrapped.
5. The petitioners herein challenged the cancellation of the selection process by filing of O.A. No. 1992/1990 before the Tribunal. This OA was partly allowed by the Tribunal on 23.01.1995 directing the respondents to hold fresh selection on the basis of the notification dated 20.04.1988 and all those selected be given benefit of promotion from the date their juniors had been promoted.
6. During the pendency of the first OA, the petitioners had already been promoted to the posts of Head TCR/Head TTE w.e.f. 01.03.1993 and this was not brought to the notice of the Tribunal. A review was filed, which was dismissed and therefore, the petitioners were given proforma promotion from the date of promotion of their juniors vide letter dated 19.02.1996. The stand of the respondent remains that this was incorrect fixation as the juniors were promoted on out-of-turn basis because of their performance in the field of sports.
7. Thereafter, the petitioners filed O.A. No. 2049/1997 seeking further promotions from the date the same juniors as in the previous OA had been promoted, i.e. claiming benefit of the proforma promotion extended by the letter dated 19.02.1996. While the OA was pending, the respondents issued a show cause notice on 23.02.1998 proposing to withdraw the benefit of proforma promotion. Accordingly, the Tribunal

disposed of the second O.A. on 28.09.1998, with a direction to the respondents to consider the case of the petitioners herein in light of their reply to the show cause notice.

8. Meanwhile, the petitioners had again approached the Tribunal by filing O.A. No. 507/1998 challenging the show cause notice dated 23.02.1998. Thereafter, in pursuance of the order dated 28.09.1998 of the Tribunal, the respondents passed the order dated 22.03.1999 withdrawing the benefit of proforma promotion, subject to the final outcome of O.A. 507/1998.
9. When the O.A. 507/1998 was being heard by the two-member bench of the Tribunal, the matter was referred to a Full Bench of the Tribunal owing to contradiction in the orders in O.A. No. 1992/1990 and subsequent O.A. No. 2049/1997, which vide order dated 23.04.2002 remanded the matter back with the observation that the decision in the former application is no longer a good decision. Thereafter, the O.A. 507/1998 was finally dismissed on 12.08.2002, which has led to the filing of the present petition.
10. Both the orders dated 23.04.2002 of the Full Bench and 12.08.2002 of two-member bench of the Tribunal have been assailed before us.
11. Before we notice the rival contentions of learned counsel for the parties, we may outline the issues which arise for our consideration today. The first issue is with respect to the promotion which was granted to the petitioners by an order dated 19.02.1996 and recalled by an order dated 13.04.1999. Secondly, the petitioners, as of today, are further aggrieved by the action of the respondents recovering the additional salary paid to the petitioners and the apprehension of the petitioners is that the respondents would seek recovery of their salary drawn on the promoted post, which promotion stands cancelled.

12. The stand of the respondents, in short, has been that no person junior to the petitioners was granted promotion, except seven persons who were promoted on out-of-turn basis for their splendid performance in the field of sports under the Railway Board's letter No. E(NG)III/75/RRI/26 dated 10.12.1975. The details of the persons promoted is tabulated as under:

Sl. No.	Name	Desg	D.O.A.	D.O.P. as TTE Sr.TCR	D.O.P as Hd. TCR/Hd. TTE	D.O.P. as JIT	D.O.P. as CIT.
1.	J.M. Sapra	CTI	31.10.77	06.07.83	07.05.88	01.03.93	16.5.95
2.	P.K. Parashar	JIT	16.10.80	16.10.80	15.05.84	01.03.93	
3.	Gian Singh	CTI	08.08.83	14.02.84	30.11.87	01.03.93	29.04.97
4.	P. Bhatnagar	CTI	07.03.84	11.03.88	20.07.91	20.06.93	29.04.97
5.	Randhir Singh	CTI	10.12.84	11.08.89	06.07.91	19.06.93	29.04.97
6.	Madhukar Sham	CTI	03.01.87	03.01.87	13.05.91	19.06.93	18.07.97
7.	Dharamvir	CTI	20.01.88	20.01.88	17.09.91	01.03.93	29.04.97

Key- 'Desg': Designation;
'D.O.P.': Date of Promotion.

13. After some hearing in the matter, the learned counsel for the petitioners, on instructions from the petitioners, submits that subject to protection being granted by this Court with regard to recovery, the other grounds mentioned in the writ petition shall not be pressed. On the other hand, learned counsel for the respondents submit that there is no order or action contemplated of the respondents for recovery and thus, the apprehension of the petitioners is unfounded.
14. We have heard the learned counsel for the parties and considered their rival contentions.
15. In the case of *Bihar State Electricity Board and Another v. Bijay Bhadur and Another*, (2000) 10 SCC 99, the respondents had been

granted due promotions and increments for about 14-15 years in derogation of a rule mandating that no promotions and increments until clearance of the Hindi Noting and Drafting Examination in Devnagri script or the Hindi Reading and Writing Examination in Devnagri script or both the examinations. When the appellant board had sought to withdraw the increments without affecting the promotions after a lapse of 14-15 years, the High Court quashed the recovery. The board preferred an appeal before the Supreme Court, which dismissing the appeal, observed as follows:

“9. Further, an analysis of the factual score at this juncture goes to show that the respondents appointed in the year 1966 were allowed to have due increments in terms of the service conditions and salary structure and were also granted promotions in due course of service and have been asked after an expiry of about 14-15 years to replenish the Board exchequer from out of the employees' salaries which were paid to them since the year 1979. It is on this score the High Court observed that as both the petitioners have passed the examination though in the year 1993, their entitlement for relief cannot be doubted in any way. The High Court has also relied upon the decision of this Court in the case of Sahib Ram v. State of Haryana [1955 Supp (1) SCC 18 : 1995 SCC (L&S) 248] wherein this Court in para 5 of the Report observed: (SCC p. 20)

“5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant. The principle of equal pay for equal work would not apply to the

scales prescribed by the University Grants Commission. The appeal is allowed partly without any order as to costs.”

10. The High Court also relied on the unreported decision of the learned Single Judge in the case of Saheed Kumar Banerjee v. Bihar SEB [CWJC No. 710 of 1994 disposed of on 27-1-1995]. We do record our concurrence with the observations of this Court in Sahib Ram case [Arising out of SLP (C) No. 7118 of 1999] and come to a conclusion that since payments have been made without any representation or a misrepresentation, the appellant Board could not possibly be granted any liberty to deduct or recover the excess amount paid by way of increments at an earlier point of time. The act or acts on the part of the appellant Board cannot under any circumstances be said to be in consonance with equity, good conscience and justice. The concept of fairness has been given a go-by. As such the actions initiated for recovery cannot be sustained under any circumstances. This order however be restricted to the facts of the present writ petitioners. It is clarified that Regulation 8 will operate on its own and the Board will be at liberty to take appropriate steps in accordance with law except however in the case or cases which has/have attained finality.”

(Emphasis Supplied)

16. The Supreme Court had held that the acts of the appellant board were impermissible in law for two reasons: firstly, as the orders were limited to recovery of excess amount paid by increments only and the promotions were not affected and secondly, owing to the lapse of substantial time.
17. Learned counsel for the petitioners has also relied upon the judgment of the Supreme Court in ***State of Punjab and Others v. Rafiq Masih (White Washer) and Others***, (2015) 4 SCC 334, more particularly paragraph 18.
18. The Division Bench of the Apex Court in ***Rafiq Masih (Supra)*** has extensively dealt with situations when recovery from employees would

be impermissible. Justice J.S. Khehar, as he then was, giving the opinion for the bench, held that the recovery would be wrong when it is iniquitous and arbitrary and, at the same time, the excess amount sought to be recovered should not have been paid owing to the employee, i.e. the employee should not be an accessory to the mistake committed by the employer or should not have furnished factually incorrect information to the employer leading to the excess payments. The Court observed as under:

“6. In view of the conclusions extracted hereinabove, it will be our endeavour, to lay down the parameters of fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. In our considered view, the instant benefit cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee.

7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, “for doing complete justice in any cause” would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the

hands of this Court.

8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.

...

10. In view of the aforestated constitutional mandate, equity and good conscience in the matter of livelihood of the people of this country has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India.”

(Emphasis Supplied)

19. Thereafter, the Division Bench came to the conclusion that it is not possible to postulate all situations of hardships which would govern employees on the issue of recovery and laid down certain situations by

relying upon previous judgments of the Supreme Court in paragraph 18 as under:

- (i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service). [***B.J. Akkara v. Govt. of India, (2006) 11 SCC 709***]
 - (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery. [***Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475***]
 - (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. [***Syed Abdul Qadir (Supra)***; and ***Shyam Babu Verma v. Union of India, (1994) 2 SCC 521***]
 - (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. [***Sahib Ram v. State of Haryana, 1995 Supp (1) SCC 18***]
 - (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.
20. Having regard to the stand taken by the parties and the fact that no order has been placed on record for recovery of the salary being paid and the stand of Ms. Malhotra, learned counsel for the respondents, that there is nothing on the part of the respondents for recovery being made; in view of the settled position of law, we dispose of this writ petition, as prayed by the counsel for the petitioners, with the direction that no recovery shall be made by the respondents from the petitioners since the

corrective order was passed on 22.03.1999 and no order of recovery having been passed since then, i.e. for more than 17 years, any recovery today would clearly be iniquitous and arbitrary.

21. The writ petition is disposed of accordingly.

G.S.SISTANI, J.

VINOD GOEL, J.

JANUARY 03, 2017

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